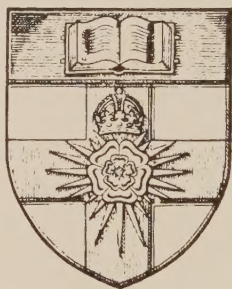
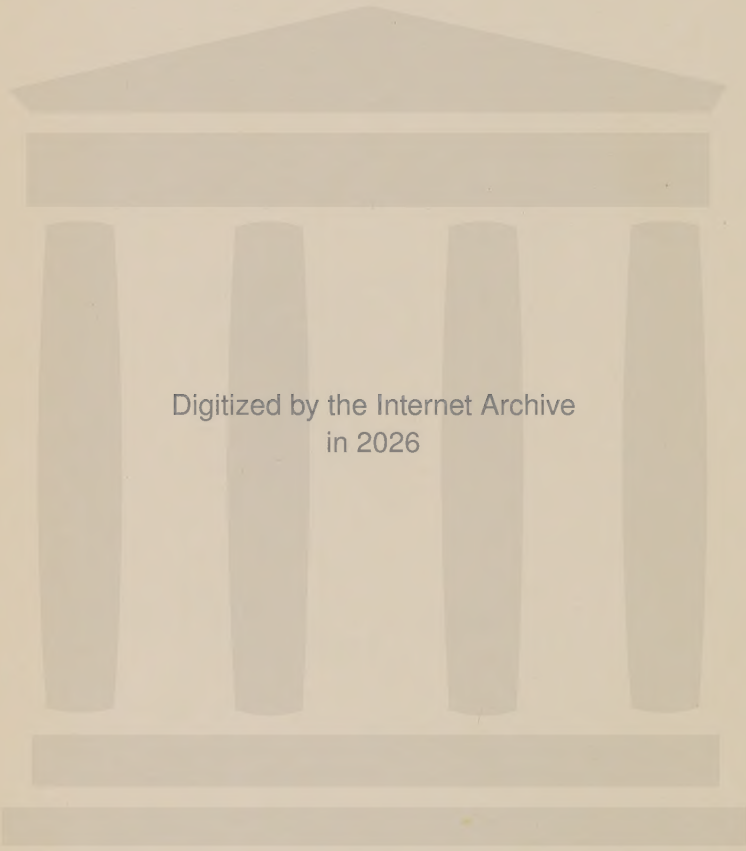


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CORRIGENDA

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- P. 1000. *EARL FITZWILLIAM'S WENTWORTH ESTATES Co. v. MINISTER OF TOWN AND COUNTRY PLANNING*. Solicitors: after "*Warren, Murton & Co.*" read "agents for *Newman & Bond, Barnsley.*"
- P. 1100. *Re SCHINTZ'S WILL TRUSTS*. Solicitors: after "*Lee, Ockerby & Co.*" read "agents for *Murton, Clarke & Murton-Neale, Cranbrook.*"

[1951] 2 All E.R.

- P. 35. *STEVENS v. SEDGMAN*. Line 2: for "recovery of possession" read "recovery of compensation."
- P. 116. *BOGUSLAWSKI v. GDYNIA AMERYKA LINIE*. Solicitors: read "*Hilder, Thompson & Dunn* (for the plaintiffs); *Constant & Constant* (for the defendants)." instead of as printed.
- P. 278. *MARCROFT WAGONS, LTD. v. SMITH*. Solicitors: for "*G. Stevenson & Son, Ltd.*" read "*G. Stevenson & Son.*"
- P. 436. *WHITE v. KUZYCH*. Counsel: for "*N. T. Nenetz*" read "*N. T. Nemetz, K.C.*"
- P. 587. *MOODIE v. HOSEGOOD*. Solicitors: after "*Jaques & Co.*" read "agents for *Potter, Outram & Peck, Haslemere.*"
- P. 758. *D'ALESSIO v. ENFIELD URBAN DISTRICT COUNCIL*. Solicitors: after "*T. D. Jones & Co.*" read "agents for *Cyril E. C. R. Platten, clerk of the council.*"
- P. 775. *CAREY v. HEATH*. Line 4: for "s. 17 (1)" read "s. 17 (2)."
- P. 806. *JEFFREY v. JEFFREY*. Line 3: after "payment" read "of."
- P. 865. *Re GARE (dec'd.)*. Solicitors: read "*Wake, Wild & Boul* (for the plaintiffs and the fourth and fifth defendants); *R. H. Behrend, Kendall, Price & Francis* (for the first and second defendants); *Field, Roscoe & Co., agents for Morrell, Peel & Gamlen, Oxford* (for the third defendants); *Treasury Solicitor.*" instead of as printed.
- P. 894. *UNIVERSAL PERMANENT BUILDING SOCIETY v. COOKE*. Counsel: for "*Hughes-Onslow*" read "*A. Owen Hughes.*"
- P. 904. *STARKEY v. RAILWAY EXECUTIVE*. Solicitors: after "*Clutton, Moore & Lavington*" read "agents for *Samuel Doberman & Richardson, Middlesbrough.*"
- P. 926. *DEAN v. BRUCE*. Lines C. 3 and 4: read "*Dicta of MAUGHAM, L.J., in Phillips v. Copping* ([1935] 1 K.B. 25) and *LORD RUSSELL OF KILLOWEN in Regional Properties, Ltd. v. Oxley* ([1945] 2 All E.R. 421), applied." instead of as printed.
- P. 964. *Re ROSE (dec'd.)*. Solicitors: after "*Merrimans*" read "*and Withers & Co.*"

THE ALL ENGLAND LAW REPORTS

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LAW TIMES REPORTS
AND THE
LAW JOURNAL REPORTS

Wed. CHRISTMAS v. GENERAL
BUILDING CONTRACTORS, LTD. [1952]
1 E.R. 39.

LONDON GRAVING DOCK CO., LTD. v. HORTON.

[HOUSE OF LORDS (Lord Porter, Lord Normand, Lord Oaksey, Lord MacDermott and Lord Reid), February 20, 21, 22, 26, May 9, 1951.]

*Negligence—Invitee—Duty of occupier—Protection against “unusual danger”—
Workman falling from staging—Workman’s knowledge that staging faulty.*

In November and the first half of December, 1946, the plaintiff, a welder, was employed by sub-contractors to weld strips of steel on the ribs of a trawler which the defendants, the head contractors, were reconditioning. While working in the fish house (part of the hold), the welders had to work in pairs on a staging provided by the defendants and comprising four boards, five feet apart, supported on iron beams on angle-irons, placed across the fish house at a height of five feet, five inches, from the bottom of the trawler. There were no cross boards to the staging, and the only means of getting from one board to another was by stepping on an angle-iron. The staging was under the exclusive control of the defendants, and the sub-contractors’ workmen had no right to interfere with it, but they had complained of its insufficiency to the defendants’ charge-hand shipwright who had promised that something would be done to remedy the defect. Nothing, however, was done. On Dec. 16, while working on the staging, the plaintiff placed one foot on a plank and the other foot on an angle-iron to pass a tool-box to a fellow welder, and, while so engaged, he slipped and was injured. There was no contributory negligence on his part. In an action brought by him against the defendants, claiming damages for negligence, it was established that the accident was caused by the insufficiency of the staging.

HELD (LORD MACDERMOTT and LORD REID *dissentiente*): it was the defendants’ duty to provide reasonably safe premises or else show that the plaintiff had accepted the risk with full knowledge of the dangers involved; it was not necessary to show that he was *volens* as well as *sciens*, as the duty owed by an invitor to an invitee was not so high as that owed by an employer to an employee; the question whether the plaintiff undertook the risk of performing his task with full appreciation of the danger was a question of fact to be decided by the tribunal which tried the case, and, on the facts, the trial judge had ample evidence for his finding that the plaintiff had full knowledge of the nature and extent of the risk which he ran; and,

therefore, the defendants were freed from liability for damage occasioned by the insecurity of their premises.

Dictum of WILLES, J., in *Indermaur v. Dames* (1866) (L.R. 1 C.P. 288), explained and applied.

Decision of the COURT OF APPEAL ([1950] 1 All E.R. 180), reversed.

AS TO DUTY TO INVITEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 600-609, paras. 851-858; and FOR CASES, see DIGEST, Vol. 36, pp. 41, 42, Nos. 247-258, and pp. 44, 45, Nos. 272-281.

Cases referred to:

- (1) *Donoghue v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- (2) *Bowater v. Rowley Regis Corpn.*, [1944] 1 All E.R. 465; [1944] K.B. 476; 113 L.J.K.B. 427; 170 L.T. 314; 108 J.P. 163; 2nd Digest Supp.
- (3) *Indermaur v. Dames*, (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; *affd.*, (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 36 Digest 35, 208.
- (4) *Norman v. Great Western Ry. Co.*, [1915] 1 K.B. 584; 84 L.J.K.B. 598; 112 L.T. 266; *revsq.* [1914] 2 K.B. 153; 83 L.J.K.B. 669; 116 L.T. 306; 38 Digest 352, 580.
- (5) *Addie, R. & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; Digest Supp.
- (6) *Cavalier v. Pope*, [1906] A.C. 428; 75 L.J.K.B. 609; 95 L.T. 65; 12 Digest 49, 273.
- (7) *Brackley v. Midland Ry. Co.*, (1916), 85 L.J.K.B. 1596; 114 L.T. 1150; 80 J.P. 369; 36 Digest 41, 254.
- (8) *Griffiths v. Smith*, [1941] 1 All E.R. 66; [1941] A.C. 170; 110 L.J.K.B. 156; 164 L.T. 386; 105 J.P. 63; 2nd Digest Supp.
- (9) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1937] 3-All E.R. 628; [1938] A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.
- (10) *Osborne v. London & North Western Ry. Co.*, (1888), 21 Q.B.D. 220; 57 L.J.Q.B. 618; 59 L.T. 227; 52 J.P. 806; 36 Digest 96, 641.
- (11) *Workington Harbour & Dock Board v. Owners of the S.S. Towerfield*, [1950] 2 All E.R. 414; [1951] A.C. 112.
- (12) *R. v. Williams*, (1884), 9 App. Cas. 418; 53 L.J.P.C. 64; 51 L.T. 546; 36 Digest 18, 81.
- (13) *Anchor Line v. Dundee Harbour Trustees, The Circassia, Ellerman Lines v. Dundee Harbour Trustees, The City of Naples*, 1922 S.C. (H.L.) 79; 41 Digest 970, *t.*
- (14) *Letang v. Ottawa Electric Ry. Co.*, [1926] A.C. 725; 95 L.J.P.C. 153; 135 L.T. 421; Digest Supp.
- (15) *Lucy v. Bawden*, [1914] 2 K.B. 318; 83 L.J.K.B. 523; 110 L.T. 580; 36 Digest 94, 627.
- (16) *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74; 92 L.J.K.B. 50; 128 L.T. 386; 87 J.P. 21; Digest Supp.
- (17) *Sutton v. Bootle Corpn.*, [1947] 1 All E.R. 92; [1947] K.B. 359; 177 L.T. 168; 111 J.P. 81; 2nd Digest Supp.
- (18) *Heaven v. Pender*, (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 36 Digest 8, 9.
- (19) *Haseldine v. Daw & Son, Ltd.*, [1941] 3 All E.R. 156; [1941] 2 K.B. 343; 111 L.J.K.B. 45; 165 L.T. 185; 2nd Digest Supp.
- (20) *Woodward v. Mayor of Hastings*, [1944] 2 All E.R. 565; [1945] K.B. 174; 114 L.J.K.B. 211, 218; 172 L.T. 16; 109 J.P. 41; 2nd Digest Supp.
- (21) *The Moorcock*, (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 36 Digest 107, 722.

- (22) *Mersey Docks Trustees v. Gibbs, Same v. Penhallow*, (1866), L.R. 1 H.L. 93; 11 H.L. Cas. 686; 35 L.J.Ex. 225; 14 L.T. 677; 30 J.P. 467; 11 E.R. 1500; *affg.* S.C. *sub nom.* *Gibbs v. Liverpool Docks Trustees*, (1858), 3 H. & N. 164; 27 L.J.Ex. 321; 31 L.T.O.S. 22; 22 J.P. 224; 36 Digest 19, 85.
- (23) *Tredegar Iron & Coal Co. v. Calliope (Owners), The Calliope*, [1891] A.C. 11; 60 L.J.P. 28; 63 L.T. 781; 55 J.P. 357; 44 Digest 104, 829.
- (24) *Earl v. Lubbock*, [1905] 1 K.B. 253; 74 L.J.K.B. 121; 91 L.T. 830; 36 Digest 63, 408.
- (25) *Jacobs v. London County Council*, [1950] 1 All E.R. 737; [1950] A.C. 361; 114 J.P. 204.
- (26) *Smith v. Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 36 Digest 95, 633.

APPEAL by the defendants from an order of the Court of Appeal (TUCKER, SINGLETON and JENKINS, L.JJ.), dated Dec. 21, 1949, and reported [1950] 1 All E.R. 180, allowing an appeal by the plaintiff from an order of LYNSEY, J., dated June 2, 1949, and reported [1949] 2 All E.R. 169, dismissing an action claiming damages for personal injuries arising out of the negligence of the appellants.

The respondent, a welder employed by sub-contractors, was injured while working on a staging erected by the appellants, the head contractors, in the hold of a vessel which the appellants were re-converting into a fishing trawler. The accident was due to the fact that the staging was defective in that it was insufficient. The respondent and his fellow workmen had complained of the insufficiency to the appellants' charge-hand, but nothing had been done to remedy it. LYNSEY, J., held that the appellants' duty to the respondent, as an invitee, was to prevent damage from an unusual danger, and, as the danger was known to the respondent, there was no unusual danger, and, therefore, the appellants were not liable in negligence. The respondent appealed and the Court of Appeal held that the danger created by the defective staging was unusual and that it did not become a usual danger merely because the respondent knew of it before his accident, and, therefore, the appellants were liable to him for their negligence. From this decision the appellants appealed.

Nelson, K.C., and *Marven Everett* for the appellants.

Edgedale, K.C., *C. J. A. Doughty* and *J. C. J. Tatham* for the respondent.

The House took time for consideration.

May 9. The following opinions were read.

LORD PORTER: My Lords, this is an appeal from an order of the Court of Appeal who awarded damages to Mr. Horton, the respondent, and set aside a judgment of LYNSEY, J., in favour of the appellants. The material facts are not in dispute and may be shortly stated as follows. The respondent was employed as a boilermaker and electric welder by Thames Welding Co., Ltd. By Dec. 16, 1946, he had been employed for at least a month in the fish hold of a trawler, known as the *Valmont*, of which the appellants were at all material times the occupiers. The respondent's employers had contracted with the appellants to weld metal strips into position on the sides of the hold, and it was the appellants' duty to provide, and they did in fact provide, the necessary staging for the respondent and other workmen to work on. The staging provided consisted of four boards, about twenty feet long, eleven inches wide, and three inches thick, laid fore and aft in the hold and resting on two thwartship angle-irons five feet five inches from the bottom of the hold and about three and a half inches by three inches in dimension. The boards were placed about five feet apart and each outside board was about eighteen inches from the side of the ship. The respondent, or any other welder who wanted to cross from one board to another, could only do so by stepping on to one of the angle-irons. The respondent and some of his fellow welders had made half-hearted complaints

to the appellants' charge-hand shipwright about the insufficiency of the staging before Dec. 16, 1946, but, though some promises were made that he would see what could be done, no steps were taken to effect a change. On that date the respondent in the course of his duty was standing on the starboard centre deal and was engaged in handing a tool-box to another man on the starboard deal. For this purpose he placed one foot on to the angle-iron and transmitted it safely, but, as he was trying to get back, his foot slipped with the result that he fell astride the angle-iron and sustained injury.

In these circumstances the respondent maintained that the Court of Appeal were right in holding the appellants to be in fault and that he was entitled to recover the damages, which, if recoverable, had been agreed at £275. The claim was put in two ways. First, it was said that he was an invitee and the appellants had not exercised the degree of care required in such a case. Secondly, it was said that, on the principle laid down in *Donoghue v. Stevenson* (1), the appellants owed a duty to the respondent to take reasonable care to avoid acts or omissions likely to injure him. Under the first heading, the duty towards an invitee was said to be to take reasonable care that the premises were safe, or, alternatively, if the duty was not so high, at any rate to establish that the danger was appreciated by the invitee and was freely undertaken by him with full knowledge of the risk which he was running and unconstrained by any feeling which would interfere with the freedom of his will. In other words, it must be shown that he was *volens*, within the meaning applied to that word in the phrase *volenti non fit injuria*, as interpreted by SCOTT, L.J., ([1944] 1 All E.R. 465) in *Bowater v. Rowley Regis Corpn.* (2). The appellants, on their part, contended that the duty of an invitor was of a lesser order than either of those claimed by the respondent. In their submission, they had fulfilled their duty if either they took reasonable care to make the premises safe or if the invitee had knowledge or notice of the danger.

My Lords, I have put the contentions on either side in a broad way because it is apparent that in one aspect the case demands a solution of the much discussed problem of the distance to which the burden imposed by the decision in *Indermaur v. Dames* (3) is to be carried and in what manner the *dictum* of WILLES, J. (L.R. 1 C.P. 288) is to be interpreted. If the respondent is right in saying that notice or knowledge is immaterial, that the invitor is under an obligation to use reasonable care to make the premises safe however manifest the risk may be, then, unless the appellants can show that the respondent was *volens*, they cannot escape liability. To this distance, at least, I understand SINGLETON, L.J., to have carried the doctrine in this case. The dispute has raged now for many years round the language of WILLES, J. (*ibid.*):

“... that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know...”

As was pointed out in argument and with truth, the words of WILLES, J., are not embedded in a statute, but they have been carefully chosen and often acted on, and they form the basis on which the duty of an invitor is established.

I am not conscious that it has been stated in plain terms, but it is noticeable that what is declared to be the duty is, not to prevent unusual danger, but to prevent damage from unusual danger. It is in this consideration, as I think, that notice or knowledge becomes important. Either may prevent damage, though the unusual danger admittedly exists. As I take this view, I find the question what is unusual danger of less importance than it might otherwise be considered. To my mind, danger may be unusual though fully recognised, and I am not prepared to accept the view that the word “unusual” is to be construed subjectively as meaning “unexpected” by the particular invitee concerned. Moreover,

I get little assistance from the alternative word "unexpected," suggested by PHILLIMORE, L.J. ([1915] 1 K.B. 596) in *Norman v. Great Western Ry. Co.* (4). I think "unusual" is used in an objective sense and means such danger as is not usually found in carrying out the task or fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises. Indeed, I do not think that PHILLIMORE, L.J., in *Norman v. Great Western Ry. Co.* (4) is speaking of individuals as individuals, but of individuals as members of a type, *e.g.*, that class of persons such as stevedores or seamen who are accustomed to negotiate the difficulties which their occupation presents. A tall chimney is not an unusual difficulty for a steeplejack, though it would be for a motor mechanic, but I do not think that a lofty chimney presents a danger less unusual for the last-named because he is particularly active or untroubled by dizziness. In the present case, undoubtedly, there was a danger of slipping owing to the wide spacing of the planks, and that danger is, in my opinion, accurately described as unusual. The existence of that factor, however, is not in itself enough to ensure the success of the respondent. Indeed, his advisers do not so contend. Contributory negligence on his part would destroy his claim and so, as I understand their concession, would a free and willing and unconstrained acceptance of the risk with full knowledge of its danger. It is in a consideration of this last concession, as I think, that the real contest lies. Contributory negligence may be disregarded. No act of the respondent could be so described.

The plea *volenti non fit injuria* does not appear in the defence, nor, as I explain hereafter, was it, in my opinion, necessary for the appellants to prove such facts as would warrant a finding to that effect, but, in any case, even if it was incumbent on the appellants to establish that the respondent undertook the risk willingly and without constraint, I do not think that a formal pleading to that effect was necessary. The protagonists are invitor and invitee and the former is entitled to set up by way of defence any circumstance which would enable him to escape liability at the suit of the latter. If notice or knowledge of the danger on the part of the invitee is enough, then the invitor can prove and rely on the existence of either or both. If, in order to succeed in that defence, the appellants must prove such facts as would establish a plea of *volenti non fit injuria*, then the appellants can cross-examine or call evidence to that effect, and, if this testimony is accepted, will escape liability, not because they have pleaded that the respondent was *volens*, but because they have established the fact that they have performed the obligations incumbent on inviters. SINGLETON, L.J., as I think, recognises this contention to be accurate, but holds that the respondent has not been shown to be *volens*, and TUCKER, L.J., finds that the evidence proves the respondent to have been *sciens*, but not *volens*. JENKINS, L.J., if I understand him rightly, goes further and takes the view that the appellants were under a duty to provide safe staging, and, if they did not do so, were liable in negligence.

I find it difficult to take any of these views. I accept the contention that an invitor's duty to an invitee is to provide reasonably safe premises or else show that the invitee accepted the risk with full knowledge of the dangers involved. If the parties were master and servant, it may well be that one should go further and say that a full appreciation of the risk is not enough, the servant must not be put in a position in which he is obliged either to obey orders or to run the risk of dismissal. To my mind, however, the position is different where the injured person is not a servant but an invitee. Admittedly, the duty of a master to his servant is higher than that of an invitor to his invitee. The invitor, as I see it, is not concerned with the position of the invitee *vis-a-vis* his own ultroneous master. So far as he is concerned, the invitee is an invitee and nothing more. I am content to accept the statement of SINGLETON, L.J., that the rule of law, as stated by WILLES, J., in *Indermaur v. Dames* (3), ends with the words "damage from unusual danger, which he knows or ought to know." The duty, however,

is not "to prevent damage," but to "use reasonable care" to prevent it, and it has to be determined what is reasonable care. This problem is dealt with in the latter part of the statement of WILLES, J., by which I understand him to mean: Even if there is unusual danger, the duty to use reasonable care to prevent damage may be performed by notice, lighting or guarding, and the recognition that the invitor may fulfil the obligations imposed on him by notice or lighting indicates that adequate warning to the invitee may be a compliance with the duty which is owed by the invitor. It is not, to my mind, an answer to say that the risk was there and the invitee returned to his work daily as the invitor knew. He did come back and continue his work, but, as the learned judge has found, he did so with full knowledge of the risk he ran. The real question is whether that fact is enough to exonerate the appellants or whether in the case of an invitee, as in that of an employee, it is incumbent to show, not only that the invitee knew and appreciated the danger, but also willingly undertook it. If so, the position of an invitee is on exactly the same footing as that of an employee, except for such special rights to compensation as are given to a workman under Acts dealing with the relation of master and servant. In my opinion, however, it is not the same, but is to be judged by a less exacting standard.

On the principle which I have asked your Lordships to accept, the question, therefore, is: Did the invitee undertake the risk of performing his task with full appreciation of the danger? This, as has been said more than once, is a question of fact for a jury to decide, if there be a jury. If not, it must be decided, like all other questions of fact, by the tribunal which tries the case—in the present instance by LYNSEY, J. At the end of his judgment that learned judge says ([1949] 2 All E.R. 171):

"If it were necessary to decide it I should have held on the facts of this case that [the respondent] did freely and voluntarily impliedly agree to accept the risk of working on the staging with full knowledge of the nature and the extent of the risk he ran."

He had, in my opinion, evidence on which he could reach the conclusion that the respondent had at least full knowledge of the nature and extent of the risk which he ran and I do not feel justified in reversing this decision. Such a finding is, I think, a sufficient answer to a contention by an invitee that the invitor fell short of the standard of care which the law imposes on him. It is true that the staging was, and remained, unsafe, notwithstanding that complaints were made, and it is true also that the appellants did nothing to improve it, but the invitee has been held to have had full knowledge of his risk and such notice or knowledge is sufficient to exculpate the invitor, provided the full significance of the risk is recognised by the invitee.

I cannot myself find much assistance in the decided cases. The exact meaning of the words of WILLES, J., in *Indermaur v. Dames* (3) and their true legal consequences have long been in dispute and for many years formed a basis of discussion by the text-book writers. The difference between *sciens* and *volens* has by now been firmly established, but where the exact line is to be drawn is a matter of more difficulty. The accurate demarcation, however, in my opinion, need not be laid down in the present case, since it is enough to protect the invitor from liability if he proves that the invitee knew and fully appreciated the risk. The further step that he must be shown not to have been under a feeling of constraint or, to put it otherwise, must have been *volens* is not an essential to the defence. Whether the learned judge meant to find that the respondent was *volens* I am not sure, nor am I sure that, if he had meant to do so, he had evidence which entitled him to reach that conclusion. As I have said, however, my view is that that question does not arise.

Before one considers the cases in which *Indermaur v. Dames* (3) was followed or discussed, it may be well to bear in mind that not every passing expression of a judge, however eminent, can be treated as an *ex cathedra* statement. It must

be read in its context, and the most that can be expected is that it should be accurate enough for the matter in hand. Two illustrations may suffice and two expressions be contrasted. In *R. Addie & Sons (Collieries) v. Dumbreck* (5) LORD HAILSHAM, L.C., said ([1929] A.C. 365):

"Towards such persons [*i.e.*, invitees] the occupier has the duty of taking reasonable care that the premises are safe."

A In *Cavalier v. Pope* (6) LORD ATKINSON expressed the *dictum* ([1906] A.C. 432):

"... one of the essential facts necessary to bring a case within that principle [*i.e.*, the principle of *Indermaur v. Dames* (3)] is that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered."

B The first was the case of a trespasser, and LORD HAILSHAM, L.C., was doing no more than setting out a rough differentiation between the duties owed to an invitee, a licensee and a trespasser. No accuracy or exactness of expression was required. In the latter, the duty of a landlord who had let a dilapidated house was under discussion. Except to point out that no question of invitor or invitee came in question, that relationship was immaterial to the point at issue. Even cases such as *Brackley v. Midland Ry. Co.* (7), where the statement of principle C was *obiter* since the danger was on a highway and not on private property, *Griffiths v. Smith* (8), where, again, the view expressed was *obiter*, and *Wilson & Clyde Coal Co., Ltd. v. English* (9), which raised a question as to a safe system of working, must be regarded with caution. So, also, must cases dependent on contract, such as *Osborne v. London & North Western Ry. Co.* (10), or those dealing with the relationship of master and servant, such as *Bowater v. Rowley Regis D Corpn.* (2). None seems to me conclusive of the matter under discussion, and, though natural sympathy must make the inclination lean towards a desire to compensate the respondent for his injury, the true principle is, in my opinion, that a full appreciation of the danger on the part of the invitee and a continuance of his work with that knowledge are sufficient to free the invitor from liability for damage occasioned by the insecurity of the premises to which resort is made.

E The argument based on *Donoghue v. Stevenson* (1) can be more rapidly disposed of. The pursuer in that case had purchased from a middle-man a bottle of ginger beer into which a snail had crept, and was made ill by drinking the contents. She did not, however, sue the vendor, but proceeded against the original manufacturer, alleging that he ought to have contemplated that the ginger beer would in the ordinary course reach the lips of the pursuer without any intermediate examination and that he was negligent in not ensuring that the bottle had been kept clean before the ginger beer was inserted. Your Lordships' House held that, assuming the facts alleged to be true, the manufacturer would have escaped if it was natural to expect that the intermediate vendor would take care to see that the contents were in order. The pursuer, however, could recover from the manufacturer because such an examination was not to be expected. The law G required him to be careful not to run the risk of injuring a person whom he contemplated, or ought to have contemplated, as likely to be injured by his negligence, but an examination by the retail vendor, if rightly expected, could be relied on by the manufacturer and would have been a complete answer to the claim. Still more so would knowledge by the purchaser of the true position, whether such knowledge was actual or such as the circumstances would warrant H the manufacturer to assume. The defence did not have to show that the pursuer drank the contents with a full knowledge of the risk. It would have been enough if examination and consequent knowledge were to be expected. To that extent an argument based on *Donoghue v. Stevenson* (1) seems less forcible than the more obvious contention founded on the relationship of invitor and invitee. Neither ground, in my opinion, supports the conclusion that the appellants were in breach of their duty of care. I should allow the appeal with costs in your Lordships' House and below.

LORD NORMAND: My Lords, I agree with my noble and learned friend on the Woolsack that the appeal succeeds. It is unnecessary for me to repeat the facts which he has stated. The appeal was argued mainly on the duty owed in the particular circumstances of the case by an invitor to an invitee, and, in my opinion, the case properly falls within that category. For though the usual, and perhaps the original, example of an invitee is a person who comes on land or enters premises such as a shop or dwelling-house in pursuance of some business common to him and the occupier, there is no doubt that the respondent's counsel was right in saying that ships at a wharf or in dock have frequently been treated as "premises" and that there can be no real difference between the rights of persons entering a ship for the purpose of repairing it and those of persons entering a shop as customers.

In the well known and frequently cited passage in *Indermaur v. Dames* (3) (L.R. 1 C.P. 288) WILLES, J., stated the principle of the invitor's liability in tort:

"... [the invitee], using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and ... where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact."

There are murmurs increasing with the passage of time against a clean cut division between invitees and licensees with a hard and fast delimitation of the duties owed to each category, but the exposition by WILLES, J., of the duty owed to invitees has been adopted in many subsequent cases and it has even been treated almost as if it were a section in a statute and as if all questions could be solved by construing and applying it. It is remarkable that, in spite of the great variety of circumstances to which it has been applied, criticism seems to have been confined to pointing out an ambiguity or uncertainty in application, the inevitable accompaniment of any condensed statement of a complex legal conception. Nevertheless, later decisions and judicial *dicta* have in some respects clarified the duties of the invitor, as I hope to show.

One problem, however, remains very much where WILLES, J., left it. The occupier has no duty to the invitee unless there is an unusual danger which he knew or ought to have known. But what is an unusual danger? It may not be unreasonable to suppose that WILLES, J., was aware that "unusual" is a word which might take a colour from the circumstances of the case, and that a definition of unusualness might hinder instead of helping a just solution of a specific problem and the rational development of the law. We were referred to the observation of PHILLIMORE, L.J., in *Norman v. Great Western Ry. Co.* (4). In that case a railway station yard was bounded by an unfenced bank. The plaintiff was in the habit of going himself or sending a driver with a horse and van to receive or deliver goods. On the occasion in question, the driver left the horse unattended while he was in the defendants' office signing for goods. The horse in his absence backed the van over the bank and damage resulted. It was held that the railway company's duty to the plaintiff was no higher than that of an occupier to an invitee and that there was no evidence of any breach of the duty to take reasonable care that the premises were safe for persons using them in the ordinary manner and with reasonable care. PHILLIMORE, L.J., said ([1915] 1 K.B. 596):

"I am not certain that a way to avoid misapprehension which might arise from the use of the words 'unusual danger'—which means, in my opinion, danger unusual for the particular person—might not be found by substituting the word 'unexpected' for 'unusual.' It is not a question whether the danger is unusual with regard to all the world, but whether it is unusual

with regard to the individual complainant. In other words, in analysing the expression 'reasonably safe' one must take into account what is called in modern parlance the personal equation; what may not be safe for one person may be safe enough for the persons who frequent particular business premises. For instance, in loading a ship in a dock a gangway consisting of a plank without a handrail may safely be provided, though its narrowness or slope may be such that ordinary persons, not accustomed to ships, might not find it easy to use, because the stevedore and seamen who are to use it can use it safely. The gangway has to be safe for the class of persons who use it on business, and so far as any complainant is concerned it has to be reasonably safe for him. If it is safe for him, it does not matter whether or not it is safe for anybody else. It is for that reason that the element of knowledge comes in."

PICKFORD, L.J., expressed his agreement with these observations. I humbly confess that I find them more ambiguous and uncertain than the words they seek to explain. I do not find that the substitution of "unexpected" for "unusual" helps me much. The real difficulty, however, is that PHILLMORE, L.J., speaks with two voices, sometimes saying that the premises have to be safe for the class of persons who come on to them on business and sometimes that the danger is unusual if it is unusual for the particular individual. I think that there is a confusion between the condition which gives rise to the duty, the existence of an unusual danger, and the notice, or its equivalent, *i.e.*, the knowledge of the individual invitee, which may be a discharge of the duty. I am of opinion that, if the persons invited to the premises are a particular class of tradesman, then the test is whether it is unusual danger for that class. Therefore, if the occupier supplies the sort of gangway which stevedores usually use, he has performed his duty so far as stevedores are concerned, and, if a particular stevedore suffers from a defective sense of balance and falls off the gangway, he cannot complain of the occupier's failure of duty. The sufferer knew the danger for him and he must accept the responsibility of using a gangway which might be dangerous for him because of his idiosyncrasy. A gangway, however, which is reasonably safe for stevedores and which is no unusual danger for them, may well be an unusual danger for another class of workman or for members of the public generally. So much for "unusual" in relation to persons. A danger, however, may also be "usual" or "unusual" in relation to the place. For example, a quay is dangerous though it is not in daylight an unusual danger for normal adults, but an uneven joint between two stones near the edge of the quay may be an unusual danger to anyone, and is none the less an unusual danger though it is not a concealed danger. I would not agree that a danger, which is unusual in either of the ways I have suggested, ceases to be an unusual danger because, through frequent visits to the place, it becomes familiar. In such a case another question will arise, whether in fact the invitee had sufficient notice, but the danger, in my opinion, remains an unusual danger. Though I think it is possible to discriminate in a concrete case between a danger which is unusual and one which is not unusual, no attempt to formulate a definition of unusualness appears to me to be likely to succeed.

In the present case LYNSKEY, J., held that an unusual danger means a danger unusual from the point of view of the particular invitee, and that, if the invitee appreciates the existence on the premises of a danger and its nature and extent, it cannot be for him an unusual danger. He also held that the respondent had full knowledge of the nature and extent of the danger. In the Court of Appeal SINGLETON, L.J., held that the danger created by the staging was unusual because it was of a kind not usually encountered by welders engaged in the repair of a ship, and that it did not become a usual danger merely because the person suing knew of it before his accident. For the reasons which I have given, I agree with the Court of Appeal on this point.

The question then arises whether the appellants discharged the duty which they owed to the invitee in relation to this unusual danger. It is a duty of reasonable care for the safety of the invitee. For some time it appears to have been in doubt whether the duty of care could be discharged by warning or notice of the danger. It seems to me, however, that the point is settled by a series of decisions, of which *Workington Harbour and Dock Board v. Towerfield (Owners)* (11) is the latest, in which it has been held that harbour authorities or wharfingers, inviting ships of a certain size to enter the harbour or tie up at the wharf, owe to their owners the duty of an invitor to an invitee and that this duty is discharged by giving warning of dangers of which they knew or ought to have known. The cases are numerous and, in addition to *The Towerfield* (11), I will mention only *R. v. Williams* (12) and *Anchor Line v. Dundee Harbour Trustees, The Circassia, Ellerman Lines v. Dundee Harbour Trustees, The City of Naples* (13). In the last-mentioned case VISCOUNT HALDANE said (1922 S.C. (H.L.) 83) of ships entering the harbour of Dundee:

"Their legal position would thus be like that of the plaintiff in the well-known case of *Indermaur v. Dames* (3), and they would be entitled to look for the discharge of a duty resting on the respondents to exercise reasonable care to avert peril to them from any unusual danger of which the respondents knew or ought to have known. . . . On the other hand, those approaching with their vessels must, notwithstanding their right to rely on such care having been exercised, use care on their own part not to incur peril rashly."

In that case, the defenders were held liable because *inter alia* they failed to give warning of the position of a sunken wreck in the approaches to the harbour by means of properly disposed buoys. In the harbour and wharf cases, the duty of warning has arisen both in circumstances when the harbour authority or wharfinger had been guilty of negligence in allowing an obstruction to grow up on the bed of the harbour or at the wharf, or in failing to remove such an obstruction, and in cases where there had been no such prior negligence and the only breach of duty was the failure to warn. There is, however, no principle by which warning may be an appropriate discharge of the duty owed to invitees by a harbour authority but inappropriate in other cases. Judicial *dicta* in support of the view that warning is a discharge of the invitor's duty generally are not lacking and they are of high authority. Thus, in *Cavalier v. Pope* (6) LORD ATKINSON said ([1906] A.C. 432) of *Indermaur v. Dames* (3):

"... one of the essential facts necessary to bring a case within that principle is that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered. If he knows the danger and runs the risk he has no cause of action."

In *Brackley v. Midland Ry. Co.* (7) SWINFEN EADY, L.J., and BANKES, L.J., expressed the same opinion (85 L.J.K.B. 1606, 1608). So also did VISCOUNT MAUGHAM ([1941] 1 All E.R. 74) in *Griffiths v. Smith* (8).

When there is already knowledge, notice or warning will have no effect and the omission of it can do no harm. So, the defendant who has failed to give warning may yet succeed if he proves that the injured person had knowledge of the unusual danger. But whether it be knowledge gained without a warning or knowledge conveyed by a warning, it must be sufficient to avert the peril arising from the unusual danger. The knowledge must, therefore, be full knowledge of the nature and the extent of the danger. In the present case, the learned judge has found that the respondent had full knowledge of the nature and the extent of the peril, and the finding is beyond doubt warranted by the evidence which shows that the respondent had before his accident complained of the same defects in the staging as were proved at the trial. The real difficulty of the case is in the argument that, though a warning may sometimes be a discharge of the invitor's duty, for example, if it excludes a part of the premises from the area of the

invitation, or if it is given to a person who has nothing to consider but his own safety and pleasure, it is not sufficient if the invitee is under a duty to his employer to work in the area of the danger. In such a case, it is said, the invitor must prove, not merely that the invitee knew of the danger, but that, knowing it, either he was himself negligent or he freely and voluntarily agreed to accept the risk. In the present case this argument is of vital importance, for the respondent was, under his contract of service, engaged on the repair of the ship and for that work the use of the defective staging was necessary. Contributory negligence was pleaded but not proved. The defence of *volenti non fit injuria* was not pleaded, and the appellants relied on the respondent's knowledge of the danger, not towards establishing the plea *volenti non fit injuria*, but as an equivalent to the discharge of their duty by warning. The issue between the parties may be stated in this way. The appellants say that, if the respondent incurred the risk *sciens*, he must fail, whereas the respondent says that he succeeds unless it is shown that he incurred the risk *sciens et volens*. On this issue I am not aware of any direct authority. In *Letang v. Ottawa Electric Ry. Co.* (14) the inviters argued that the defence *volenti non fit injuria* was established and it was held that it was not. If the appellants' argument in this appeal is sound, the defendants in *Letang's* case (14) assumed a greater onus than was necessary for their success. It is impossible to say what the result would have been if *Letang's* case (14) had been argued on the lines of the appellants' argument in this case. The solution must, therefore, be attempted on principle unaided by authority. The strength of the respondent's case is that the appellants knew that the welders were coming daily to their work and using the staging as their invitees, and that they were under a contract of service to do so. Yet the invitee's contract of service with his employer cannot be pleaded either by or against the invitor who is a stranger to it. Otherwise the invitor would owe to the invitee the same duty as an employer owes to his employees, and the invitee could sue with an equal prospect of success either his employer or an occupier of the premises who had erected staging thereon under a contract with his employer. Such a result would be just if the employer found liable in damages to his workman could in all circumstances recover the damages from the occupier, but counsel for the respondent recognised that the right of recovery might not be always available. The principle of avoiding circuity of action cannot be invoked, and to say that the invitor had agreed to perform the employer's duty to his employees is to resort to a fiction, and fiction is no longer an acceptable solution for the problems of industrial relationships. The sufferer must make up his mind whether to sue as an invitee or as an employee under his contract of service. He cannot, in my opinion, sue as an invitee and at the same time found on his contract of service as restricting his freedom to act on a warning of unusual danger given to him by the invitor.

SINGLETON, L.J., and, I think, JENKINS, L.J., also held that there was liability on the principles established in *Donoghue v. Stevenson* (1). My Lords, in *Donoghue v. Stevenson* (1) the question was whether a ginger beer manufacturer who had sold a bottle of ginger beer to a retailer was under any duty of care in manufacture to a consumer who was in no contractual relation with him. The argument for the defender was that there were certain relationships, such as physical proximity or contract, which alone give rise to duties in the law of quasi-delict or tort, and that the relationship between the pursuer and the defender was not one of them. The decision was that the categories of negligence are not closed and that duties of care are owed, not only to physical neighbours, but to anyone who is "my neighbour" in the wider sense, as stated by LORD ATKIN ([1932] A.C. 580), of a person

"... so closely and directly affected by my act that I ought reasonably to have [him] in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

This general proposition, however, left over the question whether, in the circumstances of the case, the consumer was so closely and directly affected by the manufacturer's act that the manufacturer owed him a duty of care. The answer, as LORD ATKIN said (*ibid.*, 582), was that the manufacturer

"... puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer."

He was, therefore, liable though there was no contract between him and the consumer and though he had parted with the bottle so that there was no "physical proximity" through it between him and the consumer. The importance of the absence of any real opportunity for examination of the contents is emphasised in the speeches of LORD THANKERTON (*ibid.*, 603) and LORD MACMILLAN (*ibid.*, 615 and 622). In the present case, there is no need to seek out in *Donoghue v. Stevenson* (1) a reason for finding that the appellants owed a duty of care to the respondent. Admittedly, they owed that duty which an invitor owes to his invitee in respect of premises in the possession and control of the invitor. In any event, there was in the present case an opportunity for inspection, both by the respondent's employers and by the respondent himself, so that the respondent actually knew, as the result of his inspection, the very defects of which he now complains. *Donoghue v. Stevenson* (1) cannot, in my opinion, have any application to this case. For these reasons I would allow the appeal.

LORD OAKSEY: My Lords, I agree with the opinions of the noble Lord on the Woolsack and my noble friend LORD NORMAND. The respondent, though a workman, was not employed by the appellants, and it is common ground that their relation was that of invitor and invitee and not master and servant. The duty of an invitor to an invitee is, in my opinion, to give him a fair warning of any danger on the premises which he cannot be expected to foresee. Premises inevitably contain a great variety of dangers, some great, some slight, some usual, some unusual, and it is, in my opinion, a question of fact whether the danger is so slight or so usual that no warning is needed, or so great or so unusual that the invitee, with the actual knowledge of the premises which he is known by the invitor to possess, ought, in the opinion of an ordinarily careful invitor, to be warned of it. The words of ATKIN, J., in *Lucy v. Bawden* (15) ([1914] 2 K.B. 326), approved by your Lordships' House ([1923] A.C. 81) in *Fairman v. Perpetual Investment Building Society* (16), appear to me directly applicable *mutatis mutandis* to the facts of the present case:

"The danger, if any, was patent to everyone, and the plaintiff gave evidence that she herself had complained to the defendant's agent about it."

The maxim *volenti non fit injuria* is a maxim which affords a defence to a person who has committed a breach of duty, but an invitor who invites someone on to his premises which are reasonably safe has committed no breach of duty, nor has he if the invitee knows the danger or has been adequately warned about it: see SALMOND ON THE LAW OF TORTS, 10th ed., p. 38. With the greatest respect to SINGLETON, L.J., I cannot agree with his statement ([1950] 1 All E.R. 184):

"A danger which is unusual does not become other than unusual merely because the person suing knew of it before his accident. If it were otherwise, notice of an unusual danger might of itself render the rule in *Indermaur v. Dames* (3) wholly inapplicable, whereas notice is only an element to be considered."

As I read the words of WILLES, J. (L.R. 1 C.P. 288) in *Indermaur v. Dames* (3), an occupier owes no duty to an invitee in respect of "usual" dangers, since the invitee is only entitled to expect that the invitor will take care to prevent

damage from unusual danger, but "where there is evidence of neglect," *i.e.*, where there is danger which may be found by the tribunal of fact to be unusual, it is a question of fact whether reasonable care has been taken by notice, lighting, guarding or otherwise, and, therefore, there has been no neglect.

LORD MACDERMOTT (read by LORD OAKSEY): My Lords, the facts have already been stated and there is no need for me to rehearse them at length. But it may help to define the issue for determination if I begin with a reference to the salient features of the situation which has produced it. The relationship between the appellants and the respondent was admittedly that of inviters and invitee, the respondent being employed as an electric welder on the appellants' premises by Thames Welding Co., Ltd. in the performance of certain work which that company had contracted with the appellants to carry out. The invitation, therefore, was not contractual and no question of any contractual duty, express or implied, arises. The premises of the appellants, so far as material to this appeal, consisted of a staging in the fish hold of the Valmont, a trawler which they were re-converting after war service. The appellants were the occupiers of the trawler and, as such, retained control of the staging throughout. They, acting by their shipwrights, had laid it and they alone were entitled to re-lay or alter it. At the time of his accident and for some weeks previously, the respondent had to use this staging in the discharge of his duties as a welder. In point of fact, it afforded an inadequate footing for welders and must be regarded as continuously dangerous while the respondent was working on it. In the Court of Appeal **SINGLETON, L.J.**, said ([1950] 1 All E.R. 182):

"In the condition in which it was, the staging was defective, in that it was insufficient. There is no doubt as to that. It could have been made satisfactory by the use of more deals, *e.g.*, by the use of a couple of cross boards. As it was, it constituted a danger which led to an accident to the [respondent]."

That view was not challenged before your Lordships, nor was it suggested that the respondent had not taken due care for his own safety. Contributory negligence was, indeed, alleged in the defence, but **LYNSKEY, J.**, did not deal with the plea and the evidence is insufficient to support it. It is also clear that the appellants must be taken to have known, through their servants, of the defective and dangerous condition of the staging and, further, that it could have been made reasonably safe and suitable for its purpose by the exercise of reasonable care on their part. This was not in dispute. As will be seen, the point which emerges respecting reasonable care is not whether the appellants in fact took such care, but whether, in the circumstances, they were under a duty to the respondent to do so. Two other matters must be mentioned to complete this summary and define the principal issue. First, the respondent was aware of the dangerous state of the staging and of the risk he ran in using it. And, secondly, he cannot, despite his knowledge, be taken as having freely and voluntarily agreed to accept that risk. Though *volenti non fit injuria* was not pleaded, **LYNSKEY, J.**, indicates in one passage in his judgment ([1949] 2 All E.R. 171) that, had it been necessary, he would have found against the respondent on this defence, and, thus encouraged, the appellants appear to have relied on it to some extent in the Court of Appeal. At the Bar of this House, however, *volenti* as a defence was expressly disavowed. In truth, the appellants could not well have done otherwise. It is settled law that, even in cases of accidental harm, knowledge of a risk does not necessarily import a willingness to bear it without compensation, and here the evidence which, for good reason, was not directed to this plea, comes nowhere near sustaining it.

Stated in general terms, the question, then, is whether an invitor can be held liable in tort for injury caused by the dangerous state of his premises, of which he knew or ought to have known, to an invitee who, though *sciens*, was neither

volens nor careless for his own safety. For the appellants it was contended that this question was governed by *Indermaur v. Dames* (3), and that, when properly understood, the law there laid down required that it should be answered in the negative. The essence of *Indermaur v. Dames* (3) lies in the well-known passage in the judgment of WILLES, J., in the Court of Exchequer in which he states the rights of the invitee. The passage is so directly in point that I must set it out even at the risk of being repetitive. It runs thus (L.R. 1 C.P. 288):

"... with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

This statement of the law was affirmed by the Exchequer Chamber and has long been regarded as an authoritative exposition of the duty owed by an invitor to his invitee. But for some time its meaning in one particular respect has been considered ambiguous by text writers and judges, and it is this ambiguity that your Lordships are now asked to resolve. The matter cannot, of course, be settled merely by treating the *ipsissima verba* of WILLES, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge, but the inquiry is to ascertain the applicable rule of the common law and cannot, as I regard the position, be confined to a problem of construction. There is, however, no doubt as to the substance of the point which has arisen, whatever the apt way of describing it may be. It involves a choice between two views which, put briefly and in relation to the general question as I have stated it above, may be expressed thus: (i) the invitor owes no duty to an invitee who has knowledge or due notice of the relevant danger; and (ii) the invitor's duty is to take reasonable care to protect his invitee from the relevant danger.

It will be convenient to discuss these views and their implications in turn, but before doing so I think it well to mention one or two general considerations which it may prove helpful to keep in mind. The first is that the range of circumstance affecting the relationship of invitor and invitee is virtually infinite and generalisations based on some particular state of affairs must be advanced and regarded with caution. The next is that matters pertaining to this or that ground of defence may, in this field, readily lead to confusion in ascertaining the true character of the duty involved. For example, knowledge on the part of an invitee may contribute to the defeat of his claim in a variety of ways, as by showing that he was *volens*, or careless for his own safety, or, in some circumstances, that his invitor had in fact taken reasonable care for his protection, but it does not follow in any of these cases that such knowledge, if standing quite alone, would have been sufficient to absolve the invitor. It is one thing to say that an invitee's claim has failed in consequence of his knowledge and, as it seems to me, quite a different thing to say that because he had knowledge his invitor had no duty towards him. And lastly, the authorities cited by either side appear to offer no instance in which the present point was raised, debated and decided. In most of them the *dicta* relied on, now supporting one view and now the other, are *obiter* and, no doubt for that reason, expressed on occasion perhaps less precisely than would otherwise have been the case. I shall refer to some of these decisions later, but I do not think it necessary to examine them all. Having given them my careful attention, I cannot but feel that the outcome of the present appeal must ultimately rest on principle rather than precedent.

Of the views propounded for your Lordships' consideration, that which I have stated first was the whole basis of the appellants' case. Their submission accepted *Indermaur v. Dames* (3) as containing a complete statement of the applicable law and depended largely on the meaning to be attached to the use by WILLES, J., of the expression "unusual danger." Now there can, I think, be little doubt that that expression was intended to exclude the common, recognisable dangers of every day experience inherent in premises of an ordinary type, such as the danger of working on a factory chimney or at the edge of a reasonably lit wharf. But it was not suggested that the staging in this case constituted a common or usual danger of that sort. What the appellants said was that the expression "unusual danger" also connoted a danger which, from the point of view of the particular invitee, was unexpected and, therefore, unknown to him. At the trial LYNSEY, J., acceded to this contention and the heart of his judgment dismissing the claim may be found in one sentence in which he says ([1949] 2 All E.R. 171):

"... if an invitee does appreciate the existence on the premises to which he is invited of a danger and its nature and extent, it cannot be to him an unusual danger."

In other words, an invitee with full knowledge of the danger that causes him harm is owed no duty by his invitor and is, therefore, without remedy against him, whatever the circumstances. I must say that reasoning seems to me to rest on a very narrow ledge and to lay undue stress on the import of a single word in a judgment which, however outstanding, was certainly never intended to take its place in the statute book. But I find it also unsatisfactory on several broader grounds and these I shall now mention before referring to authority.

It may be that in speaking of unusual danger WILLES, J., had in mind what was unusual for the particular invitee. That was the view of PHILLIMORE, L.J. ([1915] 1 K.B. 596), in *Norman v. Great Western Ry. Co.* (4), and, if I may say so, there is much to be said for it, provided it is not used to tax the invitor with liability for the consequences of some idiosyncrasy on the part of the invitee of which the invitor was ignorant and ought not to have known. But I find difficulty in taking the next step and saying that a danger cannot be unusual for the particular invitee if it is known to him. Why should this be, unless "unusual" is given a special and restricted meaning? A man working, for example, on a platform supported by a frayed rope, or at the unloading of a ship on fire, would surely never think of describing his danger as usual no matter how well he appreciated the risk. Had the hole down which the plaintiff fell in *Indermaur v. Dames* (3) been in the immediate neighbourhood of his work, so as to constitute a continuing and obvious danger while he was doing his job with all due care, I venture to think that no one would have been more surprised than WILLES, J., himself to learn that on the law as he stated it the danger was not unusual and no question of reasonable care on the part of the invitor could possibly arise. It seems to me that the view propounded by the appellants can only be placed on a logical basis if in this particular branch of the law *sciens* can be said to come to the same thing as *volens*. But there is nothing in *Indermaur v. Dames* (3) to justify any such disregard of a distinction long recognised in English law and, perhaps, nowhere more clearly drawn than in the sphere of industrial relations. In *Letang v. Ottawa Electric Ry. Co.* (14) the distinction was regarded by the Judicial Committee as material in determining the rights of an invitee and the correctness of that view is not, in my opinion, now open to doubt.

This last consideration leads to a further difficulty I have regarding the appellants' contention. If the invitee *sciens* is not necessarily *volens* as well, then, as I see it, the whole virtue of giving him notice of the danger, the whole relevance of knowledge on his part, must lie in his being in a position to keep clear of the danger once he knows of it. Now it may well be that the fact that

the present issue has emerged for decision so long after *Indermaur v. Dames* (3) can be accounted for by saying that in most cases of invitor and invitee the danger is, as it was there, avoidable from the point of view of an informed and reasonably careful invitee. In instances of that sort, knowledge could be decisive without the necessity of choosing between the views propounded at your Lordships' Bar. But how can knowledge rank as a decisive criterion of responsibility—and that is what the appellants' contention amounts to—where, as here, the danger is constant and inescapable for the invitee, despite his knowledge, while he remains on the premises pursuant to his invitation? In such circumstances, I find it difficult to discern any sound reason why knowledge *per se* on the part of the invitee should exonerate the invitor who is content to leave unabated, on the premises he controls, an abatable danger. On this ground the test of liability advocated by the appellants ought not, in my opinion, to be read into *Indermaur v. Dames* (3) if, as they have urged throughout, that decision states the whole duty of the invitor and is applicable irrespective of whether or not the invitee's knowledge can avert the peril.

The appellants' proposition must also be considered with reference to the ambit of the relationship of invitor and invitee. The weight of authority favours the view that for the purposes of the law of tort—I do not refer to contractual obligations—the liability of an occupier to one who visits his premises must be determined according to whether the visitor is a trespasser, licensee or invitee. There is no fourth category conferring rights superior to those of an invitee for the accommodation of persons who, as members of the public, resort to the premises as of right—e.g., intending passengers entering a railway station: see *Norman v. Great Western Ry. Co.* (4); the observations of LORD HAILSHAM, L.C. ([1929] A.C. 364), and VISCOUNT DUNEDIN (*ibid.*, 371) in *R. Addie & Sons (Collieries) v. Dumbreck* (5); and, for a more recent instance, the decision of the Court of Appeal in *Sutton v. Bootle Corpn.* (17), *per ASQUITH, L.J.* ([1947] 1 All E.R. 96). I think this view must now be accepted as good law. Counsel for the appellants, indeed, did not seek to argue the contrary, but he was constrained to admit that the result, if his main contention were sound, would be to produce an anomalous situation in certain events. I may illustrate this by an instance mentioned in the course of the debate. A, at the end of his day's work, repairs to the local railway station to get home. He goes to the ticket office by the usual and only means of approach. The roof overhead is in a dangerous state and bits of it are liable to fall at any moment. The railway company know of this and could readily avert the danger for those beneath by placing a temporary screen under the defective part. But all they do is to post a notice describing the danger in clear terms. A reads and understands this before he enters the perilous area, but hurries on to get his ticket and is hurt by a piece of falling glass. He was not *volens* or careless. Yet, if the appellants are right, he was owed no duty by the company and has no redress. My Lords, if the law confers that sort of immunity on occupiers of premises, it is, to my mind, inadequate and open to grave criticism. I do not forget the unwisdom of building principles on hard and rare instances. But I do not think the illustration I have given is fanciful or remote from the run of ordinary affairs except, perhaps, in this, that there must be many responsible occupiers who, in such circumstances, would feel they had done wrong if they had not done more. In applying the common law to a given state of facts on which there is no binding authority, it is permissible and proper, in choosing between two possible views, to have regard to the reasonable requirements of the community which the law has to serve. Such a process demands great caution and is not necessarily conclusive. But if one view leads to a narrow and unreasonable rule and the other does not, it is a point in favour of the latter. The matter to which I have been referring is, therefore, in my opinion, one to be taken account of in weighing the appellants' case. Without being decisive, it appears to me to bear against it.

The same may, I think, be said of another consideration to which I will now refer. In the Court of Appeal SINGLETON, L.J., held for the respondent on two grounds. He first rejected the view of *Indermaur v. Dames* (3) propounded by the appellants and found them in breach of the duty laid on inviters by that decision, and, secondly, he was of opinion, on the strength of the general principles enunciated by SIR WILLIAM BRETT, M.R., in *Heaven v. Pender* (18) and by LORD ATKIN in *Donoghue v. Stevenson* (1), that the present appellants were under a duty to use ordinary skill and care in the provision of the staging. It is no doubt true that, on occasion, responsibility at law may be imposed concurrently by different rules, as, for example, where the claim sounds in both negligence and nuisance. But I am not disposed to think that the liability in tort of an invitor to his invitee comes from more than one quarter. I think that where there is such liability it must be found in the doctrine of *Indermaur v. Dames* (3). That, however, is not to say that the broad concept of neighbourly duty exemplified by *Heaven v. Pender* (18) and *Donoghue v. Stevenson* (1) is entirely irrelevant to the present investigation. The question, as I see it, is whether *Indermaur v. Dames* (3) also exemplifies that concept. If the respondent is right, it does, for the duty then lies entirely in the taking of reasonable care. On the other hand, the position, as it seems to me, is essentially different if the appellants are right. It is correct to say that they do not deny the need for some initial care. The invitor's liability being in respect of danger of which "he knows or ought to know," he is, at least, under an obligation to use reasonable care to make himself aware of defects that may injure his invitee. But that done, he may, according to the appellants, discharge his obligation—or, perhaps, I should say end it—merely by giving the invitee due notice of the danger—and even that is unnecessary if the invitee is already aware of it. That might possibly be regarded as a rational form of obligation if *sciens* had to be treated as the equivalent of *volens* in this sphere. But otherwise it seems strange and unsuited to the relationship concerned, which, when all is said, remains based on common interest; almost as strange, indeed, as would the duty of a motorist become if, having seen the pedestrian in his path and given him the loudest of warnings, he was then absolved from taking any further step to avoid a collision. All this, of course, is itself inconclusive. Our judicial process cannot eliminate what is obsolete and unsatisfactory once it has become established law—as witness the recent abolition by statute of the doctrine of common employment after much judicial denunciation. But the question here is open. Your Lordships' decision will establish what was not established before and that, as it seems to me, makes a comparison between the broad merits of the rival contentions both relevant and right.

I come now to authority. For the reasons already mentioned, I confine myself to the cases that lend, or appear to lend, most support to the appellants' submission. Pride of place must go to certain statements made in the Court of Appeal in *Brackley v. Midland Ry. Co.* (7). BANKES, L.J., said (85 L.J.K.B. 1608):

"I am prepared to deal with this case upon the assumption, without deciding it, that there was an invitation by the railway company to this particular plaintiff to use this footbridge as an access to the platform to which she desired to go. Now, in those circumstances, what was the duty of the railway company to the plaintiff? A great many expressions have been used in different cases with regard to that duty; but I think that the duty was expressed in *Norman v. Great Western Ry. Co.* (4) and in *Cavalier v. Pope* (6) in the best and the simplest way—that is, that the duty which arises out of the relationship of an invitor and an invitee is a duty in respect of any danger which was known to the defendants, or ought to have been known to the defendants, and of which the plaintiff had either no knowledge or notice. If that is a correct statement of the law, it follows that in any case, when the proper conclusion upon the evidence is either that the defendants

did not know or ought not to have known the danger, or that the plaintiff did know or had notice of the danger, the defendants' duty is not established; and the duty not being established, no question can arise of any breach of their duty, and no question will arise as to any necessity for a defence on the part of the defendants arising out of contributory negligence or otherwise."

SWINFEN EADY, L.J., spoke to the same effect and I think PHILLIMORE, L.J., agreed, though he said little on this aspect of the matter. The view thus stated was *obiter*, but, as expressed, it entirely upholds the appellants' submission and cannot be lightly disregarded. In my opinion, however, there is good ground for saying that it was not an accurate exposition of the law. On the supposition that the plaintiff was their invitee, the company in that case had contended throughout that she was *volens* and, as I read the report, it seems that both SWINFEN EADY, L.J., and PHILLIMORE, L.J., were prepared (on this supposition) to hold her so, for they were at pains to distinguish *Osborne v. London and North Western Ry. Co.* (10). When one studies the arguments and judgments in *Brackley's* case (7), it is, I think, reasonable to suppose that BANKES, L.J., was not, in the passage from his judgment which I have quoted, directing his mind to the important distinction between knowledge *simpliciter* and the knowledge which in special circumstances may found a plea of *volenti non fit injuria*. This view is fortified by the reliance placed by SWINFEN EADY, L.J., and BANKES, L.J., on *Cavalier v. Pope* (6). The only relevant passage in the opinions delivered in *Cavalier v. Pope* (6) is to be found in the speech of LORD ATKINSON who, on referring to the principle of *Indermaur v. Dames* (3), says ([1906] A.C. 432):

"... one of the essential facts necessary to bring a case within that principle is that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered. If he knows of the danger and runs the risk he has no cause of action."

I see no ground for thinking that the Court of Appeal in *Brackley's* case (7) intended to put the test any higher than it was put by LORD ATKINSON in *Cavalier v. Pope* (6). But the last sentence of this passage which, it may be observed, was quoted fully by SWINFEN EADY, L.J., marks the distinction to which I have just referred by the significant words "and runs the risk." I cannot accept the view that LORD ATKINSON meant that an invitee *sciens* was necessarily in the same position as an invitee *volens*, and, if that be so, I do not think there is anything in *Brackley's* case (7) to sustain the appellants' case.

I must also refer to *Fairman v. Perpetual Investment Building Society* (16). It was there decided that the plaintiff was a licensee, not an invitee, but such relevance as this case has lies not in what it decided but in the inference to be drawn from certain observations made by LORD ATKINSON and LORD SUMNER to the effect that even as an invitee the plaintiff could not have recovered. What LORD ATKINSON said ([1923] A.C. 86) concerning the plaintiff was this:

"The findings of fact of the learned judge who tried the case, SHEARMAN, J., disentitled her, in my view, to any relief either in the character of licensee or in that of invitee of the defendants."

LORD SUMNER also considered that the findings of SHEARMAN, J., should be accepted, and then, after stating his opinion that the claimant was a licensee, he added (*ibid.*, 92):

"In this particular case, however, it makes no difference to the liability whether she was the defendants' licensee or their invitee. Under the present circumstances the obligation was only not to lay a trap for her, and none was laid."

The defect which caused the plaintiff, Lilian Fairman, to fall down the stairs was found to be obvious and such as could have been seen by her had she looked, and the suggestion based on the excerpts I have cited was, as I understand it,

that they indicated acceptance of the proposition that an invitor owed no duty to an invitee who knew or ought to have known of the danger or defect in question. I consider this suggestion ill-founded. Apart altogether from the *obiter* nature of the remarks quoted and the fact that the precise point with which your Lordships have now to deal was not raised in *Fairman's* case (16), I do not think that either LORD ATKINSON or LORD SUMNER intended to assert any such general proposition. The findings to which LORD ATKINSON referred included findings to the effect—and here I quote LORD ATKINSON'S own words (*ibid.*, 87)—

“That there was no negligence on the part of the landlord or of the caretaker in not observing the condition of the stairs, reporting it and getting them repaired.”

—and again (*ibid.*, 88), that the trial judge did not

“... think he could possibly find that the staircase as a whole or that this particular place could be described in plain English as dangerous.”

It may be that this latter finding must be linked with the view that the claimant failed to see the obvious and was, therefore, the author of her own misfortune. But whether that be so or not, the other finding meant that the occupier did not know and ought not to have known of the defect, and on that ground alone the claim of an invitee was bound to fail. The part stressed in what LORD SUMNER said was, of course, the phrase (*ibid.*, 92): “the obligation was only not to lay a trap for her.” Even if these words are to be isolated from their context, I would be slow to conclude that LORD SUMNER intended to confine the rule in *Indermaur v. Dames* (3) to an obligation not to lay traps for invitees, irrespective of the circumstances and of whether the danger was avoidable or not. But, in fact, LORD SUMNER was careful not to make any such sweeping statement. The immediately preceding words, “Under the present circumstances” were clearly meant to have a limiting effect. I confess the findings of fact in *Fairman's* case (16) cause me some difficulty, and, for that reason, I am not entirely clear as to what exactly LORD SUMNER intended to include in “the present circumstances,” but I think he must, at least, have had in mind the plaintiff's familiarity with the stairs, that they were well lighted and their condition was plain to be seen, and, also—and this I think was implicit throughout the case—that the kind of defect which had appeared was easily avoidable by people using the stairs. For these reasons I am unable to find support for the appellants' contention in *Fairman's* case (16).

The appellants also relied on certain observations of VISCOUNT MAUGHAM in *Griffiths v. Smith* (8). In that case the appellant, Mrs. Griffiths, had accepted an invitation by the managers of the school attended by her son to an exhibition on the first floor of the school premises. The floor was in a dangerous condition and collapsed during the display, causing Mrs. Griffiths serious injuries. The material part of VISCOUNT MAUGHAM'S speech reads thus ([1941] 1 All E.R. 74):

“The appellant had to show that the managers were in occupation and control of the premises, and were, therefore, under a common law duty to the invitee to take reasonable care to prevent injury to the latter from a hidden danger of which, as occupiers, they should have been aware, or to warn the invitee of the existence of the danger. Thus the claim is simply on the well-known principle of *Indermaur v. Dames* (3).”

It is to be noted that the managers did not contest the finding that they had failed in their duty to the appellant. The only issue was whether they were protected by the Public Authorities Protection Act, 1893. As well as being *obiter*, the passage quoted cannot, therefore, be regarded as having been directed in any way to the question which your Lordships have here to consider. In the

circumstances, I am in some doubt whether it can reasonably be taken as indicating more than that, in the particular instance, the managers might have discharged their duty either by removing the danger or by giving warning of it, and that is very far from saying that, in any event and to any invitee, warning is always enough. If, however, the passage is to be read as stating the substance of the rule in *Indermaur v. Dames* (3) it would lend support to the appellants' contention, for, so read, it limits the rule to hidden dangers, and dangers cease to be hidden when by warning or otherwise they become known. But if that is what VISCOUNT MAUGHAM meant, I am, with great respect, unable to agree. Had WILLES, J., intended to confine the liability of inviters to hidden dangers, it may, I think, be presumed that he would have said so, and certainly that he would not have employed the word "unusual" for the purpose. Further, the terms he chose to use, particularly with regard to what he described (L.R. 1 C.P. 288) as

"... the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise ..."

seem to me to suggest that he would have been content in appropriate cases to leave it to a jury to find as a matter of fact whether the giving of notice amounted to the taking of reasonable care. That view, resting as it does on the text of the judgment, ought not to exclude other considerations, but, if well founded, it reaches beyond the immediate point towards the heart of the controversy, for it means, not only that WILLES, J., had more in mind than dangers which are hidden (and which, therefore, pass out of that category when revealed), but that the ultimate test he considered applicable to all cases within the rule was one of reasonable care.

I turn next to the view advanced by the respondent. Is the invitor's duty one of taking reasonable care to protect his invitee from the relevant danger while the invitation subsists and the invitee is on the premises? This view also finds support in various *dicta*, usually *obiter*, to be found in the reports. Thus, in *Norman v. Great Western Ry. Co.* (4), BRAY, J., said ([1914] 2 K.B. 163):

"... it was at least a duty to take reasonable care that their premises were reasonably safe for persons using them in the ordinary and customary manner and with reasonable care."

This passage was approved in the Court of Appeal by BUCKLEY, L.J., who added ([1915] 1 K.B. 594):

"That statement of the duty is, I think, correct, and it is not a larger duty than that in *Indermaur v. Dames* (3)."

In *R. Addie & Sons (Collieries) v. Dumbreck* (5), LORD HAILSHAM, L.C., said ([1929] A.C. 364):

"The highest duty exists towards those persons who ... are present by the invitation of the occupier. Towards such persons the occupier has the duty of taking reasonable care that the premises are safe."

In *Haseldine v. Daw & Son, Ltd.* (19), GODDARD, L.J., said ([1941] 3 All E.R. 181):

"Towards an invitee the occupier has the duty of taking care that the premises are reasonably safe."

In *Woodward v. Mayor of Hastings* (20), DU PARCQ, L.J., said ([1944] 2 All E.R. 566):

"Their duty to the invitee was to use reasonable care to prevent damage which they knew or ought to have known."

In *Letang v. Ottawa Electric Ry. Co.* (14) LORD SHAW OF DUNFERMLINE, delivering the judgment of the Judicial Committee, said ([1926] A.C. 732) that the defendant company, having invited the injured person to use the access in question, "were accordingly bound to keep it reasonably safe." That statement certainly was not

obiter for, once the defences of *volenti* and contributory negligence had been disposed of, the appeal turned on it. But, though the injured person there must have been *sciens* to some extent, the present issue was not in debate. *Letang's* case (14), therefore, while more directly in point than the other cases to which I have just referred, cannot be regarded as a coercive authority on this aspect. Its prime importance in this appeal lies in the distinction it emphasises between *sciens* and *volens*.

My Lords, it will be observed that the view for which the respondent contends has not always been precisely echoed in the supporting *dicta* of which I have given examples. And I think that, in so far as the duty of the invitor has been described as a duty to take reasonable care that his premises are reasonably safe, it has been put too high to be accurate as a general proposition, even if the respondent is right. No doubt, on his submission, the duty falling on the invitor would, on occasion, be properly so described. But occupiers would be placed in an intolerable position if on *all* occasions their obligation to invitees was of that nature and they had to make their actual premises reasonably safe, irrespective of whether due and timely warning or other precaution might suffice to avert the danger. I think it is clear from the terms in which WILLES, J., spoke in *Indermaur v. Dames* (3) that, if the respondent is correct in the substance of his contention, the duty of an invitor, stated generally, is to take reasonable care to prevent damage to his invitee from the relevant danger—and that does not necessarily and invariably mean making the premises reasonably safe.

It remains to choose between these conflicting views. In my opinion, that propounded by the respondent is to be preferred. It accords better, as it seems to me, with the language employed by WILLES, J., in *Indermaur v. Dames* (3), including his use of the expression “unusual danger.” It respects the settled distinction between *sciens* and *volens* in this branch of our jurisprudence, a distinction which the appellants’ contention would, in effect, obliterate. It provides a rational criterion of responsibility over a wider range of circumstance, being equally applicable to avoidable and unavoidable dangers and to invitees of all kinds and degrees. And, not least, though in a sense this is but to enlarge on what I have just said, it applies to a relationship which, as already observed, is infinitely varied in character, a test of liability which is correspondingly flexible and adaptable. For what is reasonable in any given case must depend on all the relevant circumstances, including such factors as the nature of the invitation, the nature of the danger, the knowledge of the invitee, and the practicability of the possible means of removing or reducing the risk. So, in some instances, notice may suffice—in certain cases, indeed, such as those relating to dangers which lurk in navigable waters, notice may be the usual as well as the best means of protecting the invitee. In other instances fencing, or watching, or repair, or re-construction may be requisite. And lastly, I see nothing in all this to bear harshly on the occupier. He controls the premises, he serves his own interest by the invitation, he has left to him all the pleas open to one accused of negligent conduct. Why should he be exonerated, or partly exonerated, from the duty of taking reasonable care? I have been unable to find any satisfactory answer to that question in principle or authority.

My Lords, I have already said enough to apply the view I favour to the facts of this particular case. Had the appellants taken due care for the respondent’s safety, they would have taken steps to make the staging adequate for its purpose. They did nothing and should, accordingly, be held liable. For these reasons I am entirely in agreement with the conclusion reached by the Court of Appeal. I would, therefore, dismiss this appeal.

LORD REID (read by LORD PORTER): My Lords, the relevant facts in this case are simple. The respondent sustained injuries without negligence on his part. Those injuries were caused by the state of the appellants’ premises being so unsafe that an accident could and did occur in spite of the respondent having

full knowledge of the danger and in spite of the respondent having taken proper care for his own safety. The respondent was a servant of a sub-contractor. He had no contract with the appellants. His position was simply that of an invitee, the appellants being the inviters. The respondent had been working at the place where the accident happened for some considerable time before his accident and the danger was obvious to him. Indeed, it would have been obvious to any ordinary person. The appellants must be taken to have been aware of the danger and there is nothing to suggest that there would have been any difficulty in making the place reasonably safe. The place was under the control of the appellants and the respondent had no right to make any alteration to diminish the danger.

The decision of this case depends, in my judgment, on the question whether the duty of an invitor to an invitee can never be more than to see that the invitee is fully aware of the dangerous state of premises which he is invited to use, or whether, notwithstanding that his invitee has such knowledge, the invitor can ever be under a duty to take care to make his premises reasonably safe for the use which he invites his invitee to make of them. If such a duty can exist in any circumstances, the facts here are such that, in my opinion, it must exist in this case. This case was argued, I think rightly, on the footing that this question is still an open question, and, therefore, I think that it should first be considered as a question of principle. I do not doubt that the law is now firmly established that a person who comes to premises occupied by another with whom he has no contractual relation must be either an invitee, a licensee, or a trespasser. The respondent here was, undoubtedly, an invitee. There was a danger on the appellants' premises and the first question is whether the existence of that danger created any duty at all towards their invitee. If it did, it will then be necessary to inquire what was the nature of that duty.

There are many dangers the existence of which creates no duty at all to an ordinary invitee. (I express no opinion about a case when an invitee has some special quality.) These are generally referred to as dangers which are not "unusual." Such dangers can be found in most industrial premises and, indeed, in private houses. The roof of a house is often a dangerous place. Such dangers are well known. Either they cannot be removed, or their removal is so difficult that in practice reasonable people do not remove them. If removal of a danger is easy, it could hardly be a usual danger, because reasonable people who are careful of the safety of others would remove such dangers from their premises. The danger in this case was not one commonly found and it was easy to remove, so at first sight it would seem clearly to fall within the class of dangers the existence of which creates a duty. It is said, however, that a danger unusual in this sense may become usual for a particular invitee by his becoming accustomed to it and that, when that happens, the invitor ceases, as regards that invitee, to have any duty.

I have not observed any case in which this point was taken before *Norman v. Great Western Ry. Co.* (4). In that case, the plaintiff's horse and cart sustained damage in a yard belonging to the company. The plaintiff was an invitee and it was held that an invitee of a railway company had no higher right than an invitee of any other invitor. It was held that no breach of duty causing the accident had been proved, but in the course of his judgment PHILLIMORE, L.J., dealt with the question whether the premises were reasonably safe and held that that meant reasonably safe for the plaintiff. He said ([1915] 1 K.B. 596):

"I am not certain that a way to avoid misapprehension which might arise from the use of the words 'unusual danger'—which means, in my opinion, danger unusual for the particular person—might not be found by substituting the word 'unexpected' for 'unusual.' It is not a question whether the danger is unusual with regard to all the world, but whether it is unusual with regard to the individual complainant. In other words, in analysing

the expression 'reasonably safe' one must take into account what is called in modern parlance the personal equation; what may not be safe for one person may be safe enough for the persons who frequent particular business premises. For instance, in loading a ship in a dock a gangway consisting of a plank without a handrail may safely be provided, though its narrowness or slope may be such that ordinary persons, not accustomed to ships, might not find it easy to use, because the stevedore and seamen who are to use it can use it safely. The gangway has to be safe for the class of persons who use it on business, and so far as any complainant is concerned it has to be reasonably safe for him. If it is safe for him, it does not matter whether or not it is safe for anybody else. It is for that reason that the element of knowledge comes in."

PICKFORD, L.J., agreed (*ibid.*, 598) with this explanation of the word "unusual," but it must be noted that, immediately before doing so, he had cited with approval passages from the judgments of LUSH, J., and BRAY, J., in the court below. LUSH, J., said ([1914] 2 K.B. 160):

"... I think it is not accurately said that the defendants are free from liability merely because there was no hidden or concealed trap."

BRAY, J., said (*ibid.*, 163):

"... it was at least a duty to take reasonable care that their premises were reasonably safe for persons using them in the ordinary and customary manner and with reasonable care."

I agree with PHILLIMORE, L.J., at least to this extent. In considering whether a danger is usual or unusual you must have regard to the nature of the place where it is and to the apparent experience of the invitee. A danger may be usual for a stevedore but quite unusual for an ordinary tradesman. In this case, however, LYNSKEY, J., went considerably farther than that. He appears to have taken the view that, although the danger might be unusual for the particular invitee when he first arrived at the place, it would become for him a usual danger when he appreciated it. LYNSKEY, J., said ([1949] 2 All E.R. 170):

"The duty to an invitee is stated in that oft-quoted passage from the judgment of WILLES, J., in *Indermaur v. Dames* (3) and is (L.R. 1 C.P. 288): '... that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care had been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact.' From this passage it seems clear that the only duty imposed on the invitor, or occupier, is to prevent damage from unusual danger. This, of course, raises the question of what is unusual danger. Is it danger unusual generally, or is it danger unusual in premises of the type, description and use, to which the invitation is extended, or is it a danger unusual from the point of view of the particular invitee, regard being had to the type, description and use of the premises to which he has been invited? In my view, 'unusual danger' means a danger unusual from the point of view of the particular invitee: see PHILLIMORE, L.J.'s judgment ([1915] 1 K.B. 596) in *Norman v. Great Western Ry. Co.* (4). It must be, from his point of view, unexpected in the particular circumstances in which he is availing himself of the invitation. It may be that other persons might expect such dangers or might know of their existence in the premises on which he goes, but if he, acting reasonably and exercising due care for his own safety, did not appreciate the existence of the danger, or its nature, or its extent, it would be to him an unusual danger. On the contrary, if an

invitee does appreciate the existence on the premises to which he is invited of a danger and its nature and extent, it cannot be to him an unusual danger."

I do not agree with that for two reasons. In the first place, it would be contrary to ordinary principles that the question whether one person owes a duty to another should depend, not on objective considerations or on facts which he can ascertain, but on the state of mind of that other person which may well be unknown to him. Secondly, what is the position to be if the danger is highly unusual in the ordinary sense, but is at once appreciated by the invitee when he sees it? If "usual" is an apt word, as I think it is, to denote the class of dangers which give rise to no duty, it would surely be a misuse of language to say that something hitherto unknown has become "usual" the moment it is seen. Counsel for the appellants, in his admirably candid argument, did not attempt to support this. He simply put the argument in this way: As soon as a danger is known to and appreciated by the invitee the invitor's duty is at an end. That, however, goes rather to the nature and extent of the duty than to the question whether there is any duty in respect of a particular danger.

I think that in this case there was a duty in respect of the danger which caused the accident and that the real question is what was the nature and extent of that duty. Three views have been suggested. In the first place, it has been said that the duty of an invitor is to make his premises reasonably safe (at least, in so far as that is practicable). Secondly, it can be said that the invitor has the option to make his premises reasonably safe or to give to his invitee adequate notice of the danger, and that, if he adopts the latter alternative, his duty is at an end. Thirdly, his duty can be said to be to use reasonable care to prevent damage to his invitee. I think that the first of these clearly puts too high a duty on the invitor. It is easy to imagine many situations which are highly dangerous to a person without knowledge of the danger, but which to a person with such knowledge become safe. The danger is so situated that the invitee can continue to accept the invitor's invitation and at the same time without difficulty avoid the danger. He can only suffer damage from the danger after he knows about it if he acts in complete disregard for his own safety. In such a case, I can see no reason why an invitor should have to do any more than see that his invitee has the necessary knowledge. Reasonable care for the safety of the invitee could not require more. There are, however, other cases where full knowledge of the danger gives no assurance of safety. If a man is invited to work for a long period in a place where a slight slip on his part may lead to disaster, the fact that he realises the danger goes but a short way to assure his safety. Therefore, I find it necessary to examine somewhat narrowly the view that an invitor is entitled to discharge his duty to his invitee merely by giving notice of the danger when it would be easy for him to ensure his invitee's safety by removing the danger. In such a case, if the true view is that it is the duty of the invitor to use reasonable care to prevent damage to the invitee, then it would be his duty to remove the danger. If, in the present case, it was the duty of the appellants to use reasonable care to prevent damage to the respondent while he was on their premises in response to their invitation, doing work which it was their common interest to have done, then, in my judgment, the appellants clearly failed in their duty. On the other hand, if the appellants' duty to the respondent came to an end once he had knowledge of the danger, then, of course, the appeal must succeed.

It is convenient at this point to deal with arguments based on *Donoghue v. Stevenson* (1). In that case the defender had parted with control of a dangerous object, but he was nevertheless held liable to the person ultimately injured by it. It is plain that a person who has parted with control cannot have the same duty as a person who retains control and can, therefore, remain under a continuing duty down to the time when damage is suffered. I can find nothing in this class of case which assists towards the determination of the question now in issue.

I think that the authorities on the duty of an invitor to his invitee can be summarised in this way. The point at issue in this case has never been the subject of decision and there is no clear indication that it has been specifically considered in the course of any case. Text writers of authority have considered the question but have expressed no decided opinion. There are a number of cases in which brief general statements of the duties of an invitor have been made. Many of these do not appear to be intended to be more than adoptions or paraphrases of the judgment of WILLES, J., in *Indermaur v. Dames* (3). Some tend to give a wider interpretation of that judgment by emphasising the duty to take care. Others tend to give a narrower interpretation by emphasising the importance of giving notice of concealed dangers. As almost all discussions of this subject start from the judgment of WILLES, J., and particularly from that passage in the judgment which I have already quoted, I must first state what I conceive to be its meaning and effect. I do not for a moment doubt the authority of this passage. Its words have clearly been chosen with great care and if one were dealing with facts at all comparable with the facts in that case, or, indeed, with any situation of a kind which WILLES, J., can be supposed to have had in mind, it would hardly be necessary to go beyond his judgment. I do not think, however, that this judgment was meant to be, or can properly be used as, a codification of the law. In dealing with a situation different from anything contemplated in that judgment, I do not think that it is very helpful to analyse that passage as if it were a section in an Act of Parliament. I prefer to seek the principles underlying the judgment which are, I think, of general application. In the first place, I think that the judgment recognises that it is only with regard to a certain class of dangers that any duty arises. I have stated my view about that and I do not think that my view conflicts in any way with this judgment. In the second place, WILLES, J., does not state the invitor's duty alternatively as a duty either to take care or to give notice. He states the invitor's duty as a general duty to use reasonable care and he does not lay down any particular method as one which an invitor is in all circumstances entitled to adopt in discharging his duty. On the contrary, he mentions a variety of methods, "notice, lighting, guarding, or otherwise," and must, I think, have had in mind that such method should be adopted as reasonable care in the circumstances requires. I think that his meaning is that what reasonable care requires in any particular circumstances is a matter of fact. Therefore, I can find no support in this judgment for the view that, as a matter of law, the invitor always has the option to give notice and do nothing more. There are, it is true, many cases in which the duty has been stated in an alternative form—that the invitor must either make his premises safe or give notice of unusual dangers. It appears to me that those cases are of one or other of two kinds. In some of the cases, the circumstances were such that the invitor was entitled to assume that, once the invitee knew of the danger, he would avoid it. In others, a principle similar to that underlying the defence of *volenti non fit injuria* was assumed to be applicable. It seems to have been held that, if an invitee continues to accept the invitor's invitation after he knows the danger, the law must infer that he has agreed to accept the risk from that danger.

I shall deal with the former class of case first. Cases of this kind have arisen in a wide variety of circumstances. Those dealing with invitation to ships are as good an example as any. The leading case on invitation to ships is *The Moorcock* (21). In that case, wharfingers invited a ship to discharge at their jetty. They did not control the bed of the river adjoining the jetty where the ship must lie, but they took no step to ascertain whether it was a safe place. The vessel lying at the jetty grounded and sustained damage from the uneven condition of the bed of the river. The wharfingers were found liable for the damage. BOWEN, L.J., said (14 P.D. 69):

"Assume that the berth outside had been absolutely under the control of

the owners of the jetty, that they could have repaired it and made it fit for the purpose of the unloading and the loading. If this had been the case, then the case of *The Mersey Docks Trustees v. Gibbs* (22) shows that those who owned the jetty, who took the money for the use of the jetty . . . would have been bound to take all reasonable care to prevent danger to those who were using the jetty—either to make the berth outside good, or else not to invite ships to go there—either to make the berth safe, or to advise persons not to go there.”

BOWEN, L.J., then pointed out that the berth outside was not under the actual control of the jetty owners, but nevertheless they were not relieved of all responsibility. He said (*ibid.*, 70):

“ . . . if they let out their jetty for use they at all events imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so.”

This case is not directly in point, but it has been used as if the passage which I last quoted was equally applicable in a case where the defendant is in control of the place where the danger is. I think that an examination of the case makes it plain that this is not so. In *Tredegar Iron & Coal Co. v. Calliope (Owners)*, *The Calliope* (23), LORD HALSBURY, L.C., after referring to *The Moorcock* (21), said ([1891] A.C. 14):

“ . . . either he ought not to have invited the vessel or he ought to have informed the vessel what the condition of things was when she was invited, so that the injury might have been avoided.”

The italics are mine. LORD HALSBURY, L.C., must, I think, have taken the view that in that case warning would have led to safety, and, as I have said, I have no doubt that warning in such a case is all that reasonable care for the safety of the invitee requires. In *Anchor Line v. Dundee Harbour Trustees* (13) two ships sustained damage owing to the unsafe state of the approaches to Dundee harbour. VISCOUNT HALDANE said (1922 S.C. (H.L.) 83):

“ Their legal position would thus be like that of the plaintiff in the well-known case of *Indermaur v. Dames* (3) and they would be entitled to look for the discharge of a duty resting on the respondents to exercise reasonable care to avert peril to them from any unusual danger of which the respondent knew or ought to have known. It is important to have this in mind inasmuch as it bears on the extent of the counter duty of those approaching the harbour as regards the standard of skill required of them in navigating their vessels in the course of such approach. The latter, approaching under such an invitation as I have referred to, are entitled to rely on care having been taken by those inviting them to avert any unusual danger of which they are cognisant. I think that the duty imposed on the harbour trustees arose, not only under the principle of invitation, but as the result of s. 92 of [the Dundee Harbour and Tay Ferries Consolidation Act, 1911]. On the other hand, those approaching with their vessels must, notwithstanding their right to rely on such care having been exercised, use care on their part not to incur peril rashly.”

Here, again, it seems to me that the harbour authority would be entitled to expect that a ship being warned of a danger would avoid it, and, therefore, warning would be an adequate discharge of their duty. I do not think it necessary to consider further instances of this kind.

Cases where the defendant was entitled to assume that warning would be an adequate protection are, in my opinion, clearly distinguishable from the present case. In this case, the respondent returned to the dangerous place day after day,

and the appellants knew that the respondent's knowledge of the danger was no protection to him. How, then, does it come about that the appellants' duty towards him had ceased, unless, indeed, it has to be said that the only inference which the law permits to be drawn from such circumstances is that the respondent, by returning to his work in knowledge of the danger, must be held to have accepted the risk and relieved the appellants of their duty to take care? Some of the expressions of opinion that warning is sufficient appear to be based on the view that, if the invitee is warned or gets to know of the danger, he must then elect either to continue to accept the invitation at his own risk or to go away, and that, if in knowledge of the danger he continues to accept the invitation, he will be deemed to have accepted the risk of injury to himself. In *Cavalier v. Pope* (6) LORD ATKINSON said ([1906] A.C. 432):

"It is, I think, clear that the case does not come within the principle of *Indermaur v. Dames* (3) and the cases which followed it down to *Earl v. Lubbock* (24), because one of the essential facts necessary to bring a case within that principle is that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered. If he knows of the danger and runs the risk he has no cause of action."

That statement was *obiter* because the case was decided in favour of the landlord against the tenant's wife on a different ground—that she, not being a party to the contract, had no right to require the landlord to repair the premises. Moreover, the landlord was not in occupation of the place where the danger was, and it has since been decided that, even if damage is suffered by an invitee of the tenant in a place which the landlord does occupy, that invitee is only the licensee of the landlord: see *Fairman v. Perpetual Investment Building Society* (16) and *Jacobs v. London County Council* (25). LORD ATKINSON's dictum has, however, been quoted with approval in later cases. For example, it was so quoted by SWINFEN EADY, L.J., and BANKES, L.J., in *Brackley v. Midland Ry. Co.* (7). That was a case where an intending passenger crossing a bridge slipped on ice which was an obvious danger. It was held that the bridge was

part of a highway, but that, even if the plaintiff had been an invitee of the company, she could not recover because, knowing the danger, she had run the risk. The case was distinguished from *Osborne v. London & North Western Ry. Co.* (10) because in *Osborne's* case (10) the defence *volenti non fit injuria* had failed. It is, I think, clear that the court in *Brackley's* case (7) took the view that an invitee, who knew the danger, was presumed to have undertaken the risk. It is

at this point that I think that the most difficult question in this case arises. There is no doubt that, when the defence *volenti non fit injuria* is pleaded, it is now well recognised that it is not enough to show that the plaintiff was well aware of the danger. There must also be evidence from which it can properly be inferred that he agreed to accept the risk. It is said, however, that the rule is different in a question between invitor and invitee. It is said, if I understand the

argument rightly, that here it is not a question of a defence, but that, when the invitor tells the invitee of the danger, he thereby relieves himself of any further duty or liability to the invitee, with the result that, whether the invitee consciously elects to run the risk or not, he is, in fact, confronted with the option of continuing to accept the invitor's invitation at his own risk or going away. There may be a technical distinction, but, if I am entitled to look at the sub-

stance of the matter, I can see no substantial distinction. It seems to me that all the reasons which have led courts for many years past to stress the difference between *volens* and *sciens* are equally valid here. The defence of *volenti non fit injuria* is of general application. It is not confined to cases between master and servant. That is clearly explained by LORD HALSBURY, L. C., in *Smith v. Baker & Sons* (26), and the limitations of that defence are founded on general considerations of good sense. In *Smith v. Baker & Sons* (26) LORD WATSON said ([1891] A.C. 355), on the assumption that a workman appreciated his danger:

"... I am unable to accede to the suggestion that the mere fact of his continuing at his work, with such knowledge and appreciation, will in every case necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case."

In *Bowater v. Rowley Regis Corpn.* (2) SCOTT, L.J., said ([1944] 1 All E.R. 465):

"... a man cannot be said to be truly 'willing' unless he is in a position to choose freely; and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, in order that he may be able to choose wisely, but the absence from his mind of any feeling of constraint, in order that nothing shall interfere with the freedom of his will."

Such considerations are almost as much applicable in a case like the present as they are in a case of master and servant. It may be just as difficult for a sub-contractor's servant to leave his work because he fears danger as it is for a servant of the main contractor who is in occupation of the premises. I do not think that it is certain or even probable that every invitee who is *sciens* is, in fact, also *volens*, so any rule of law that an invitee who is *sciens* must be deemed to have accepted the risk of which he was aware can only be founded on a fiction. I would not be prepared to assent to the introduction of a further fiction into the law in any case where that could be avoided.

Of course, if all these considerations are irrelevant, if your Lordships are forced by some overriding principle or by binding authority to disregard them, then there is no more to be said. If, however, this is really an open question, then such considerations do not appear to me to be irrelevant. If they were relevant when one branch of the law was being developed, they are, I think, equally relevant now. In my judgment, the duty of an invitor is not merely to take care that his invitee knows of unusual dangers. His duty is that, so long as he holds out his invitation, he shall take reasonable care for the safety of his invitee unless the invitee has relieved him of that duty by accepting the risk.

The only question which remains is whether it can be held in this case that the respondent did, in fact, accept the risk and relieve the appellants of their duty towards him. I do not doubt that an invitee can, if he chooses, accept the risk of injury to himself from a danger known to him, and, if he does accept that risk, he cannot thereafter hold the invitor liable for any injury which may result to him from that danger. In effect, his acceptance of the risk brings to an end the invitor's duty to him with regard to that danger. Further, I do not doubt that a man does not have to state expressly that he accepts a risk. His acceptance can be inferred from the whole facts of the case. I do not, however, think that it can be held in this case that, as a matter of fact, the respondent did accept the risk of injury to himself from the dangerously inadequate staging. I understood counsel for the appellants to state expressly that he did not put forward that case. His case was that, as a matter of law, no matter what the circumstances may be, an invitee who continues to accept an invitation in knowledge of the danger involved cannot be heard to say that he has not accepted the risk, and I have already said why I do not agree with that. I do not think that on the pleadings counsel could properly have done otherwise. There is nothing in the appellants' pleadings to raise this issue. The appellants merely deny negligence on their part and allege negligence on the part of the respondent, and that is all. It is true that LYNKEY, J., said ([1949] 2 All E.R. 171):

"If it were necessary to decide it I should have held on the facts of this case that [the respondent] did freely and voluntarily impliedly agree to accept the risk of working on the staging with full knowledge of the nature and the extent of the risk he ran."

I do not know what virtue there is in the word "impliedly." If the learned judge merely means that acceptance of the risk must be inferred from the respondent's having continued to work in knowledge of the danger, then, for the reasons which I have given, I do not agree with that, but, if he means that the whole facts of the case are sufficient to prove acceptance of the risk by the respondent, I do not think that he was entitled to make such a finding, and I do not think that it is open to your Lordships to make such a finding now. We do not know what the evidence would have been if the issue had been properly raised. If there is in this matter a difference between *sciens* and *volens*, and if it is not enough to prove knowledge, then the burden of proving facts to show that the plaintiff was *volens* as well as *sciens* must lie on the defendant and it cannot, in my judgment, be held that that burden has been discharged in this case.

To return to the main question, this case will decide whether an invitor's duty is determined by a rule, which seems to me to have no foundation in principle, that he can, while continuing to hold out an invitation, always relieve himself of his duty to take care by giving notice. I do not deny that fixed rules have advantages. Cases can be more readily decided and people interested can, perhaps, forecast more accurately what the decision will be in any case, but in the realm of negligence, at least, rigid rules give rise to what I believe to be avoidable injustice. I see no reason to depart unnecessarily from the simple method of asking in any case: What would a reasonable man in the shoes of the defendant have done? That test is subject to obvious limitations. In some cases it is impracticable and in many cases it is for one reason or another undesirable to make that which a reasonable man would do a legal obligation, but I see no such difficulty in this case. In this case, I have no doubt that a reasonable man in the position of the appellants would have averted the danger which caused damage to the respondent by providing more adequate staging. Why, then, was it not the appellants' duty to do this? I have come to the conclusion that to hold that there was such a duty would infringe no principle and would conflict with no binding or well-recognised authority. I am, therefore, of opinion that this appeal should be dismissed.

Appeal allowed.

Solicitors: *Carpenters* (for the appellants); *Shaen, Roscoe & Co.* (for the respondent).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

R. v. PATEL.

[COURT OF CRIMINAL APPEAL (Humphreys, Hilbery and Byrne, JJ.), April 30, May 1, 8, 1951.]

Criminal Law—Evidence—Admissibility—Matters not subject of charge—Evasion of purchase tax—Evidence of like transaction.

The appellant was convicted on an indictment containing five counts charging him with the fraudulent evasion of purchase tax in respect of quantities of nylon stockings and one count charging him with conspiring with other persons to evade such tax. It was alleged that he had obtained the goods without paying the purchase tax and consigned them to persons who were not registered traders and who bought, not for the purpose of exportation, but for sale on the home market. The prosecution called evidence of a similar transaction in which the appellant took part, although no charge in respect of it was included in the indictment.

HELD: the evidence in regard to the other transaction was relevant to the issue whether the appellant had assisted in the conspiracy to evade purchase tax, and was, therefore, admissible and the appeal must be dismissed.

AS TO THE PROOF OF RELEVANT FACTS IN CRIMINAL CASES, see HALSBURY, Hailsham Edn., Vol. 9, p. 183, para. 267; and FOR CASES, see DIGEST, Vol. 14, pp. 384-387, Nos. 4052-4069.

AS TO THE TIME FOR OBJECTING TO THE ADMISSIBILITY OF EVIDENCE, see DIGEST, Vol. 14, p. 274, No. 2840.

Cases referred to:

- (1) *R. v. Cole*, (1941), 165 L.T. 125; 105 J.P. 279; 2nd Digest Supp.
- (2) *R. v. Hammond*, [1941] 3 All E.R. 318; 166 L.T. 135; 106 J.P. 35; 2nd Digest Supp.
- (3) *R. v. Zielinski*, [1950] 2 All E.R. 1114; 34 Cr. App. Rep. 193.
- (4) *Thompson v. R.*, [1918] A.C. 221; 87 L.J.K.B. 478; 118 L.T. 418; 82 J.P. 145; 14 Digest 360, 3810.

APPEAL against conviction.

The appellant, Framroze Patel, was convicted at the Central Criminal Court on an indictment which charged him, in the first count, with conspiring with other persons and a company to evade, and in five further counts with evading, the payment of purchase tax in respect of transactions relating to nylon stockings. He was sentenced to a total of three years' imprisonment and was fined £200 on each count. The ground of appeal was that evidence of a transaction which did not form one of the charges in the indictment had been wrongly admitted.

Platts-Mills for the appellant.

J. M. G. Griffith-Jones for the Crown.

Cur. adv. vult.

May 8. **BYRNE, J.**, delivered the following judgment of the court. Before dealing with the facts of this appeal, the court desires to impress on those who are concerned with the administration of criminal law the necessity of adhering to the practice referred to in *R. v. Cole* (1), approved in *R. v. Hammond* (2), and stated to be the only proper course in an ordinary case in *R. v. Zielinski* (3). As stated in the headnote to the last-mentioned case (34 Cr. App. Rep. 193):

"Where defending counsel has informed counsel for the prosecution that he intends to object to the admissibility of certain evidence, it is, as a general rule, undesirable that the argument on admissibility should be heard and the issue decided before the case is opened. The proper course is for counsel for the prosecution to refrain from referring to the evidence in his opening, and that the issue should be decided at the appropriate moment in the case when the evidence is tendered."

The present case is a good example of the confusion likely to arise from the modern practice, pursued in this case, of inviting the judge to rule on the admissibility of evidence expected to be given, the relevance of which may well be affected by other evidence in the case. In fact, the full evidence opened to the jury by permission of the learned commissioner at the Central Criminal Court was never given at all, but a small, and as we think, innocuous instalment was given and the accuracy of that evidence was not disputed. We further think it well to remind those who prosecute, as well as those who try long criminal cases, that complication is a weapon for the defence. The fewer and simpler the issues left to the jury the less chance there is of a miscarriage of justice. With all deference to the experienced commissioner, who was plainly doubtful whether the further evidence should be admitted, there is an ancient maxim that the accused is entitled to the benefit of any doubt.

The appellant was tried before the commissioner with three other persons, Ghulam Shamas, Somer Ali, and Ilam Dean, and a company called Welford

A Hawes & Co., Ltd., upon an indictment which contained six counts. In the first count the appellant, the three individuals, and the company were charged with conspiring together and with two other persons, Gerrard Peter Scott and Sher Mohamed, and other persons unknown to be knowingly concerned in the taking of steps with a view to the fraudulent evasion of purchase tax in respect of transactions relating to nylon stockings. In the second count the appellant, Ghulam Shamas, and the company were charged with the fraudulent evasion of purchase tax in respect of 1,320 pairs of nylon stockings on Sept. 15, 1949. In the third count the appellant, Ghulam Shamas, Ilam Dean, and the company were charged with a similar offence in respect of six thousand pairs of nylon stockings on Oct. 2, 1949. In the fourth count the appellant, Somer Ali, Ilam Dean, and the company were charged with a similar offence in respect of six thousand pairs of nylon stockings on Nov. 9, 1949. In the fifth count the appellant, Somer Ali, Ilam Dean, and the company were charged with a similar offence in respect of 1,560 pairs of nylon stockings on Nov. 11, 1949, and in the sixth count the appellant and the company were charged with a similar offence in respect of 1,836 pairs of nylon stockings on Jan. 3, 1950. After a trial which lasted nine days, the appellant was convicted on all the counts in the indictment, and the other defendants were convicted on all the counts in which they were charged with the exception of Ilam Dean who, on the direction of the commissioner, was acquitted on the third count.

D The case for the prosecution was that the appellant, with the assistance of Gerrard Peter Scott, a director of Welford Hawes & Co., Ltd., used that company, which was insolvent but was registered for purchase tax, for obtaining without payment of purchase tax large supplies of nylon stockings, which were at once consigned to non-registered traders who bought the stockings, not for the purpose of exporting them, but for sale on the home market. The appellant's case was that he had been deceived by Scott, that he did not know that Scott was evading the payment of purchase tax, and that except in one instance he did not know that the goods were nylon stockings or that they were being sold to unregistered traders for sale on the home market.

F There was abundant evidence that the appellant had financed the purchase of nylon stockings by Welford Hawes & Co., and that he had arranged the transport of the goods which had gone to unregistered traders in this country, and it would have been surprising if a jury had failed to draw the inference that he had full knowledge of the transactions and knew perfectly well that the payment of purchase tax was being evaded. Nevertheless, the prosecution were not content to rest their case on that evidence, but called witnesses with regard to another transaction in which the appellant took part, but which was not the subject of any of the counts in the indictment. That transaction related to a firm called Central Oriental Agency and the evidence established the fact that on behalf of that firm the appellant placed orders for nylon stockings for which he paid. G The appellant, with leave of the court, now appeals against conviction on the ground that the evidence with regard to that other transaction was inadmissible. The court was, therefore, left in the position of trying to steer between the Scylla of releasing to the world unpunished an obviously guilty man and the Charybdis of upholding the conviction of a possibly innocent one. In such a case the court would lean to the more merciful course, since it is better to release the guilty H than to run the risk of convicting the innocent.

It is unnecessary to deal with the transaction relating to Central Oriental Agency in detail. It is sufficient to say that two witnesses were called with regard to it—Mr. Triggs and Mr. Holderoft. In our view, the question whether their evidence was admissible may be dealt with shortly. That the case against the appellant without that evidence was an almost conclusive one we have no doubt, that the evidence of those two witnesses made it no stronger we are also agreed, for all that those persons proved was that on May 23, 1949, the appellant went

to the place of business of Mr. Triggs, representing himself as the buying agent for the Central Oriental Agency, the principal of that firm being a Mr. Sastry, and gave an order for eleven hundred dozen pairs of nylon stockings to be delivered to certain packers. Mr. Triggs communicated with his principals, the manufacturers, who accepted the order. The goods were said to be required for export to Pakistan, and some of them at least were not suitable for the English market owing to their garish colours. The goods were paid for by the appellant with a banker's draft for £3,993. What became of the bulk of that order was never proved. We are not concerned with the object of the prosecution in calling that evidence. Counsel for the Crown in opening, suggested that it would be admissible on one of the grounds mentioned by LORD SUMNER in *Thompson v. R.* (4) ([1918] A.C. 232), as tending to prove guilty knowledge or system. If the whole of the evidence had been called it might have been, but the evidence of the two witnesses called failed to carry the case far enough.

The doctrine there referred to relates solely to the proof of other crimes by the accused. The doctrine applicable to this case is the far older one that no irrelevant evidence should be admitted in a criminal case. In our opinion, from that point of view, it cannot be said that the evidence was irrelevant. The case against the appellant was that he financed the three deals the subject of counts 2 to 6 of the indictment. Here was another case in which he was financing another concern to the tune of £4,000. Since his business, apparently, consisted of financing companies with which he was not directly connected when those companies were placing orders for nylon stockings which purported to be orders for export, could the jury believe that in the cases charged he made no inquiries and took no interest in what became of the goods ordered and paid for by him. The jury might well take the view that the more instances of his financing which were proved, the less could they accept his explanation. We are not prepared to hold that the evidence of the two gentlemen named was irrelevant. Turning to the summing-up, that appears to be the way in which the commissioner was inviting the jury to consider the case against the appellant.

That there was a fraudulent evasion of purchase tax was, apparently, admitted. In such a case the man who financed the deal, including the transport of the goods to English destinations, will naturally be regarded as at the head of the conspiracy. The appellant's defence did not deny the facts. His case was: "I got the money from Scott." The jury may well have considered that that afforded no answer to the charge when the evidence of the relationship which existed between Scott and the appellant was considered. Scott and the appellant were co-directors of Scott, Mills & Co., Ltd. from June 28, 1949, and on July 15, Mr. Phillips, a senior investigating officer of Customs and Excise, spoke to Scott about purchase tax which was payable on nylon stockings acquired by Scott, Mills & Co., Ltd. On Aug. 18 Mr. Phillips told the appellant that he wished to see him, as it appeared that Scott, Mills & Co., Ltd. owed £2,000 purchase tax, to which the appellant replied that he had financed some of the company's purchases, but had dealt with the manager, Scott. Not only were the appellant and Scott co-directors of Scott, Mills & Co., Ltd., but on Aug. 25 Scott became a director of Welford Hawes & Co. and less than a month later—on Sept. 15—the appellant ordered transport for the first consignment of nylon stockings ordered by Welford Hawes & Co. For these reasons we have come to the conclusion that the evidence with regard to the other transaction was admissible, and the appeal is, therefore, dismissed.

Appeal dismissed.

Solicitors: *Hart-Leverson & Co.* (for the appellant); *Solicitor for Customs and Excise* (for the Crown).

[*Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.*]

STEVENS v. SEDGMAN.

[COURT OF APPEAL (Somervell, Denning and Birkett, L.JJ.), May 8, 9, 1951].

Agriculture—Agricultural holding—Allotment—Land of half an acre used for production of produce for sale—Notice to quit—Allotments Act, 1925 (c. 61), s. 1—Agricultural Holdings Act, 1948 (c. 63), s. 1 (1).

A piece of land, of whatever size, which is an allotment within the definition in s. 1 of the Allotments Act, 1925, and is used by a tenant for growing vegetables for the purposes of trade or business is also an agricultural holding within the meaning of the Agricultural Holdings Act, 1948, s. 1 (1), and, therefore, a tenancy thereof can only be determined by the twelve months' notice to quit prescribed by s. 23 (1) of the Act of 1948.

FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 1 (1), (2), see HALSBURY'S STATUTES, Second Edn., Continuation Vol., 1948, p. 26.

APPEAL by the tenant from an order of His Honour JUDGE RAWLINS, made at Helston County Court on Mar. 13, 1951, whereby he allowed the landlord's claim for possession of a field.

The learned judge held that the land, comprising half an acre, which was used by the tenant for the production of vegetables for sale, was an allotment within the Allotments Act, 1925, s. 1, and that the tenancy was terminable by six months' notice to quit. For the tenant it was contended that the land was an agricultural holding within the Agricultural Holdings Act, 1948, s. 1 (1), (2) and that twelve months' notice was required.

E. B. Gibbens for the tenant.

Comyn for the landlord.

SOMERVELL, L.J.: The landlord sought possession of a field of half an acre, let at a rent of 5s. per year, having given the tenant six months' notice to quit. The defence was that no, or no sufficient, notice to quit had been given. The question was whether the field was an agricultural holding within the Agricultural Holdings Act, 1948. The learned judge found that it was an allotment within the definition of "allotment" in the Allotments Act, 1925, s. 1, and held that in those circumstances it was outside the provisions of the Agricultural Holdings Act, 1948, and there was no statutory provision making the notice which had been given ineffective, and he made an order for possession.

The Allotments Act, 1922, dealt with two categories of allotment: an "allotment garden" and an "allotment." Section 1 (1) provides:

"Where land is let on a tenancy for use by the tenant as an allotment garden or is let to any local authority or association for the purpose of being sub-let for such use the tenancy of the land or any part shall not (except as hereinafter provided) be terminable by the landlord by notice to quit or re-entry, notwithstanding any agreement to the contrary, except by—(a) a six months' or longer notice . . ."

By s. 22 (1),

"The expression 'allotment garden' means an allotment not exceeding forty poles in extent which is wholly or mainly cultivated by the occupier for the production of vegetable or fruit crops for consumption by himself or his family."

The plot in this case was not, as found by the learned judge, an allotment garden, as its extent was over forty poles, and the tenant used it, not wholly or mainly for the production of vegetable or fruit crops for consumption by himself or his family, but for production for sale. Section 2 provides for compensation on quitting allotment gardens. Section 3 (2) provides:

"In the case of any allotment within the meaning of this section (not being an allotment garden), the tenant shall, on the termination of his tenancy by

effluxion of time, or from any other cause, be entitled, notwithstanding any agreement to the contrary, to obtain from the landlord compensation for the following matters . . ."

Then there are set out the heads in respect of which compensation can be claimed. Section 3 (5) provides:

"The Agricultural Holdings Acts, 1908 to 1921, shall, in the case of an allotment within the meaning of this section to which those Acts apply, have effect as if the provisions of this section as to the determination and recovery of compensation were substituted for the provisions of those Acts as to the determination and recovery of compensation, and a claim for compensation for any matter or thing for which a claim for compensation can be made under this section, may be made either under those Acts or under this section, but not under both."

That sub-section has considerable importance because it makes clear that at that stage Parliament was not intending to make the special provisions for compensation contained in this section exclusive, but intended that where the two codes both applied they should be alternative. Section 3 (7) provides:

"In this section the expression 'allotment' means any parcel of land, whether attached to a cottage or not, of not more than two acres in extent, held by a tenant under a landlord and cultivated as a farm or a garden, or partly as a garden and partly as a farm."

It is to be noted that there is no statutory provision in this Act with regard to notice to quit in respect of an allotment. Section 22 (6), which was repealed by the Agricultural Holdings Act, 1923, s. 58 and sched. IV, reinforces the point as to the inference which is to be drawn from s. 3 (5). It provides:

"For removing doubts, it is hereby declared that the expression 'holding' in the Agricultural Holdings Act, 1908, and in the Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919, does not include any allotment garden or any land cultivated as a garden unless it is cultivated wholly or mainly for the purpose of the trade or business of market gardening."

The fact that it was thought necessary to remove doubts with regard to the question whether an allotment garden was a "holding" seems to suggest that an allotment was regarded as a holding. I should say at once that it does not follow that because an allotment may be a holding, therefore, all allotments are holdings. If, for example, one takes the position today, for the land to come within the definition of agricultural holding it has to be shown that it is used for the purposes of a trade or business, whereas no such limitation is imposed in respect of an allotment as defined by the Allotments Act, 1922.

The Agricultural Holdings Act, 1923, s. 56, deals with allotments and provides:

"(1) Nothing in this Act shall affect the operation of the Allotments Act, 1922, save that sub-s. (6) of s. 22 of that Act shall cease to have effect. (2) In the case of any holding to which this Act applies consisting of a parcel of land, whether attached to a cottage or not, of not more than two acres in extent held by a tenant under a landlord and cultivated as a farm or garden, or partly as a garden and partly as a farm, this Act shall have effect as if the provisions of s. 6 of the Allotments Act, 1922, as to determination and recovery of compensation were substituted for the provisions of this Act as to the determination and recovery of compensation."

Those two sub-sections, read together, seem to me to reinforce the conclusion that these two codes remain side by side as alternatives where in the circumstances of the case they are both applicable. Section 56 (1) leaves the provisions of the Act of 1922 in effect, so an application for compensation under that Act was presumably still open. Section 56 (2) says that when the provisions of the Agricultural Holdings Act, 1923, apply, they shall apply with one modification

only, viz., the incorporation of the provisions as to the determination and recovery of possession. The Allotments Act, 1925, by s. 1, increased the area of an "allotment" from two to five acres.

Coming to the later Acts, reference was made to s. 109 (1) of the Agriculture Act, 1947, which provides:

"In this Act the expression 'agricultural land' means land used for agriculture which is so used for the purposes of a trade or business, or which is designated by the Minister for the purposes of this sub-section, and includes any land so designated as land which in the opinion of the Minister ought to be brought into use for agriculture: Provided that no designation under this sub-section shall extend—(a) to land used as pleasure grounds, private gardens or allotment gardens . . ."

I do not think that that sub-section affords much assistance because it merely deals with land which the Minister can designate, but it does fit in with the submission that whereas allotment gardens are outside the general agricultural holdings legislation, allotments, if they are in other circumstances within it, are not. The definition of agricultural holding for the purpose of the Agricultural Holdings Act, 1948, is stated in s. 1 as follows:

"(1) In this Act the expression 'agricultural holding' means the aggregate of the agricultural land comprised in a contract of tenancy, not being a contract under which the said land is let to the tenant during his continuance in any office, appointment or employment held under the landlord. (2) For the purposes of this and the next following section, the expression 'agricultural land' means land used for agriculture which is so used for the purposes of a trade or business . . ."

Section 23 and s. 24 deal with notices to quit in respect of agricultural holdings as defined by the Act and provide that there must be twelve months' notice, and, when that has been given, the tenant can serve a counter-notice and then the Minister's consent to the operation of the notice to quit has to be obtained. Section 100 (10) is on similar lines to s. 56 (1) of the Agricultural Holdings Act, 1923. It provides:

"Nothing in this Act shall affect the provisions of the Allotments Act, 1922 . . ."

There does not appear there the equivalent of sub-s. (2) of s. 56 which was repealed by the Agriculture Act, 1947, s. 45 and s. 110, but I do not think any significance is to be drawn from that, because all that s. 56 (2) did was to incorporate in the agricultural holdings code where applicable in the case of allotments the particular provision in the Allotments Act as to the measurement and recovery of compensation. If Parliament thought that where somebody was entitled to come under the Agricultural Holdings Act, the whole of that Act, including its provisions as to the measure and recovery of compensation, should apply, one would have expected that sub-section to disappear.

The submission on behalf of the landlord was that on the findings of fact the land in question was an allotment, and, therefore, it was *ipso facto* outside the Agricultural Holdings Act, 1948. He also made a subsidiary submission based on the view that this was, as the evidence shows, a very small holding. I cannot find anything in the Act of 1948 to indicate that in applying the definition in s. 1 (1) and (2) one should have regard to the size of the holding. In my view, the various provisions of the statutes in the two codes to which I have referred lead to the conclusion that it cannot be said that because this piece of land is an allotment within the definition it is *ipso facto* outside the Agricultural Holdings Act. It seems to me that the provisions have expressly preserved the two codes as alternatives. Therefore, it having been decided that this land is plainly within the definition of agricultural holding, the fact that it is within the definition of allotment does not take it out of the provisions of the Agricultural Holdings

Act, 1948, and it follows that the provisions of that Act with regard to notice to quit apply in respect of the tenancy of this plot of land. As admittedly they have not been complied with, the learned judge's order must be set aside. For these reasons I think this appeal must be allowed.

DENNING, L.J.: I agree. The distinction between an allotment garden and an allotment is important. An allotment garden is an allotment of less than a quarter of an acre where a man grows vegetables or fruit for himself and his family. It is not an agricultural holding and a notice to quit has to be a six months' notice. An allotment, on the other hand, which is used by a man for growing fruit or vegetables for the purposes of a trade or business, is an agricultural holding, and a tenancy of it can only be determined by twelve months' notice and only for certain specific reasons, which are set out in the Agricultural Holdings Act, 1948. There is nothing in that Act to say that an allotment must be of any particular size in order to qualify to be an agricultural holding. The only essential requisite is that it must be used for the purposes of a trade or business. The learned judge has found that that essential requisite was present. The fact that it was only half an acre or a little less does not deprive it of the status of being an agricultural holding. I agree, therefore, that the appeal should be allowed.

BIRKETT, L.J.: I agree. The question before the learned county court judge, in form at least, was a simple question—whether the notice which is requisite should be a six months' notice or a twelve months' notice. The learned judge decided that six months' notice was sufficient, because he held this piece of land to be an allotment and not an agricultural holding which would require a twelve months' notice under the Agricultural Holdings Acts. Reading his judgment, one can see how he came to that conclusion, because he was referred to the definition of an agricultural holding in s. 1 (1) and (2) of the Act of 1948 and asked to find that the lease in question came within the section. He pointed out in his judgment:

“He [counsel for the tenant] urged and I have so found that the land is used for agriculture for the purposes of a trade or business.”

Then the learned judge proceeds:

“[Counsel for the landlord] then pointed out that by s. 100 (10) of the Agricultural Holdings Act, 1948, nothing therein is to affect the provisions of the Allotments Act, 1922. I hold this land is an ‘allotment’ within the meaning of the Allotments Act, 1925, which I observe has not been repealed by the Agricultural Holdings Act, 1948.”

The learned judge misunderstood the effect and meaning of sub-s. (10), and I think the construction which my Lord has put on it is the true construction. It was not adequately realised that there were two codes which could exist side by side as alternatives. I do not think that the point that it seems a little absurd to bring a small piece of land within the rather complicated machinery of the Act of 1948 with regard to notice and counter-notice and the intervention of the Minister is a matter for this court. It may be one for Parliament, but the present case could not be decided merely on the fact that this was a very small piece of land.

Appeal allowed.

Solicitors: *Burton, Yeates & Hart*, agents for *Vivian Thomas & Jervis*, Penzance (for the tenant); *Balderston, Warren & Co.*, agents for *Ratcliffe, Son & Henderson*, Helston (for the landlord).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

MAHER v. MAHER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), April 20, May 7, 1951.]

Divorce—Foreign decree—Unilateral divorce by Mohammedan—Marriage in England of Christian woman and Mohammedan domiciled in Egypt—Divorce in Egypt.

A The wife petitioned for dissolution of marriage on the ground of her husband's desertion. The marriage took place in England on Mar. 4, 1946, the wife being a Christian domiciled in England and the husband a Mohammedan domiciled in Egypt. On June 16, 1946, the husband left his wife and did not return to her. In August, 1946, the wife was informed at the Egyptian embassy in London that her husband had divorced her, and she was given a copy of a document which stated that the husband had appeared at the Court of Personal Status in Cairo and in the presence of two witnesses had declared that he had divorced the wife. It was proved that such a form of divorce was in accordance with the Mohammedan religion and would be recognised as valid in Egypt.

B **C** **HELD:** the marriage was a civil marriage pursuant to the Marriage Acts, 1811 to 1939; it was a marriage in the Christian sense and could not be dissolved by a method of divorce appropriate to a polygamous union; it, therefore, still subsisted, and, as the husband had been guilty of desertion, the wife was entitled to a decree.

R. v. Hammersmith Superintendent Registrar of Marriages. Ex p. Mir-Anwaruddin ([1917] 1 K.B. 634), applied.

D AS TO FOREIGN DECREES OF DIVORCE, see HALSBURY, Hailsham Edn., Vol. 6, p. 304, para. 360; and FOR CASES, see DIGEST, Vol. 11, pp. 428-432, Nos. 927-956.

Cases referred to:

- (1) *Shaw v. A.-G.*, (1870), L.R. 2 P. & D. 156; 39 L.J.P. & M. 81; 23 L.T. 322; 11 Digest 429, 930.
- E** (2) *Rudd v. Rudd*, [1924] P. 72; 93 L.J.P. 45; 130 L.T. 575; Digest Supp.
- (3) *R. v. Hammersmith Superintendent Registrar of Marriages. Ex p. Mir-Anwaruddin*, [1917] 1 K.B. 634; 86 L.J.K.B. 210; 115 L.T. 882; 81 J.P. 49; 11 Digest 432, 956.
- (4) *Warrender v. Warrender*, (1835), 2 Cl. & Fin. 488; 6 E.R. 1239; 11 Digest 333, 218.

F PETITION by a wife for dissolution of marriage on the ground of her husband's desertion.

Vincent for the wife.

The husband did not appear.

Cur. adv. vult.

G May 7. **BARNARD, J.**, read the following judgment. This is a petition of Kathleen Mary Maher for the dissolution of her marriage with Mohamed Aly Maher on the ground of his alleged desertion. In the prayer she asks the court to exercise its discretion in her favour, she having committed adultery.

The parties were married on Mar. 4, 1946, at the Cambridge register office. The wife at that time was twenty-two years of age, a spinster, a Christian, and domiciled in England. The husband was twenty-one years of age, a bachelor, a Mohammedan, and domiciled in Egypt. He was, at the time of the marriage, an undergraduate of Cambridge University, and it was agreed between them that when he had graduated both he and his wife were to leave England for Egypt and make their permanent home there. In the meantime they lived together at Bridge Street, Cambridge, and there has been no issue of the marriage. In June, 1946, the husband graduated, and their luggage was sent to London for transshipment to Egypt. On June 16, 1946, the husband went alone to London, ostensibly on a visit to his mother, and from that day to the present time the

wife has never seen him. She wrote to him several letters at his father's address in Cairo, but received no replies. In August, 1946, on the invitation of the Egyptian embassy, she called there and was informed that her husband had divorced her and she was given a copy of the divorce certificate. For a time she believed this divorce to be valid, and, in consequence of that belief, on June 21, 1947, she signed a document at the Egyptian consulate accepting a sum of £125 in full and final settlement of any claims which she might have against her husband.

The question which I have to decide is whether the divorce which the husband effected on June 29, 1946, at Cairo is a divorce which would be recognised as valid by the courts of this country. The document, which was produced, is not a decree of any court, resulting from any divorce proceedings. It would appear to be a certificate to the effect that the husband together with two witnesses appeared at the Cairo Court of Personal Status and that there the husband declared that he had divorced his legally married wife by saying: "My wife, Kathleen Mary Collet, is divorced from me by three divorces," and that the divorce took place in the presence of the same two witnesses. The document seems to be nothing more nor less than the registration of a divorce. I have heard the evidence of Mr. Nasir and I am satisfied on his testimony that this divorce is in accordance with the Mohammedan religion and would be recognised as a valid divorce in Egypt.

It is the established rule of English law that domicile is the true test of divorce jurisdiction, and the courts of England will recognise as valid any divorce which is granted by the courts of the country where the parties are domiciled, even on a ground which is not a ground for a divorce in England. The wife acquired by her marriage an Egyptian domicile. Counsel for the wife has argued that this divorce was contrary to natural justice in that she had no notice of the proceedings, and he referred me to two cases in support of this proposition: *Shaw v. A.-G.* (1), and *Rudd v. Rudd* (2). In both cases the English courts refused to recognise a divorce granted by the court of a country in which the parties were not domiciled at the commencement of the suit. In *Shaw v. A.-G.* (1) LORD PENZANCE, referring to the judgment of a foreign court, said (L.R. 2 P. & D. 162):

"A judgment so obtained has, therefore, in addition to the want of jurisdiction, the incurable vice of being contrary to natural justice, because the proceedings are *ex parte* and take place in the absence of the party affected by them."

No notice of the proceedings in that case was personally served on the respondent, the citation being by advertisement which the respondent did not see. In *Rudd v. Rudd* (2) HORRIDGE, J., based his decision not only on the want of jurisdiction, but also on the ground that there had been no sufficient notice of the proceedings. The wife had been served by registered post to her last known address and by advertisement. There had, in fact, been substituted service analogous to that allowed by English courts, and the question of service seems to me to be a matter for the court which heard the case, provided it was a court of competent jurisdiction, which it was held not to be in either case. I am of opinion that the true *ratio decidendi* of both cases was the want of jurisdiction. In the present case there were no divorce proceedings and no amount of notice would have enabled the wife to have contested the husband's unilateral declaration of divorce. I, therefore, reject this argument.

Counsel for the wife also argued that the marriage was an English one and could not be dissolved by the law of the husband's religion. The husband, by the law of his religion, has the power of unilateral and even capricious divorce, as well as the right to have two, three or four wives at one and the same time. These factors would have been implicit in the marriage contract, if such marriage had been a Mohammedan marriage. It must be borne in mind, however, that the declaration of divorce by the husband in accordance with the law of his religion is regarded as a valid divorce by the law of the domicile. On this point *R. v.*

Hammersmith Superintendent Registrar of Marriages. Ex p. Mir-Anwaruddin (3) is of great assistance. In that case, which first came before the Divisional Court of the King's Bench Division and later before the Court of Appeal, it was held that a marriage solemnised in this country between a Mohammedan domiciled in India and a Christian woman cannot be dissolved by the husband handing to the wife a "writing of divorcement," although that would be an appropriate means of effecting the dissolution of a Mohammedan marriage according to Mohammedan law. VISCOUNT READING, C.J., in the course of his judgment in the Divisional Court, said ([1917] 1 K.B. 642):

"Neither authority nor principle can be found in English law to establish the proposition that a marriage contracted in England is dissolved according to the law of England by mere operation of the laws of the religion of the husband and without decree of a court of law."

and further (*ibid.*, 643):

"An Englishwoman or a woman domiciled in England who marries in England a person domiciled . . . out of the realm of England, acquires by the status of marriage the domicile of the husband and is subject to the law of that domicile, but she does not acquire his religion or become subject to the laws of his religion except in so far as they are the law of his domicile, and then to that extent only."

I do not think that LORD READING, C.J., in stating that the wife became subject to the law of her husband's domicile meant to detract in any way from his previous statement that there must be a decree of divorce of a court of law. SWINFEN EADY, L.J., in the course of his judgment in the Court of Appeal, said (*ibid.*, 659):

"Now under these circumstances the marriage which was celebrated between the appellant and Ruby Hudd on Mar. 18, 1913, has not been dissolved by any court of competent jurisdiction (the appellant says there is none), and it is not a marriage in the Mohammedan sense which can be dissolved in the Mohammedan manner."

Later in his judgment he quoted LORD BROUGHAM in *Warrender v. Warrender* (4) (2 Cl. & Fin. 534):

"... if there were a country in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing *in pais* to separate, every other country ought to sanction a separation had *in pais* there, and uphold a second marriage contracted after such a separation. It may safely be asserted, that so absurd a proposition never could for a moment be entertained."

The marriage between the wife and the husband was a civil marriage pursuant to the Marriage Acts, 1811 to 1939, which laid down certain regulations for the contracting of monogamous marriages. It was a marriage in the Christian sense and cannot be dissolved by a method of divorce which is appropriate to a polygamous union. I, therefore, find that the marriage solemnised between the wife and the husband is a valid and subsisting marriage, the Mohammedan divorce being inappropriate to such a union. To hold otherwise would not only be contrary to the law as I understand it, but would both encourage and sanction the purely temporary unions of English women and foreigners professing the Mohammedan religion during their limited residence in this country. I am satisfied that the charge of desertion has been established, and I consider that this is a proper case to exercise discretion in favour of the wife. As she has resided in England ever since her marriage in March, 1946, I pronounce a decree *nisi*.

Decree nisi for dissolution of marriage.

Solicitors: *Gery & Brooks* (for the wife).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

THE TROILUS.

[HOUSE OF LORDS (Lord Porter, Lord Normand, Lord Oaksey, Lord Reid and Lord Tucker), January 22, 23, 24, 25, May 10, 1951.]

Shipping—Salvage—Distinction between towage and salvage—Ship losing propeller—Towed to place of temporary safety—Towed to home port via ports at which repairs could be effected and alternative service available.

On July 2, 1948, the Troilus lost her propeller when she was in the Indian Ocean about 1,050 miles from Aden, and on July 5 she was taken in tow by the Stentor to an anchorage in the quarantine area at Aden where they arrived on July 12. That service was admittedly salvage. On July 17 the Troilus was towed from Aden by another vessel, the Glenogle, to Suez, where she was taken in tow by tugs through the Suez Canal to Port Said. At Port Said she was again taken in tow by the Glenogle to her home port in the United Kingdom. The Troilus could have lain in physical safety at either Aden, Suez, or Port Said, but at none of those ports were there any satisfactory facilities for repairing the vessel so as to enable her to put to sea again or for preventing the deterioration of the ship and the perishing of the cargo. The owners of the cargo on board the Troilus, who would be liable to a proportion of salvage charges, claimed that the services rendered to the Troilus after her arrival at Aden were not salvage services but towage.

HELD: the fact that the Troilus could lie in physical safety at any of the three ports, Aden, Suez or Port Said, in the circumstances stated did not transform a service, which began as salvage, into towage, nor did the continuance by the Glenogle of the service started by the Stentor change the nature thereof, and, therefore, the whole of the services rendered in towing the Troilus from Aden to the home port in the United Kingdom were salvage services.

The Syria (1874), (PRITCHARD'S ADMIRALTY DIGEST, 3rd ed., vol. II, p. 1928; SHIPPING AND MERCANTILE GAZETTE, July 7, 1874), applied.

Decision of the COURT OF APPEAL ([1950] 1 All E.R. 103), affirmed.

AS TO CONDITIONS OF A SALVAGE SERVICE, see HALSBURY, Hailsham Edn., Vol. 30, pp. 886-888, paras. 1185-1190; and FOR CASES, see DIGEST, Vol. 41, pp. 827-829, 833-838, Nos. 6859-6887, 6937-6994.

Cases referred to:

- (1) *The Glaucus*, (1948), 81 Ll.L. Rep. 262.
- (2) *The Syria*, (1874), see PRITCHARD'S ADMIRALTY DIGEST, 3rd ed., vol. II, p. 1928; and SHIPPING AND MERCANTILE GAZETTE, July 7, 1874.
- (3) *Anderson v. Ocean S.S. Co.*, (1884), 10 App. Cas. 107; 54 L.J.Q.B. 192; 52 L.T. 441; 41 Digest 601, 4281.
- (4) *The Reward*, (1841), 1 Wm. Rob. 174; 8 L.T. 704; 41 Digest 833, 6937.
- (5) *The Princess Alice*, (1849), 3 Wm. Rob. 138; 6 Notes of Cases, 584; 41 Digest 836, 6972.
- (6) *The Charlotte*, (1848), 3 Wm. Rob. 68; 6 Notes of Cases 279; 11 L.T.O.S. 473; 41 Digest 862, 7310.
- (7) *The Germania*, [1904] P. 131; 73 L.J.P. 59; 90 L.T. 296; 41 Digest 897, 7889.
- (8) *The Idomeneus*, (1925), 22 Ll.L. Rep. 299.
- (9) *The Laomedon*, (1925), 23 Ll.L. Rep. 230.

APPEAL by the owners of cargo lately laden on board the S.S. Troilus against an order of the Court of Appeal dated Dec. 16, 1949, and reported [1950] 1 All E.R. 103, dismissing an appeal by the cargo owners against an award of LORD MERRIMAN, P., made on May 12, 1949.

In the action, which was brought by the owners, master and crew of the motor vessel Glenogle for salvage services rendered by them to the Troilus, her cargo and

freight, LORD MERRIMAN, P., awarded £22,000. The owners of the Troilus did not appeal against the award.

Nelson, K.C., and *Vere Hunt* for the cargo owners.

Naisby, K.C., and *J. B. Hewson* for the owners, master and crew of the Glenogle.

The House took time for consideration.

A May 10. The following opinion was read.

LORD PORTER: My Lords, this is an appeal by the owners of cargo lately laden on board the S.S. Troilus from the judgment of the Court of Appeal affirming an award made by LORD MERRIMAN, P., of £22,000 for salvage of that vessel, her cargo and freight, to the owners, master and crew of the motor vessel B Glenogle. If the award was justified—*i.e.*, in the circumstances which existed, if the service was a salvage service—the appellants are liable to pay the amount of the award. Their contention is, however, that, at any rate so far as they are concerned, that service was not salvage inasmuch as before it was rendered the Troilus had reached a position of safety and salvage is only payable in a case where the ship against which the claim is made is in a position of danger. C The values of the interests concerned are agreed at:—ship, £193,350; cargo, £888,000; freight at risk, £15,410. The ship owners have not appealed, and, therefore, it is the cargo owner's proportion of the award which alone is in issue.

There is no substantial dispute about the facts. The Troilus was carrying a general cargo from Australia to Liverpool. In the course of her voyage on July 2, 1948, when in the Indian Ocean and about 1,050 miles from Aden, she D fractured her tail shaft at the end of the stern tube and dropped her propeller. On July 5 she was picked up by the motor vessel Stentor and towed to Aden, where she anchored in the quarantine anchorage on July 12. Messrs. Alfred Holt and Co., Ltd., are the managers of the Troilus and of the Stentor, which are both owned by the Ocean Steamship Co., Ltd. They are also managers of the motor vessel Glenogle owned by the Glen Line Co., Ltd. On July 9 Alfred Holt E & Co. by wireless had asked the master of the Glenogle whether he could tow the Troilus from Aden to Liverpool, and the master of the Glenogle replied: "Yes." The Glenogle is a twin screw motor ship of 9,513 tons gross register and was bound from Australia to the United Kingdom with a general cargo. On July 13 the master of the Troilus told the master of the Stentor (who was then ready to resume towage to Suez) that he would not be ready for two days, F and on July 14 the owners of the Stentor instructed her master to proceed on his voyage if the master of the Troilus was satisfied to lie at anchor off Aden. On the same day Alfred Holt & Co. sent instructions to the Glenogle to tow the Troilus to the United Kingdom. The Stentor then proceeded on her voyage. The Stentor had a single screw, while the twin screws of the Glenogle presumably made her more efficient for towing purposes. The Stentor also had to call at G various ports in the Mediterranean en route for England. In the present action the owners, master and crew of the Stentor claimed salvage for services rendered to the cargo in the Troilus, and her master and crew also claimed salvage for services to the Troilus herself. The President awarded the sum of £18,000 in respect of these claims. The services rendered by the Stentor are admitted to be salvage services and there is no appeal against the part of the award in her H favour.

On July 16 the Glenogle arrived at Aden, and on July 17 made fast to the Troilus, which had remained at anchor in the same position, and started to tow her to Suez. The Troilus, which was an American liberty ship, did not carry a spare propeller and tail shaft, but there was a spare of each in England. Alfred Holt & Co. considered the question of sending these spares out to the Troilus, and made inquiries for that purpose. On July 16 they received a cable from Port Said to say that the engineering works there could fit the spare propeller

to the Troilus by tilting her stern sufficiently to clear the shaft aperture above the water line, and estimated the time, including the handling of cargo, at a month. On July 20 Alfred Holt & Co. inquired whether a dry dock at Malta was available for the Troilus on about Aug. 1 and the reply was that no docks were available before the end of September. On July 21 they cabled Port Said to ask whether a dry dock was available at Alexandria for the Troilus to be docked with cargo on board, and received the reply on July 22:

“suitable dry dock not available before Aug. 15 not guaranteed do not recommend.”

About July 22, Alfred Holt & Co. also inquired whether there was any suitable tug in the locality which could tow the Troilus to the United Kingdom, and ascertained that the tug Empire John, belonging to William Watkins, Ltd., would be available at Taranto on or about July 30, and would be able to tow the Troilus at approximately four knots, and the owners of the tug gave a quotation of £6,000 to tow the Troilus from off Malta to Liverpool. Alfred Holt & Co., however, were unwilling to entrust the ship to one tug for towage across the Bay of Biscay, and decided that the most satisfactory course, in the interests of all concerned in the safety of ship and cargo, was for the Glenogle to tow the Troilus to Falmouth. The Glenogle towed the Troilus to Suez, which was reached on July 25, at an average speed of 6.8 knots. Tugs then towed the Troilus through the Suez Canal, and on July 29 the Glenogle, having proceeded through the canal ahead of the Troilus, made fast to her outside Port Said, and continued with the towage. On Aug. 3 the vessels were near Malta, and on that day tug and tow were proceeding at a speed of $8\frac{1}{2}$ knots. On Aug. 8 they passed Gibraltar, and on Aug. 15 they reached Falmouth Bay. The Troilus then anchored and was subsequently towed to Liverpool by two tugs. The average speed of the towage from Port Said to Falmouth, a distance of 2,980 miles, was 7.3 knots. The appellants admitted that, if the claim of the Glenogle was salvage, the amount of the award was not excessive.

In setting out the facts I have adopted, with some slight and immaterial alterations, the statement of BUCKNILL, L.J. ([1950] 1 All E.R. 105, 106), which I accept in full and which, indeed, is not in dispute. On these facts the appellants contended that the services rendered, after Aden had been reached, were towage and no longer salvage. “Salvage services,” they said, “are only those which are rendered to a ship in danger.” Once the Troilus had reached Aden, she was in perfect safety, except, perhaps, in case of a freak storm, which there was no reason to anticipate, and in the ordinary course ship and cargo could have lain there indefinitely without danger to either. The cargo, it appears, consisted of various kinds of foodstuffs, but, as the President found, was not strictly perishable and was in no immediate danger of perishing. “A few weeks’ delay,” he said, “at any rate, would not injure it.” The argument before your Lordships, as I understood it, was that the Stentor, having finished her service and left the Troilus in physical safety at Aden, the incidents prior to her coming to anchor there became irrelevant and the only question was: Had the Glenogle taken her from a position of danger to one of safety?

On this argument the first question to be answered is: Was the Troilus in physical danger while lying at Aden? In *The Glaucus* (1) WILLMER, J., held that a vessel which had suffered such damage to her boilers as could not be repaired at Aden was in danger while lying at the quarantine anchorage there. The President and BUCKNILL, L.J., came to the same conclusion in reference to the Troilus. In the course of the hearing of the appeal, the assessors in the Court of Appeal were asked whether the Troilus was in danger while at anchor off Aden, and replied:

“No immediate danger, but in the event of an unusual gale springing up she would certainly be in greater danger than a ship with all her main power available.”

In a sense, the answer is a truism. Any ship without motive power not in dock or securely tied up in a sheltered harbour is in great r danger than one capable of motion, but the question under consideration is not an abstract one, but whether a prudent master would be reasonably apprehensive of physical danger having regard to the weather to be anticipated in the locality while his ship lay in the anchorage which she had reached. We asked our assessors: "Would a prudent master of a steam vessel apprehend any appreciably greater danger in lying for an indefinite time with a broken tail shaft in a harbour with the features of the outer harbour at Aden, and subject to the conditions indicated in the RED SEA AND GULF OF ADEN PILOT as to that port, than he would if his ship were so lying in such a condition that he was able to use her propellers?" They answered: "No, provided she was equipped with proper tackle to keep her at anchor," and added that she was, in fact, so equipped. For the purpose of deciding this case, I am prepared to accept that answer, though I am not sure that it means more than that the Troilus was safe enough for all practicable purposes. It has to be remembered, however, that in the long run the ship would deteriorate if not removed, and, likewise, the cargo, which consisted of foodstuffs, would do so at an earlier period. The ship admittedly could not be repaired at Aden, and no one suggested that there were facilities for discharging or storing the cargo at that port. Nevertheless, whatever view may be taken of *The Glaucus* (1), that case cannot be decisive of the facts of this. Moreover, I agree with BUCKNILL, L.J., that there is no general rule that a ship which for some reason or other is without motive power is still in danger until she is repaired.

The solution of the question whether a ship has reached a place of safety must, I think, depend on the facts of each case, one of which is the facility for repairs at the place in question, and another the possibility of safely discharging and storing the cargo and sending it on to its destination and the danger of its deterioration. It is not a sufficient answer to say that she can lie in a particular position of physical safety. It must be remembered that in every voyage of a merchant ship carrying cargo the interests of both ship and cargo have to be borne in mind. In saying this I am not determining in one way or the other, in a case in which a decision to that effect is not required, that, if the Troilus had lost her propeller while lying at Aden, a ship which towed her to a port of safety would be entitled to salvage. In this case the services began as salvage rendered by a ship managed by the same company and were continued by another so managed because that was the safest, quickest and most convenient method of towage. It was for the joint advantage of the Troilus and her cargo, because the Glenogle was a better ship for the towage required and was sailing direct to this country, and because the Troilus was not ready to proceed until after the Stentor would and did leave in the ordinary course of her voyage. Admittedly, salvage services can be rendered by two ships in succession and I see no reason for holding that, if the Stentor had towed throughout, it might have made the whole of the service rendered salvage, whereas the substitution of the Glenogle would have put an end to any such claim. Once this aspect of affairs is accepted, the same question arises at Aden which afterwards arose at Suez and Port Said, *i.e.*: Does the fact that the Troilus could lie in physical safety at any of the three ports transform a service which began as salvage into towage and nothing more? There are a number of authorities, beginning with *The Syria* (2) which was decided by SIR ROBERT PHILLIMORE in 1874 (the record of which has been furnished to us), which say that it does not. That vessel was towed from Ascension, where she was held to have been in danger, to Southampton, but on the way calls were made at Goree, at St. Vincent and at Madeira, in all three of which she and her cargo were physically safe. It was sought to distinguish that case on the ground that the Syria was admittedly in danger at Ascension, but so was the Troilus when picked up by the Stentor, and if, as I have indicated, the case is to be regarded as if the Stentor had been the towing ship throughout

the voyage, the circumstances of the two cases are very much alike. In *The Syria* (2) the cargo was made liable as well as the ship, and though the master asked to be towed to Southampton the service was held to be a salvage service, and the only difference between that and the present case is that it was the master and not the manager who made the request. In the course of his judgment, SIR ROBERT PHILLIMORE says (SHIPPING AND MERCANTILE GAZETTE, July 7, 1874):

"I have paid all attention to Mr. Butts' argument with respect to the first point, that the salvage service ceased at St. Vincent, but I am unable to assent to it. I put out of consideration the fact that both the vessels belonged to the same owners. The principle of law is independent of that fact. This service was simply salvage service, and it was intended to extend to towing this vessel to her port of destination; and the fact that she touched at a port where she might have remained in safety does not seem to alter the original contract, and make the service cease there or begin there. What the question might have been in a case where the master of the towed vessel expressed himself satisfied, and did not wish to be towed further, and made no arrangement by implication or parol, is another consideration altogether. I must consider it as a salvage service continuing over the whole six weeks."

My Lords, the basis of this judgment appears to be that a ship taken from a position of danger to her ultimate destination is still the subject of salvage, though on her voyage she is towed past, or, indeed, into, ports at which she could lie in safety, provided, of course, she continues to be so damaged that it would be unsafe for her to put to or remain at sea until she is repaired.

Nor, as I think, does *Anderson v. Ocean S.S. Co.* (3) in any sense make this outlook untenable. The action was in general average by a ship owner against one of the cargo owners for his proportion of the sum which the ship owner had consented to pay for salvage services rendered to the ship and cargo. Admittedly, the services were salvage services, and, consequently, the cargo owners would have to contribute to the sum due to the salvors. The dispute was as to how much their share should be and how the sum to be awarded should be ascertained. The case was tried with a jury, and it is enough to set out two of the questions put to them: (i) Did the master of the Achilles (the salvaged ship) make her owners liable to pay a named sum? (ii) Was that a reasonable course for him to pursue under the circumstances? To both questions the jury answered "Yes," but that fact was held not to be conclusive against the cargo owners. LORD BLACKBURN says (10 App. Cas. 114):

"I do not think that the owners of the Achilles could, by paying the claim of the Shanghai [the salving ship], entitle themselves to recover more from the goods owners than the Shanghai could have recovered in a salvage suit against the goods owners, but I do not see why they might not recover whatever it was fair and just should be paid as a contribution."

He says further (*ibid.*, 117):

"I think therefore that it was quite clear that there was a contract binding on the owners of the Achilles to pay this sum of £2,691 19s. 6d. to the owners of the Shanghai, whether it was made by themselves or by their master for them is, as far as regards the binding of the owners of the Achilles, unimportant. But neither the owners of the ship nor their master have authority to bind the goods, or the owners of the goods, by any contract. The master has, I think, authority to make for his owners all disbursements which are proper for the general purposes of the voyage, and when once those disbursements are paid for, either by the master out of funds belonging to the owners which the master has, or by funds which the owners themselves apply to discharge a contract which they either could not dispute because the master had bound them to make it or did not choose to dispute, I think that

the disbursement, in so far as it is a disbursement for the salvation of the whole adventure from a common imminent peril, may properly be charged to general average. But I think that there is neither reason nor authority for saying that the whole amount which the owners of the ship choose to pay is, as a matter of law, to be charged to general average. And though I quite agree that there is some evidence here that the Achilles and her cargo were both in danger, and were both saved by the services of the Shanghai, and though I also agree that it is not a question of law whether the amount of the sum charged as a disbursement was exorbitant or not, still I cannot find that any question as to the amount was submitted to the jury."

No question arose as to the point at which the service began or ended. The sole matter in dispute was what was a reasonable remuneration for the service rendered to ship and cargo. The ship must, of course, pay the contractual sum, but the cargo owners were liable, not for their proportion of the sum paid, but for their proportion of what would properly be awarded for the services rendered if no contract had been made. It differs from the case now under discussion in that the quantum has here been determined by an Admiralty judge in a Court of Admiralty and the only matter of contention is where the service began and ended.

The master or owner or manager of the vessel alleged to have been salvaged cannot, of course, bind the cargo owners to pay salvage where the services rendered are not salvage services any more than he can bind him to pay the amount which he has promised to the vessel which is said to have salvaged his ship, but this qualification in no way determines what are salvage services or how long they last. There is some authority for the proposition that a vessel so damaged as to be unable to proceed except under tow is receiving salvage services, not only when she is picked up in a position of danger, but continues to enjoy those services until she reaches her destination, and both *The Reward* (4) and *The Princess Alice* (5) differentiate between salvage and towage by attributing the former to the towing of a disabled ship and the latter to the mere acceleration of the tow's progress. My Lords, I have already said that, in my view, this statement as to the difference between the two services must not be carried too far and that I agree with BUCKNILL, L.J., that there is no established principle that a vessel which has no means of progression remains in a state of danger until she has recovered some power of propulsion even though she has come to anchor in a safe place. But your Lordships are still faced with the question: What in this collocation is meant by a safe place? Are there only the three views, either (i) a place where the ship can lie in physical safety even though she cannot be repaired there and may have to remain for an indefinite time until some problematical tug or tugs can be procured to tow her away at a fixed contract price for the towage service; or (ii) some place where she can ultimately be repaired with or without some risk but after a very considerable delay, the cargo meanwhile being either partially or wholly discharged and stored until the ship is repaired or until space in some other ship can be obtained to carry it to its destination; or (iii) the port of destination at which the cargo is to be delivered. The arguments for each of these meanings were presented to your Lordships and it may at some time and in some case be necessary to answer them, but I am not persuaded that in the present case an answer to them as presented is required.

If a vessel is in danger as defined by DR. LUSHINGTON in *The Charlotte* (6) (3 Wm. Rob. 71) and salvage services are offered, the master must make up his mind whether to accept them or not. In so doing he must, of course, act like a prudent master, but considerable latitude ought to be allowed him, more particularly in a case such as the present where the ship is carrying a general cargo, and it is, therefore, a difficult task involving much delay to communicate with

the various owners. He is responsible for ship and cargo and the danger of failing to accept salvage services or of dispensing with them at too early a period is well illustrated by *The Germania* (7). Of course, if no salvage award is permissible when once the damaged vessel has reached some place where she can lie for an indefinite period in physical safety, but from which no method of egress has been shown to exist, and where, unless some means of further progress is obtained, the ship must lie deteriorating and the cargo ultimately perishing, *cadit quaestio*, but I do not accept that view. The master whose ship has suffered damage must do his best to preserve the ship and cargo and to bring both to their destination as cheaply and efficiently as possible. The possibility of expense and the effect of delay both on the ship and cargo must be borne in mind, and it has to be remembered that the master, manager, or owner of the ship has a difficult task in assessing what will be best for the various interests. If it is clearly to the advantage of his cargo, he ought to tranship and arrange for it to be carried on by another ship. The possibility of repair at convenient ports and the time involved and safety of the operation to ship and cargo must be borne in mind. The question, in my view, is not the simple one: "Is the ship in a position of physical safety?" I do not think that the only possibilities are to be found in the answer to one of two alternatives, *viz.*, (i) May the master of a damaged ship which is taken in tow in a damaged condition from a position of potential danger treat the towage to his destined port as salvage services? Or (ii) Is the cargo only bound to pay its proportion of salvage up to the nearest position at which the ship can lie in physical safety? On the contrary, I think that, if the considerations mentioned above are borne in mind, a third view can be loosely expressed by saying that the salvage lasts so long as the master acts reasonably for the combined benefit of ship and cargo.

Some further support for this view is to be obtained from a number of cases decided in the Court of Admiralty. In *The Idomeneus* (8), BATESON, J., says (22 Ll.L. Rep. 300), in a case where the damaged ship was towed first to Port Sudan and then to Suez and it was argued that the only salvage service was the towage to Port Sudan:

"It is quite true that the principal salvage was getting the *Idomeneus* into Port Sudan to start with, but for the long tow the *Perseus* has to be paid as a steamer rendering a service, and it is really an ocean tow, and, therefore, must be properly remunerated as salvage."

In *The Laomedon* (9) that ship was towed by two vessels in successive stages from a position to the south and east of Perim to Malta except through the Suez Canal from Suez to Port Said when she was under the charge of tugs. The whole towage seems to have been admitted to be a salvage service and the quantum of award alone to have been in dispute, but the only excuse for proceeding to Malta appears to have been that that was the first port at which repairs could be effected and the towage was at least as much for the benefit of the cargo as that of the ship. HILL, J., says (23 Ll.L. Rep. 234):

"With regard to the *Pheonius* [one of the salving ships] I must reward them upon the basis that they have . . . towed this very valuable property a distance of three thousand odd miles, and that that is salvage and not towage, because throughout the whole time the *Laomedon* was disabled and had no means of propulsion of her own, and is salvage right up to Malta because that was the first port where she could get a new propeller."

I have already referred to *The Glaucus* (1) and need not deal further with that case. In none of these cases does the distinction appear to have been drawn between ship and cargo which it has been sought to establish in the present case. I cannot but believe that the reason why no such distinction was made was because in each case it was accepted that an award held reasonable in the case

of the ship was reasonable in the case of the cargo also, unless it could be established that the master or owner had neglected its interests.

In the present case the whole of the facts and law were carefully considered by the learned President and unless the appellants could establish that salvage services always end where the ship can be in physical safety and where the cargo also can remain at least for some time without danger or damage, he appears
A to me to have reached the right conclusion on ample and adequate grounds. He carefully considered the opportunities for repair at each port on the voyage, the risks and delay involved and the possibilities of safe towage. Among others, he had in mind those of dry-docking the Troilus without discharging her cargo and the imprudence of tipping a liberty ship sufficiently to fit a propeller. On the last two points the Court of Appeal took the advice of their assessors who thought
B that either expedient would be unsafe, and your Lordships' assessors took the same view. In my opinion, if I may respectfully say so, the learned President has adopted the right approach to the solution of the question, and I find myself in agreement with the answer reached. This view is fortified by the judgment of the Court of Appeal, from which I differ only in that I have accepted the views of our assessors as to the physical safety of the Troilus at Aden without having
C thought it necessary to come to any definite conclusion on the point. As he took the view that the Troilus was in some danger at Aden, BUCKNILL, L.J., did not deal with the argument that the services of the Glenogle could not be salvage because she started them when the Troilus was in safety. SOMERVELL, L.J., however, as an alternative ground for his decision, did consider the question and expressed the opinion that in the circumstances the change from Stentor to
D Glenogle did not affect the result. As I have said, I am of the same opinion and would dismiss the appeal with costs.

LORD NORMAND: My Lords, I have had the advantage of reading the opinion of my noble and learned friend on the Woolsack and I agree with it.

LORD OAKSEY: My Lords, I too have had the advantage of reading the
E opinion of my noble friend on the Woolsack and I agree with it.

LORD PORTER: My Lords, my noble friends **LORD REID** and **LORD TUCKER** have asked me to express their agreement with the opinion which I have read.

Appeal dismissed.

F Solicitors: *Thomas Cooper & Co.*, agents for *Batesons & Co.*, Liverpool (for the cargo owners); *Bentleys, Stokes & Lowless*, agents for *Alsop, Stevens & Co.*, Liverpool (for the owners, master and crew of the Glenogle).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

BARRATT v. GOUGH-THOMAS.

[CHANCERY DIVISION (Danckwerts, J.), April 24, 25, 1951.]

Mortgage—Interest—Notice by mortgagor to pay off—Failure to pay on date named—Sum due not set aside and available on date of expiry of notice—Right to interest subsequent to date of expiry.

Even if there has been a tender by a borrower of the amount due for principal and interest, that tender does not stop interest running after the date of the tender unless there is evidence that the sum has been set aside and is ready for payment at any time.

In December, 1919, the plaintiff mortgaged certain property to one R. to secure a sum of £5,000. The defendant acted as solicitor for both parties and retained the original documents of title together with the mortgage deed. In February, 1941, R. died, by his will having appointed the defendant and three others his executors. On June 12, 1943, the plaintiff served on the defendant and his co-executors notice to redeem the mortgage on Dec. 14, 1943. On Dec. 4, 1943, the defendant claimed to be entitled to a lien on the deeds of the property in respect of costs incurred by the plaintiff, and asserted a right to withhold the deeds from the plaintiff on the redemption date unless he paid not only the mortgage debt and interest but also the amount due for costs. The mortgage was not redeemed on the day on which the notice of intention to pay off expired. On Feb. 11, 1944, the plaintiff stated that he was now in a position to arrange for the immediate payment off of the mortgage, and in March, 1944, he instituted redemption proceedings against the executors. On July 10, 1945, VAISEY, J., decided against the defendant's claim to a lien ([1945] 2 All E.R. 414), but on an appeal by the defendant, the Court of Appeal held (*ibid.*, 650) that a consideration of the lien and the questions relating thereto was premature and discharged the order. In January, 1946, the defendant took a transfer of the mortgage and thenceforth became sole mortgagee. On Feb. 3, 1948, an order was made in chambers directing the taking of accounts in the redemption action. That order provided, *inter alia*, that the amount of interest in respect of the mortgage since Dec. 14, 1943 (being the date of expiry of the plaintiff's original notice to redeem) and the amount of certain costs of the defendant were to be separately certified. On Nov. 8, 1948, the certificate contemplated by the order was issued by the master who found that there was a principal sum of £5,000 due to the defendant, and that there was also due to the defendant a sum of £674 13s. 10d. for interest thereon, after deducting income tax, at the rate of £5 per cent. per annum from Dec. 14, 1943, to the date of the certificate. The plaintiff complied with the terms of the redemption order and redeemed the mortgage. On a claim by the defendant to interest from Dec. 14, 1943, down to the date when the principal sum was paid off,

HELD: there had been no actual tender in the present case, and in the absence of evidence that any money had been set aside and was available for payment off of the mortgage on the date on which the notice to redeem expired or during the period subsequent to that date, the plaintiff, who had had the use of the mortgagee's money at all times during that period, was liable to pay interest on the mortgage to the date of actual payment.

Principle in Gyles v. Hall, (1726) (2 P. Wms. 378); *Kinnaird v. Trollope*, (1889) (42 Ch.D. 610); *Bank of New South Wales v. O'Conner* (1889) (14 App. Cas. 273) and *Edmondson v. Copland*, ([1911] 2 Ch. 301), applied.

Midleton (Lord) v. Eliot, (1847) (15 Sim. 531); *Thornton v. Court*, (1854) (3 De G.M. & G. 293) and *James v. Rumsey*, (1879) (11 Ch.D. 398), distinguished.

AS TO INTEREST CEASING TO RUN AFTER TENDER, see HALSBURY, Hailsham

Edn., Vol. 23, p. 402, para. 601; and FOR CASES, see DIGEST, Vol. 35, pp. 666-668, Nos. 4019-4037.

Cases referred to:

- (1) *Gyles v. Hall*, (1726), 2 P. Wms. 378; 24 E.R. 774; 35 Digest 361, 1031.
(2) *Kinnaird v. Trollope*, (1889), 42 Ch.D. 610; 58 L.J.Ch. 556; 60 L.T. 892; 35 Digest 667, 4028.
A (3) *Bank of New South Wales v. O'Conner*, (1889), 14 App. Cas. 273; 58 L.J.P.C. 82; 60 L.T. 467; 35 Digest 257, 161.
(4) *Edmondson v. Copland*, [1911] 2 Ch. 301; 80 L.J.Ch. 532; 105 L.T. 8; 35 Digest 362, 1040.
(5) *Middleton (Lord) v. Eliot*, (1847), 15 Sim. 531; 60 E.R. 725; 35 Digest 417, 1563.
B (6) *Thornton v. Court*, (1854), 3 De G.M. & G. 293; 22 L.J.Ch. 361; 20 L.T.O.S. 318; 43 E.R. 151; 35 Digest 667, 4036.
(7) *James v. Rumsey*, (1879), 11 Ch.D. 398; 48 L.J.Ch. 345; 35 Digest 417, 1564.

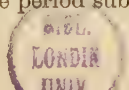
ADJOURNED SUMMONS to determine whether interest on a mortgage continued to be payable after the date on which the mortgagor's notice to pay off the mortgage expired. The facts are set out in the headnote.

Gray, K.C., and J. A. Brightman for the plaintiff.

Winterbotham for the defendant.

DANCKWERTS, J., stated the facts, and continued: The defendant's lien having finally been disposed of in that way, the matters of the interest and the costs of this action come before me for decision, that is to say, the other matters which were raised by the summons dated Feb. 7, 1949. It is claimed on behalf of the mortgagee, the defendant, that he is entitled to further interest from and after Dec. 14, 1943, down to the date when the principal sum was actually paid off. I have been referred by counsel on his behalf to a number of cases which seem to me to establish the principle that, even if there has been a tender by a borrower of the amount due for principal and interest, that tender does not stop interest running after the date of the tender unless there is evidence that the sum has been set aside and is ready for payment at any time. Those cases are: *Gyles v. Hall* (1); *Kinnaird v. Trollope* (2) (42 Ch.D. 618); *Bank of New South Wales v. O'Conner* (3) (14 App. Cas. 282-284) and *Edmondson v. Copland* (4).

F On the other hand, counsel for the plaintiff has referred me to a certain number of cases which establish, as he says, the proposition that when the delay in redemption is caused by the wrongful conduct of the mortgagee, the mortgagee is not entitled to claim interest after that date. The cases in which it appears that in the particular circumstances of the case the mortgagee was deprived of interest by reason of his wrongful conduct are *Middleton (Lord) v. Eliot* (5), *Thornton v. Court* (6), and *James v. Rumsey* (7). It appears to me that those cases are to some extent inconsistent with the cases on the question of tender to which I have referred. I consider that the matter depends really on the special circumstances of those cases. It seems to me that I ought to apply the principle which was laid down in the earlier cases to which I have referred. Indeed, the present case is stronger, because it appears that there was no actual tender at all in the present case, and it is very much open to doubt whether the plaintiff was in a position to pay off the mortgage on Dec. 14, 1943. It may be he would have had to raise the money from a bank or in some other way in order to do it. It is true that the plaintiff stated in his affidavit that he was ready and willing to pay off on Dec. 14, 1943, but the correspondence seems to me to be to some extent inconsistent with that, and there is, as I see the case, no evidence that any money was set aside for the purpose and was available for payment off of the mortgage on Dec. 14, 1943, or during the period subsequent to that date. It seems to me,



therefore, that the plaintiff should be liable to pay interest on the mortgage at the mortgage rate down to the date of actual payment off of the principal. After all, it has to be considered that he has had the benefit of the money, which has to be regarded in the circumstances as the defendant's, the mortgagee's, money, at all times during that period. Therefore, it seems to me there is nothing inequitable in directing that the interest should be paid to the defendant as the mortgagee, and I so hold.

I now come to the question of the costs of the action, which is more difficult. As regards the costs of the action generally, and putting aside for the moment the costs of the hearing before me, it seems to me that the plaintiff plainly should have those costs—that is to say, the costs amounting to £33 odd which were referred to in the master's certificate, the costs of the hearing before ROMER, J., which I think have not been dealt with, and any other general costs of the action. It seems to me that the delay in the redemption is entirely due, as was contended by counsel for the plaintiff, to a wrong claim by the defendant. It is quite true that it may have been a claim possibly supported by some authority which has now been overruled by the Court of Appeal and it was put forward possibly quite *bona fide*, but it is a claim which has completely failed. That claim has really been made on a wrongful basis and has been entirely responsible for the delay in redemption. Accordingly, as regards those general costs it seems to me that the plaintiff is entitled to have them, and there will, therefore, be an order in his favour to that extent. As regards the costs of the hearing before me the matter is more difficult because the right of the defendant to his interest has been contested. It seems to me that both sides have succeeded to some extent. It is rather difficult to make an exact apportionment. It is quite true that the interest was larger than the amount of the costs. On the whole I think the right order in regard to the hearing before me is that each side should bear its own costs.

Judgment for the defendant.

Solicitors: *Field, Roscoe & Co.*, agents for *Batten & Whitsed*, Peterborough (for the plaintiff); *Rooke & Sons*, agents for *W. Gough-Thomas*, Ellesmere, Salop (for the defendant).

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

PERRY v. DEMBOWSKI.

[COURT OF APPEAL (Somervell, L.J., Croom-Johnson and Romer, JJ.), May 3, 1951.]

Rent Restriction—Death of tenant—“Member of the tenant's family”—Reputed husband of tenant—Child of parties living as husband and wife—No de facto adoption of child by putative father—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (g).

For some seven years the defendant and a Mrs. B., the statutory tenant of a dwelling-house to which the Rent Restrictions Acts applied, had lived together in the house as man and wife until her death on July 9, 1950. They had one son who was born in 1946. The defendant remained in the house after her death. In an action by the landlord for possession of the house, the defendant claimed the protection of the Rent Restrictions Acts on the ground that he was a “member of the tenant's family” within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g), and that he had to reside at the house in pursuance of

his duty to look after and bring up the child whom he proposed to adopt.

HELD: in the absence of evidence that the defendant had *de facto* adopted the child during the lifetime of the mother and had maintained it both while the mother was alive and after her death and intended to continue to do so, and was also trying to make the *de facto* position permanent by seeking to be allowed to adopt the child, or taking steps indicating such an intention, the defendant could not be treated as a "member of the tenant's family" within the meaning of s. 12 (1) (g).

Gammans v. Ekins ([1950] 2 All E.R. 140), applied.

AS TO STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, p. 334, paras. 400, 401, and 1950 Supplement; and FOR CASES, see DIGEST, Vol. 31, pp. 575, 576, Nos. 7226-7255 and Digest Supps.

B Cases referred to:

(1) *Gammans v. Ekins*, [1950] 2 All E.R. 140; [1950] 2 K.B. 328.

(2) *Cameron v. Baker*, (1824), 1 C. & P. 268; 171 E.R. 1190; 3 Digest 385, 236.

APPEAL by the defendant from an order of His Honour JUDGE TUDOR REES, made at Brentford County Court, and dated Feb. 9, 1951, whereby he granted the landlord possession of certain premises to which the Rent Restrictions Acts applied.

The county court judge held that the defendant, a man named Dembowski, who had been living with the statutory tenant of the premises, a Mrs. Bild, as her husband up to the date of her death, was not a member of her family within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g).

Figg for the defendant.

R. B. Willis for the landlord.

SOMERVELL, L.J.: This is an appeal from a decision of His Honour JUDGE TUDOR REES who made an order for possession in respect of certain premises. The learned county court judge found that up to her death in July,

1950, a Mrs. Bild was the tenant of the premises in question. She started as a contractual tenant, but by reason of an increase in rent she had become, at the date of her death, a statutory tenant. In those circumstances the question arose whether there was anyone who could claim to be, within s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, a member of the tenant's family entitled to remain on after the death of the statutory tenant. On Mrs.

Bild's death the landlord claimed possession. In his particulars of defence the defendant said that in or about 1943 he began to live with Mrs. Bild and they lived together as man and wife until her death on July 9, 1950. They had one son who was born in 1946. The defendant contended that he was a "member of the tenant's family" within s. 12 (1) (g) of the Act of 1920, and said further that he had to reside at the premises in pursuance of his duty to look after and bring up his child whom he proposed to adopt legally. It was admitted before us that he had not, so far, taken any steps to adopt the boy.

It was decided in *Gammans v. Ekins* (1) that a man who has been living with a woman tenant, they not being married, could not be held to be a member of the tenant's family within the meaning of s. 12 (1) (g), and, therefore, the landlord was entitled to possession. In that case there were no children of the union, and the court left open the question whether, if two unmarried persons have been living together and there are children of the union, on the death of the woman who is the tenant the survivor can claim as a member of the tenant's family within s. 12 (1) (g). It seems to me that if one is to distinguish this case on the ground that here there is a child, it must depend on the defendant's relationship to the child as putative father. At first I was inclined to think that the fact that the defendant had taken no steps to adopt the child, or, as, possibly, he might, to make himself the child's guardian, rendered it impossible

to distinguish the present case from *Gammans v. Ekins* (1). I think, however, that this approach is somewhat too simple. As counsel for the defendant submitted, one has to consider the matter first of all in the light of the position as and when the tenant dies. It is clear that the law has recognised what is described as *de facto* adoption by a father of an illegitimate child. In those circumstances he will be held bound—I am quoting from the headnote in *Cameron v. Baker* (2)—

“to provide for the child himself, or to give the most distinct notice of his intention to pay such annual sum no longer.”

I will indicate the type of fact or circumstance in which, I think, the court might distinguish *Gammans v. Ekins* (1) and find that the father of an illegitimate child might be entitled to say that he came within s. 12 (1) (g). Obviously the question must be left to be decided when the sort of facts which I have indicated arise. If the defendant in the present case had led evidence to show that he ought to be treated as having *de facto* adopted the child during the lifetime of the mother, that he had maintained it both while the mother was alive and after her death and intended to continue to do so, and also was trying to make the *de facto* position permanent by, at any rate, seeking to be allowed to adopt the child or taking such other steps as indicated such an intention, he might be treated as a member of the family. The evidence in the present case falls short of what is required under both heads, namely, when one is considering the position at the time of the death and the failure to take any steps since. The defendant gave some evidence that he paid the rent, and he said he paid for a stove, but this evidence is of a most fragmentary kind which does not enable one to come to any clear conclusion as to his responsibility *vis-a-vis* either the mother or the child. The child has been away for reasons of health, the defendant said, since the death of the mother. The defendant said that he was looking after the child, but he did not say that he was paying for it. He said he was “fetching [the child] tomorrow.” In my view, this falls short of what would be required to show that the defendant had put himself in the position of having *de facto* adopted the child. One has to consider the state of circumstances at the date of the death, and the steps which the father takes after the mother’s death are a very important part of the picture, in my view, as indicating the position in which he then was. It is also relevant to consider as showing how, the mother having died, the father has, or has endeavoured to, put himself in a permanent relationship with the child. So far as that is concerned, the evidence is wholly against any such conclusion. I am not satisfied that this point was taken in this form before the county court judge. If it was not, that might be a fatal objection to it. Counsel for the defendant also argued, in the first instance, that we should consider the position of the child under s. 12 (1) (g). That, I think, is impossible. I am not saying that, when there are children, it may not be right and proper, if a guardian *ad litem* is appointed, to consider their position and their rights under s. 12 (1) (g), if any, in proceedings such as the present. The child is, however, not before the court, and the defendant is in no way in a position to represent it or to bind it by any judgment. For these reasons I think the appeal must be dismissed.

CROOM-JOHNSON, J.: I am of the same opinion.

ROMER, J.: I agree.

Appeal dismissed.

Solicitors: *Claude Barker & Partners* (for the defendant); *Shepheards & Bingley* (for the landlord).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

Re ST. PETER, ST. HELIER, MORDEN.

Re ST. OLAVE, MITCHAM.

[SOUTHWARK CONSISTORY COURT (E. Garth Moore, Esq., Chancellor of the Diocese), March 7, April 20, 1951.]

Ecclesiastical Law—Ornaments—Stations of the Cross—Ten Gospel Stations—Representation of the three falls—Representation of the legend of St. Veronica—Legality—Superstitious reverence—Grant of faculty “until further order”.

Pictorial or sculptured representations of incidents in the Passion of Our Lord and known as the Stations of the Cross are not intrinsically unlawful.

Clifton v. Ridsdale (1876) (1 P.D. 316) and *Capel St. Mary, Suffolk* (*Rector & Churchwardens*) v. *Packard* ([1927] P. 289), explained and distinguished.

Stations of the Cross may, however, be forbidden if they are likely to be put to improper uses or where there is a danger of their becoming the objects of superstitious reverence.

It is not unlawful to include among the Stations of the Cross representations of the falls or a representation of the legend of St. Veronica for which there is no scriptural authority, although it may be preferable to display the Gospel story without additions of a disputed nature.

Since Stations of the Cross are not in themselves unlawful, it is within the discretion of the court to grant or refuse a faculty for them, but it may be appropriate to limit the grant “until further order”.

AS TO ILLEGAL ORNAMENTS, see HALSBURY, *Hailsham Edn.*, Vol. 11, p. 787, para. 1448; and FOR CASES, see DIGEST, Vol. 19, p. 447, Nos. 2900-2904.

Cases referred to:

(1) *Clifton v. Ridsdale*, (1876), 1 P.D. 316; 35 L.T. 432; 41 J.P. 70; 19 Digest 447, 2900.

(2) *Re St. Mark's, Marylebone Road, St. Mark's (Vicar) v. St. Mark's (Parishioners)*, [1898] P. 114; 19 Digest 438, 2786.

(3) *Davey v. Hinde*, [1901] P. 95; 19 Digest 437, 2768.

(4) *Markham v. Shirebrook Overseers*, [1906] P. 239; 19 Digest 311, 1115.

(5) *Vincent v. St. Magnus the Martyr, etc. (Rector & Churchwardens)*, [1925] P. 1; Digest Supp.

(6) *Capel St. Mary, Suffolk (Rector & Churchwardens) v. Packard*, [1927] P. 289; Digest Supp.

(7) *Re Christ Church, Ealing*, [1906] P. 289; 19 Digest 448, 2913.

(8) *Rossi v. Edinburgh Corpn.*, [1905] A.C. 21; 38 Digest 165, t.

PETITIONS for the grant of faculties.

In the case of St. Peter, St. Helier, Morden, the petition was for “a faculty for the purpose of hanging in Bishop Andrewes' Church [a chapel] a set of the fourteen Stations of the Cross in plaster relief.” The petitioners were the Rev. F. Livesey Godfrey, vicar of the mother-church of St. Peter; the Rev. J. A. Court, who, at the time of the filing of the petition, was the priest in charge of Bishop Andrewes' Church, but had since been succeeded by the Rev. Marshal McIntyre who himself supported the petition; and Mr. H. A. Baker and Mr. A. C. Wooden, the churchwardens. In the case of St. Olave, Mitcham, the petition was for “a faculty for the purpose of erecting a set of Stations of the Cross” and also for a memorial tablet inscribed: “The Stations of the Cross are dedicated to the glory of God and in memory of Harry John Andrew Rudolph, Vicar's Warden, 1928-1950.” The Stations were also fourteen in number and were executed pictorially in relief. The petitioners were the Rev. C. V. B. Haddelsey, vicar of the parish at the time when the petition was filed, since succeeded by the Rev. A. Duckett, who himself supported the petition, and Mr. F. E. Pailthorpe and Mr. J. R. Phipps, the churchwardens. The fourteen Stations of the

Cross included, in each case, three pictures representing Our Lord falling on the way to Calvary and one picture representing the incident of the meeting with St. Veronica.

Hutchinson, K.C., Wigglesworth and Chavasse for the petitioners.

The petitions were unopposed.

THE CHANCELLOR: These are two similar petitions for faculties which for convenience and by consent have been heard together. In each case the petition received the unanimous support of the parochial church council. In neither case is there any opposition. In each case the proposal has received the approval of the diocesan advisory committee. In each case there are fourteen Stations of the Cross. Ten of them depict in the usual manner incidents in Our Lord's Passion recorded in the Gospels. Of the remaining four, as is often found, three represent Our Lord falling beneath the weight of the Cross and one depicts the well known story of Our Lord's encounter with St. Veronica.

In Bishop Andrewes' Church at the time of the hearing of the present petition the Stations had already been temporarily placed without a faculty on window sills for the purpose during Lent of holding the service known as "Devotions," and services are, in fact, held in the form set out in the well-known booklet published by W. KNOTT & SON, entitled "AN OFFICE FOR THE WAY OF THE CROSS." It is a sufficient description of that service to say that at each Station meditation on the scene depicted is first invited and prayers are offered up addressed to one of the Persons of the Trinity, the last prayer before each Station being: "May the souls of the faithful, through the mercy of God, rest in peace." There is no invocation of Our Lady or of the saints. Mr. McIntyre, the priest in charge of Bishop Andrewes' Church, stated in evidence that, apart from telling children that they would not find the incident of St. Veronica in the Gospels, he gave no teaching as to the historical basis either of that story or of the three falls and that children would go away with the impression that they were historical events.

In St. Olave's Church the Stations which are the subject of the petition have not been introduced, although they have been bought. Fourteen brown-paper crosses have, however, been affixed to the wall of the church and are utilised for the purpose of a service of much the same sort as in Bishop Andrewes' Church, the booklet used being HANKEY'S "STATIONS OF THE CROSS," stated to be arranged for private use and containing pictures of the fourteen Stations, but omitting any prayer for the souls of the faithful. With regard to the representation of the incidents concerning St. Veronica and the three falls, the vicar, Mr. Duckett, stated that his teaching concerning them is couched in the terms: "It is said that Jesus's face is wiped by Veronica," and, "It is said that Jesus fell." The only remaining facts which appear to me to be at all relevant are that both Mr. McIntyre and Mr. Duckett clearly regard the Stations as of value as an aid to devotion and that, from the evidence as to the services which are held in them, I should say that both churches would probably in current parlance be described as "rather high church."

Three main questions arise for determination, namely: (i) Are the proposed Stations aesthetically satisfactory? (ii) Can they, or any of them, be lawfully introduced into a church? And (iii) If the answer to the first two questions is in the affirmative, ought they, or any of them, to be so introduced in the circumstances of these particular cases?

The first question I can answer at once. Pictures of the Stations have been put in evidence. I am in agreement with the advisory committee and I hold that on purely aesthetic grounds the proposals are satisfactory.

The second question regarding their legality is far more difficult. I am bound to confess that, had I not been aware of the body of opinion to the contrary, it would never have occurred to me to doubt the legality of the ten Gospel Stations. Save during the period of puritanical excesses it has been customary to embellish

churches with all sorts of decorations, both pictorial and sculptural, notably, but not exclusively, in the form of stained glass windows. The object of such decorations is a twofold one, namely, to give glory to God by beautifying His houses and as aids to devotion. A frequently recurring theme in such decorations is the representation of some scene in the life of Our Lord. It is true that such decorations, like almost everything, are capable of being abused, and the likelihood of abuse is a factor to take into consideration in deciding whether or

A not in any given case they ought to be introduced, but that matter falls to be considered as one of discretion and only after the question of legality has been decided. It is with the legality of such decorations that I am at the moment concerned, and, in general, I can see no ground for impugning their legality. Nor can I, on the point of legality, see any ground for differentiating between Stations of the Cross and any other pictorial or sculptured representations.

B It is often stated that Stations of the Cross are a post-Reformation innovation. Even if the statement were true, I do not see why that should be regarded as militating against their legality or even against their desirability, but, the statement that Stations of the Cross are post-Reformation is not wholly accurate. In one form or another they were known before the Reformation and counsel has reminded me that there was a set at Nuremberg in the fourteenth century.

C It is, however, true to say that in their present form and in the form in which they are proposed in the present applications they are post-Reformation and were in use in the Roman Church before it occurred to anyone to introduce them into a church of the Anglican Communion. In the Roman Church they have been used as a substitute for a pilgrimage to the actual Via Dolorosa in Jerusalem, and, because in the Latin Church (to use a term which in this context at least is

D common and preferable) the Franciscans are the guardians of the Holy Land, in post-Reformation times the Stations of the Cross were at first peculiarly associated with the Friars Minor though in recent years their popularity has been such that their use has spread far beyond the confines of places administered by the friars. Once again, however, on the question of legality, these considerations, though interesting, seem to me to be irrelevant. As I have had occasion to remark

E before, the fact that the Church of Rome does something is by itself no reason why the Church of England should not also do it. Indeed, in these days, when suspicion is less strong and there is what might be described as an oecumenical feeling in the air, one might have thought that the more one could find in common between the severed parts of Christendom the better. I emphasise that I am not at the moment considering the use to which these decorations are put by the

F Roman Church or to which they might be put if introduced into these two English churches. I am considering merely the question of their intrinsic legality, and on this point, if the matter were free from authority, I should certainly hold that Stations of the Cross were lawful.

There is, however, a formidable volume of decided cases of such a nature as to cause the stock text-books to state that Stations of the Cross are not lawful.

G It is the contention of the petitioners that this conclusion of the text-books is wrong, and it is, therefore, necessary to examine the authorities in detail. The first in point of time and also the most important is *Clifton v. Ridsdale* (1), decided in the Court of the Arches, and, therefore, binding on me. The headnote to that case in the LAW REPORTS states that Stations of the Cross "are decorations forbidden by law in churches of the Church of England," and that summary of the decision has usually been regarded as correct. As counsel has pointed out, the case

H was not a faculty case. It was a case in which proceedings were brought against the Rev. Charles Joseph Ridsdale under the Public Worship Regulation Act, 1874, in respect of a number of alleged unlawful acts of a varied nature, including the wearing of vestments, the mixing of water with wine, the use of wafer bread, the manner of conducting services, and the introduction of various articles into the church. The twelfth charge was in respect of the introduction without a faculty of a set of Stations of the Cross, "such as are commonly used in Roman

Catholic churches." In dealing with this charge the learned Dean of the Arches (LORD PENZANCE) said (1 P.D. 359, 360):

"The first objection taken to them I must hold to be a fatal one, namely—that they constitute 'an addition to the fabric ornaments or furniture of the church' within the meaning of the statute, and have been set up in the church by the respondent 'without lawful authority,' no faculty having been either granted or applied for to justify their erection. The law which requires that those who wish to fix or set up any new decoration in a church must apply to the proper authorities for a faculty before they do so, is very salutary and ought to be upheld . . . It is upon this ground, therefore, that I shall order their removal."

I pause there to note that the objection which LORD PENZANCE found to be fatal to the Stations of the Cross was that they had been introduced without a faculty and it was on that ground that he ordered their removal. So far, no basis is given to the statement in the headnote that they "are decorations forbidden by law." Once the learned dean had stated that the ground on which he was ordering their removal was that they had been introduced without a faculty anything further which he said, though deserving the most careful study, was purely *obiter* and not of binding authority. His judgment, however, continued, and dealt with the allegation that they were decorations forbidden by law, and in respect of that allegation he said (*ibid.*, 360): "as they now stand I think they are." In this connection he pointed out that neither the three falls nor the story of St. Veronica had any warrant in Gospel history and he further went on to discuss the use to which Stations of the Cross were put in the Roman Church, including the obtaining of indulgences. It is this part of the judgment which alone lends some support to the sweeping condemnation of Stations of the Cross contained in the headnote. On analysis I do not think, however, that LORD PENZANCE was any longer dealing with the question of the intrinsic legality or otherwise of Stations of the Cross. He was dealing with the third question which arises in all these cases, namely, whether in the circumstances of the particular case then before him the Stations ought, in fact, to be introduced. In this connection it is highly significant that the learned dean continued (*ibid.*, 361):

"I shall, therefore, as I have above said, order their removal, leaving it open to the respondent, if he shall desire it, to apply for a faculty to authorise the introduction into his church of such of them as may turn out to be free from objection."

It seems to me, therefore, impossible to regard *Clifton v. Ridsdale* (1) as authority for the proposition that Stations of the Cross are necessarily and intrinsically unlawful and I do not think that that was what LORD PENZANCE intended to decide.

In *Re St. Mark's, Marylebone Road. St. Mark's (Vicar) v. St. Mark's (Parishioners)* (2) the Chancellor of London (DR. TRISTRAM, Q.C.) ordered the removal of a set of Stations of the Cross which, together with other things, had been introduced into the church "without a faculty, and contrary to the vote of the vestry and the wishes of the parishioners" and which the learned chancellor found had given the greatest offence to the parishioners and had been used superstitiously. I am for the moment concerned only with the question of the intrinsic legality or otherwise of Stations of the Cross, and, therefore, I reserve comment on the finding that the Stations had been used superstitiously. On the question of intrinsic legality that decision is no authority either one way or the other, and with its result, although it is not binding on me, on the facts of that particular case, I respectfully agree.

Davey v. Hinde (3) was also heard by CHANCELLOR DR. TRISTRAM, Q.C., this time in the Consistory Court of Chichester. In that case the chancellor ordered the removal of a set of Stations of the Cross although they were already in the

church at the time of its consecration. Evidence was given of the type of service which was performed before these Stations. The chancellor said ([1901] P. 118):

“From the above evidence it is patent that the purpose for which the Stations of the Cross are in this church is to enable a service to be celebrated there, which is prescribed by and in use in the Church of Rome, but which is in contravention of the doctrines and practice of the Church of England. It is, therefore, imperative on the court, following the decision of the Arches Court and of the Judicial Committee in the *Ridsdale* case (1), to make an order for their removal.”

From this it seems to me to be clear that the learned chancellor was not purporting to decide the question of the intrinsic legality or otherwise of the Stations. He was ordering their removal because of the use to which they had been put.

In *Markham v. Shirebrook Overseers* (4) CHANCELLOR KEMPE, sitting in the Consistory Court of Southwell, made an order for the removal of fourteen Stations of the Cross which had been introduced into the church without a faculty. It does not, however, seem to me that at any point he decided that Stations were necessarily unlawful, or, indeed, that he ever seriously directed his mind to the question. The sole basis of his decision appears to be that in his judgment these particular Stations had been put to unlawful uses and were likely, if left, to be put to such uses again. That is an aspect of the case which calls for more detailed consideration, but on the question of intrinsic legality or illegality one receives no guidance from the decision which was founded on the learned chancellor's view that the uses to which these Stations had been put and were likely to be put were superstitious uses within the chancellor's understanding of the interpretation placed on that expression in *Clifton v. Ridsdale* (1).

Vincent v. St. Magnus the Martyr, etc. (Rector & Churchwardens) (5), began in the Consistory Court of London where CHANCELLOR ERRINGTON refused to grant a faculty for Stations of the Cross. His judgment was not reported. The case went to appeal on other points and the judgment of the Dean of the Arches (SIR LEWIS DIBDIN) on these other points is almost essential to a proper understanding of *Clifton v. Ridsdale* (1) and I shall return to it later, but the refusal of a faculty for Stations of the Cross was not appealed against and so was never the subject of a judgment in the Arches Court, and, therefore, it is not binding on me.

The last case which it is necessary to consider in connection with the legality of Stations of the Cross is *Capel St. Mary, Suffolk (Rector & Churchwardens) v. Packard* (6). In that case CHANCELLOR NORTH in the Consistory Court of St. Edmundsbury and Ipswich had ordered the removal of a number of objects from the church, among them a set of fourteen Stations which had apparently been put into the church without a faculty. On appeal to the Court of the Arches, counsel for the appellants, submitting that ten of the Stations might be retained, said ([1927] P. 295):

“It is admitted that a service has been used in connection with the Stations of the Cross, and that the presence of the three pictures for which there is no scriptural authority cannot be defended. The rector is prepared to undertake that no such service shall be held hereafter and to remove the said three pictures. It is submitted that the rest may remain.”

It is interesting in passing to note that only three and not four of the pictures were admitted to be without scriptural authority and I assume that counsel was submitting that there is scriptural authority for one fall. SIR LEWIS DIBDIN, however, in dealing with this submission, held that all fourteen should be removed and gave his ruling in the following words (*ibid.*, 306):

“Fourthly, the Stations of the Cross, consisting of the whole series, including the St. Veronica picture. The rector admits that the services and

instructions known as the Stations of the Cross are held and that lights are used ceremonially in connection with them. These pictures are illegal ornaments . . . ”

That is emphatic language, and the decision is binding on me. If it means that Stations of the Cross are necessarily illegal, that is an end of these present two cases. Furthermore, it would be entirely wrong for me, in the face of such language to accede to any argument to the contrary unless the most careful examination were to drive me to the conclusion that by these words the learned dean did not intend to rule that Stations of the Cross are necessarily and in all circumstances illegal. The context in which these words were used must, therefore, be scrutinised very carefully.

The first thing to note is that these articles had been introduced without a faculty and that the learned dean specifically refers to the manner in which they had been used. We are not, unfortunately, given much information in the report how exactly they had been used, but it is clear from the rest of the case that illegalities of one sort or another were rife in this particular church. In any event, if the dean had meant to rule that Stations of the Cross were intrinsically unlawful, the use to which they had been put was irrelevant and would not have been mentioned. The next thing to note is the list of three cases which the learned dean cited in support of his ruling. One of them was *Re Christ Church, Ealing* (7), which had nothing to do with Stations of the Cross as such and, in so far as it is relevant at all, is relevant with regard to the principles on which sculptured decorations are admissible. Another of the cases cited was *Clifton v. Ridsdale* (1), which, as I have said, is not, in my view, authority for the proposition that Stations of the Cross are necessarily illegal. In that case they had been introduced without a faculty and in so far as they came under further condemnation, they did so by reason of the use to which it was then thought they were likely in that particular case to be put, and it was expressly indicated that at a later date a faculty for some at least of the Stations might be sought. The third case cited was *Markham v. Shirebrook Overseers* (4) in which again, as I have indicated, in my view, the sole reason given for bringing the Stations under condemnation was because of the use to which it was thought they were likely to be put. Bearing in mind these matters and how important it is not to divorce judicial pronouncements from their context, I have come to the conclusion that when in the *Capel St. Mary* case (6) SIR LEWIS DIBDIN said ([1927] P. 306): “These pictures are illegal ornaments,” he did not intend to rule for all time against Stations of the Cross as such (which would constitute a departure from the attitude of LORD PENZANCE in *Clifton v. Ridsdale* (1)), but intended merely to indicate that in the circumstances of the particular case then before him the retention of these Stations could not be sanctioned—in other words, if the learned dean had been sharply distinguishing, as I am, between the question of the intrinsic legality or otherwise of such articles and the question whether in the particular case they ought to be permitted, while he would have answered the latter question in the negative, it by no means follows that he would so have answered the former question. After the most careful consideration, and, I hope, in complete loyalty to the decisions of the Court of the Arches, I am of the opinion that the *Capel St. Mary* case (6) on examination is not an authority for the proposition that Stations of the Cross are intrinsically illegal.

I have now reviewed all the cases cited to me on this question of intrinsic legality or illegality and I do not find anything which binds me to hold that such articles are intrinsically unlawful. I, therefore, continue in the opinion at which I had arrived without recourse to the decided cases and I hold that Stations of the Cross are not in themselves unlawful.

I turn, then, to the third question, namely, whether in the particular cases now before me these Stations or any of them ought to be introduced, and this involves the question whether, if they are introduced, they are likely to be put

to improper uses, or, to employ the technical language forced on me, whether there is danger of their becoming the objects of superstitious reverence. I have no doubt that, if these Stations are permitted to be introduced as permanent or semi-permanent additions to these two churches respectively, they will continue to be used as in the one case they have hitherto been used and as in the other case the brown-paper crosses have been used. They will continue to be used like that, at any rate so long as Mr. McIntyre and Mr. Duckett are each at his respective church. Services will be held in which at each Station meditation will be invited on the scene depicted and the prayers contained in the two little booklets, to which I have referred, will be offered to the Almighty. It is also probable that private individuals will make their private devotions in much the same way. In addition, the roaming eye of the casual observer will sometimes alight on one or more of these representations and sometimes a meditation on the scene depicted may flow therefrom. Furthermore, the churches will be embellished by these additions. Is there anything in all this to which exception can be taken?

It is, I think, necessary to consider this question first with regard only to the ten Gospel Stations, leaving out of account the representations of the three falls and of the story of St. Veronica. I have considered the two little booklets most carefully. The booklet entitled "AN OFFICE FOR THE WAY OF THE CROSS" contains the prayer for the souls of the faithful, which I take to mean the faithful departed, and in some quarters exception might be taken to such a prayer, but I hold that there is nothing therein contrary to the doctrine or law of the Church of England and I need cite no further authority for that than the *Capel St. Mary* case (6) ([1927] P. 306). Apart from that prayer there is nothing to which even the most censorious could take exception simply in the actual language of the devotions contained in these booklets. CHANCELLOR KEMPE in *Markham v. Shirebrook Overseers* (4) ([1906] P. 254, 257) seems to have regarded the prospect of private devotions as being peculiarly suspect, but only, I think, because he thought that all devotions in that particular church would be tainted by superstition, but I am quite sure that the prayers in the two booklets which I am considering could be recommended for private devotion as being wholly in accordance with the doctrine of the Church of England.

If, then, as I hold, these devotions are of such a character that they may be employed by any loyal Anglican privately, do they assume a different character if they are used as a service in a form of public worship? The answer, I think, is that in themselves they remain unobnoxious. Their use in public worship, however, might be challenged on another ground, in that the minister who takes the service, if a clerk in holy orders, might be guilty of a breach of the declaration required by canon 36 and also by the Clerical Subscription Act, 1865, namely, in public prayer to use the form prescribed in the Book of Common Prayer "and none other, except so far as shall be ordered by lawful authority." No one, not even in the House of Lords, knows what these words mean: see LORD DAVEY'S observations in *Rossi v. Edinburgh Corpn.* (8) ([1905] A.C. 29). The memorandum of VAISEY, J., "LAWFUL AUTHORITY" (to be found in *THE CANON LAW OF THE CHURCH OF ENGLAND*, p. 215) is sufficient for me. Let it suffice to say that, since the wording of these devotions is doctrinally unobnoxious, they could properly be ordered by lawful authority (whoever or whatever that is in these particular cases) for use in public prayer. There can, therefore, be no reason on this ground why I should withhold a faculty. If hereafter any clerk in holy orders should use this or any other form of public prayer not ordered by lawful authority, there are proceedings of a different nature by which he can be restrained.

There still remains the question whether these devotions, unobnoxious in themselves, are to be viewed differently if they are performed either before a single Station or in sequence before each of the Stations in turn. Do they thereby

partake of the nature of the worshipping or adoration of images contrary to the twenty-second article of religion, and, therefore, come under condemnation as superstitious reverence? In ordinary parlance they clearly do not. No one could for a moment imagine that anybody would attach the slightest sanctity to any of these representations themselves. I have, however, to interpret this unfortunate expression, "superstitious reverence," in the light of what LORD PENZANCE said about it in *Clifton v. Ridsdale* (1). He said (1 P.D. 352) that it

"by the use of the words 'superstitious reverence,' 'adoration,' or 'worship' to convey only the limited idea of a figure or object itself worshipped like a pagan idol. On the contrary, I understand these expressions as intended to embrace the far more extended conception of worship, adoration, or reverence paid to the deity in presence of or before those objects or figures. It may not be easy to push definition further than this, and define what it is that in any, or every case, constitutes adoration or worship in presence of an image or figure; nor is it necessary to do so; it is enough for the purpose in hand to say that it must be taken to include all and every form or degree in which the object in question is made to take a place, or play a part, in the devotions which are paid to the deity before it."

Those are hard words and, so far as I am concerned, binding words. Were they really intended to dub with the taint of superstition every act of devotion inspired by and in the presence of some pictorial or sculptural memorial of our faith? I do not think so. As CHANCELLOR KEMPE observed in *Markham v. Shirebrook Overseers* (4) ([1906] P. 255), all pictorial representations must necessarily serve the purpose of reminding observers of the events portrayed. If so narrow a construction were placed on LORD PENZANCE'S words, it would be impossible to have a crucifix at the place where confessions are wont to be made, a practice for which there is now ample authority, including the judgment of SIR LEWIS DIBDIN in the *Capel St. Mary* case (6) ([1927] P. 302). LORD PENZANCE himself in *Clifton v. Ridsdale* (1) obviously found it difficult to put into words exactly what he meant, as the passage quoted shows. He certainly intended to rule that the error of superstition could be manifested by acts which fell short of the actual adoration of an image. To attribute to an image any intrinsic sanctity would probably fall within the scope of his condemnation. So, probably, would also the belief that any special grace flowed from the doing of an act in the presence of an image. Thus, he would have condemned as superstitious the Roman teaching with regard to the indulgences to be gained by performing devotions in the presence of Stations of the Cross, but he would not, I think, have wished to be taken to condemn the use of a picture for the purpose of putting the worshipper in mind of something upon which a meditation may profitably be made. Whatever may have been the case in the nineteenth century or in any of the authorities which have been cited, I am completely satisfied that in the cases before me the sole purpose for which these Stations are intended and to which they are likely to be put is, as CHANCELLOR KEMPE would have said, the one they must necessarily serve, namely, that of reminding observers of the events portrayed, with the wholesome result of stimulating meditation on those events. I, therefore, hold that there can be no valid objection to the ten Gospel Stations.

The non-scriptural ones, however, require further consideration. Nor are they all on an equal footing with each other. They have this in common, that none is recorded in the Bible. That in itself can clearly not be conclusive. There are many undoubted historical facts which are nowhere recorded in the Scriptures. A more serious objection to the four Stations which I am now considering is that the historicity of the events depicted is doubtful. Even that is not necessarily fatal. If it were, we could have in our churches no representation of St. George killing the dragon or of St. Christopher carrying the infant Christ. The real

difficulty is that these four Stations, non-scriptural and of doubtful historicity, are presented on terms of apparent equality with the ten Gospel Stations, and, therefore, might be taken to have received the sanction and to convey the authoritative teaching of the Church.

This is a serious objection. It is necessary to see how serious. Counsel has pointed out that, whereas the authorised version of the Bible in Mark, c. 15, v. 22, reads "And they bring him unto the place Golgotha," the Greek reads, "καὶ φέρουσιν αὐτὸν ἐπὶ Γολγοθα τοπὸν" and φέρω always implies the idea of carrying. If that does not suggest that Our Lord fell, it certainly suggests that He required support and was stumbling. It is for this reason, I suppose, that my learned predecessor, SIR WILLIAM HANSELL, felt able to grant, as I am told he did, a faculty for Stations which included one, but not more than one, fall. I find it difficult, however, to swallow the camel of one fall while straining at the gnat of more than one fall. If it is conceded that Our Lord was stumbling and in need of support, it does not seem to me to matter very much precisely how that is represented pictorially. Were it to be represented as a continuous sequence in the form of a religious play or film, instead of, as here, in what I believe are known as "stills" from such a sequence, I do not think that any serious point would be taken as to the number of times Our Lord was represented as falling, and counsel tells me that the pre-Reformation Stations at Nuremberg contain representations of seven falls.

These arguments, however, cannot be applied to the representation of the incident of the meeting with St. Veronica which rests solely on tradition. Counsel has ingeniously argued that it quite likely happened, that at the worst it is an edifying story, and that at the best it is true. This argument, I think, refers only to the meeting and not to its sequel, the miraculous imprint of Our Lord's features on the cloth with which in the case of both the sets of Stations under consideration it is clearly linked, for in both sets the miraculous imprint is depicted. I do not presume to pass judgment on the veracity or otherwise of these stories. The Church of England gives no authoritative teaching either way on the matter. The question here, as with the representations of the falls, is whether it is right for such things to be displayed in the context of the Gospel story as though they were on the same authoritative level as the other incidents depicted. I am bound to say that I have been much exercised by what the answer should be. On the one hand, I should very much prefer to see the Gospel story unfolded pictorially in all the grim simplicity of the scriptures without additions of a disputed nature. On the other hand, I am loath, even indirectly, to interfere with the teaching functions of the clergy to whom that responsibility is entrusted, unless the teaching in question is clearly contrary to the teaching of the Church. I am also aware that the full set of fourteen Stations is nowadays to be found throughout the world in churches outside the Church of England, but within the Anglican communion as well as in churches of the Roman communion. I am reluctant to do anything, in however small a matter, which would appear to create yet another point of obligatory differentiation between the Church of England and other branches of Christendom. In the result, although only with great hesitation, in the present two cases I have decided not to place a veto on any of these four non-scriptural Stations. In reaching this conclusion I am influenced in part by the form in which I propose to make the order which will provide some check on the manner in which the Stations are used, and I am also partly influenced by the fact that there has been no opposition, archidiaconal or parochial, to these petitions which would seem to indicate that in responsible quarters no fears are entertained and in the parishes no sentiments are outraged.

I, therefore, decree that in each of the cases a faculty shall issue in the full form as prayed, but I further decree that this shall be only until further order. I do not anticipate any abuse of these Stations, but a decree in this form provides a useful additional safeguard should conditions in the future change. It is, I am

told, a form of order which commended itself in this court to CHANCELLOR HANSELL and it has received the emphatic approval of the Dean of the Arches (SIR LEWIS DIBDIN) in the *St. Magnus the Martyr* case (5) ([1925] P. 18). Where, as here, the major part of the expenditure has already been incurred, there can be no objection to such an order and, on many grounds, much to commend it.

I wish to add just this. CRIPPS ON CHURCH AND CLERGY, 8th ed., at p. 237, includes Stations of the Cross among the ornaments which are "without question" illegal, and that is a view which has been very widely shared, though, if it is right, it places under condemnation many good Anglicans and the many churches where Stations are now to be found. Out of deference to this view, however, I have thought it necessary to examine the whole matter very fully and to give my reasons at considerable length. I believe that the conclusion at which I have arrived will be found to be in accordance with the authorities when carefully examined, and I am strengthened in that view by the knowledge that in recent years other chancellors have sometimes found it possible to permit the introduction of Stations of the Cross, though their decisions have not reached the reports. I think that one of the chief reasons why it has been so widely thought that Stations of the Cross are illegal is because two questions have tended to become confused, namely, whether or not they are intrinsically illegal and whether or not they are in any given case likely to be put to illegal uses. As I have said, an examination of the decisions has led me to the conclusion that it has never been authoritatively decided that Stations of the Cross are intrinsically illegal, and in the two cases before me I am satisfied that they are not likely to be put to illegal uses. It is, therefore, a matter for my discretion whether or not faculties should issue. In the exercise of that discretion I have decided that in these two cases faculties may issue. It does not follow that on other applications and in different circumstances I should exercise my discretion in the same way. Nor is it surprising that in the present two cases, in the twentieth century, I should have exercised my discretion more readily and more favourably than courts were wont to do in the nineteenth century. Circumstances are very different now from then, and the courts were probably wise in their generation to move cautiously. We must not, however, mistake the cautious use of their discretion in something which concerns merely the trappings of religion for an authoritative and immutable ruling on a matter of principle. The basic principles which guide the Church are unchanging. Within the framework of those principles, the Church in her wisdom adapts herself and her trappings to ever changing conditions. She is the Body of Christ, and the Body of Christ is not a mummy. It is a living organism. It is not a mummy, held together only by the restricting folds of a winding-sheet which permit of no further changes than those wrought by slow decay. It is a living organism requiring freedom to grow and move, and, when the clothes of yesterday no longer fit, it is as well to discard them. The reformers of the sixteenth and seventeenth centuries had no doubt of this, and we in the twentieth century should bear it in mind when interpreting the decisions of the nineteenth century. They must never be considered out of the context of the conditions in which they were reached. This is nowhere more clearly stated than by the Dean of the Arches (SIR LEWIS DIBDIN) in the *St. Magnus the Martyr* case (5) ([1925] P. 11, 12). It is in accordance with my understanding of what was there enunciated that I have based my decision.

Solicitors: *Trollope & Winckworth* (for the petitioners).

[Reported by W. H. E. JAMES, ESQ., Barrister-at-Law.]

Re GIBBS (deceased). MIDLAND BANK EXECUTOR AND TRUSTEE CO. LTD. v. INLAND REVENUE COMMISSIONERS.

proved. Re CUNLIFFE-OWEN
cd.). [1953] 2 All E.R. 196. (Danckwerts, J.), May 8, 9, 1951.]

Legacy Duty—Exemption—“Event” occurring after commencement of Finance Act, 1949—Instalments of legacy duty falling due—Ascertainment of residuary estate—Finance Act, 1949 (c. 47), s. 27 (2), (e).

By his will a testator, who died on Dec. 1, 1946, gave certain annuities to commence from the date of his death and directed his trustees to appropriate investments and retain the income thereof to answer them. The investments were appropriated as so directed on Jan. 30, 1947 (*i.e.*, before the Finance Act, 1949, s. 27, came into operation on July 30, 1949). The testator devised his real estate and the residue of his personal estate to his trustees on trust for conversion and to pay his debts and the usual expenses and the legacies bequeathed by his will. The trustees were directed to invest the residue and hold such investments on trust to pay out of the income thereof £800 per annum to I.M.G., and subject thereto the testator declared trusts in favour of other persons, all of whom were chargeable at the same rate of legacy duty as I.M.G. The administration of the estate was not completed before July 30, 1949, and there was no retainer for the benefit of the residuary legatees prior to that date. Legacy duty was claimed on the value of the annuities and on the capital value of the residuary estate.

HELD: (i) on the appropriation on Jan. 30, 1947, legacy duty became payable in accordance with the Legacy Duty Act, 1796, s. 8, in respect of the annuities for which the appropriation was made, and the annual payment of instalments of the legacy duty was not an “event” within the Finance Act, 1949, s. 27 (2), which, if occurring after July 30, 1949, would render the relevant annuity exempt from duty by virtue of the Finance Act, 1949, s. 27 (1).

(ii) although until the residue was ascertained in due course of administration the residuary legatees had no right to any particular assets forming part of the estate, the ascertainment of the residuary estate was merely an administrative matter not affecting the title of the residuary legatees, and, therefore, particularly in view of s. 27 (3), the ascertainment of the residue was not an “event” within s. 27 (2) of the Act of 1949, and the residue was not exempt from legacy duty under s. 27 (1).

FOR THE FINANCE ACT, 1949, s. 27, see HALSBURY'S STATUTES, Second Edn., Continuation Vol., 1949, p. 125.

Cases referred to:

- (1) *Scholefield v. Redfern*, (1863), 2 Drew & Sm. 173; 32 L.J.Ch. 627; 8 L.T. 487; 62 E.R. 587; 39 Digest 113, 60.
- (2) *Attenborough v. Solomon*, [1913] A.C. 76; 82 L.J.Ch. 178; 107 L.T. 833; *affg.* S.C. *sub nom.* *Solomon v. Attenborough*, [1912] 1 Ch. 451; 43 Digest 563, 126.
- (3) *Sudeley (Lord) v. A.-G.*, [1897] A.C. 11; 66 L.J.Q.B. 21; 75 L.T. 398; 61 J.P. 420; *affg.* S.C. *sub nom.* *A.-G. v. Sudeley (Lord)*, [1896] 1 Q.B. 354; 21 Digest 122, 917.
- (4) *Barnardo's Homes v. Income Tax Special Comrs.*, [1921] A.C. 1; 90 L.J.K.B. 545; 125 L.T. 250; *sub nom.* *R. v. Income Tax Acts Special Purposes Comrs.*, *Ex p. Barnardo's Homes National Incorporated Asscn.*, 7 Tax Cas. 646; 23 Digest 394, 4653.
- (5) *Corbett v. Inland Revenue Comrs.*, [1937] 4 All E.R. 700; [1938] 1 K.B. 567; 107 L.J.K.B. 276; 158 L.T. 98; 21 Tax Cas. 449; Digest Supp.

ADJOURNED SUMMONS to determine whether, having regard to the Finance Act, 1949, s. 27, and in the events which had happened, certain annuities and the

residuary estate bequeathed by the testator were exempt from legacy duty. The testator died on Dec. 1, 1946, but the residuary estate had not been ascertained before, and some instalments of legacy duty in respect of the annuities fell due after, July 30, 1949, when s. 27 of the Act of 1949 came into operation.

Cyril King, K.C., and Jackson Wolfe for the executors.

Upjohn, K.C., and J. H. Stamp for the Crown.

DANCKWERTS, J.: The question which I have to decide depends on the operation of the Finance Act, 1949, s. 27. That section, speaking quite generally and possibly inaccurately, abolishes the burden of legacy duty in respect of events happening after the commencement of Part III of the Act. That important date was July 30, 1949.

The testator, the provisions of whose will are material, died on Dec. 1, 1946, and his will was proved on Feb. 22, 1947. The administration of his estate does not appear to have been fully completed even at the present time. The residuary estate has not been ascertained, and so had not been ascertained before July 30, 1949. The testator's will is dated Apr. 24, 1939, and there is also a codicil dated May 17, 1940, which is immaterial, except that an additional executor was added, and the codicil confirmed the terms of the will. The testator, who left a considerable estate, by his will gave a large number of pecuniary legacies. He then bequeathed a number of annuities free of all duties to commence from the date of his death and directed his trustees to retain the income of investments appropriated to meet the annuities as they fell due. In the case of each of the annuities he directed his trustees to appropriate out of his personal estate in their names certain sums of $2\frac{1}{2}$ per cent. consols which he mentions, and he declared that the income from the respective funds directed to be appropriated should in each case be the primary source for answering the respective annuity to which it related and the capital of the said funds should form the secondary fund for answering the same in the event of the income proving insufficient,

"and further that after any such appropriation shall have been made my residuary estate or the income thereof shall no longer be liable to provide for the annuity in respect of which such appropriation shall have been made."

Finally, he devised and bequeathed

"all my real and the residue of my personal estate not hereby or by any codicil hereto otherwise disposed of unto my trustees [on trust for conversion and] Subject to the payment of my debts funeral and testamentary expenses legacies and any duties payable on any legacies bequeathed free of duty by this my will or any codicil hereto I direct that my trustees shall invest in manner hereinafter authorised the proceeds of the said sale calling in and conversion with power from time to time to vary such investments and shall stand possessed of such investments and all such parts of my estate as shall at my death consist of such investments as aforesaid [his residuary trust fund] upon the following trusts . . . Upon trust to pay out of the income thereof the sum of £800 per annum to Iva Muriel Gibbs so long as she remains the widow of the late Harold Vivian Gibbs."

There follows a trust to pay the remainder of the income of the residuary trust fund and a trust to pay the whole of the income of the residuary trust fund after the death or re-marriage of the said Iva Muriel Gibbs to the children of the late Harold Vivian Gibbs in equal shares for their respective lives, and then a trust on the death of any of the said children, a bachelor or a spinster, to pay the income of the part of the residuary trust fund to which such deceased child was entitled to the survivors of the said children in equal shares and on the death of any of the said children while married or having been married on certain further

trusts as to the capital of such part of the residuary trust fund to the income of which such child was entitled during his or her life.

The Finance Act, 1949, s. 27, on which the case turns, provides:

“(1) Legacy duty and succession duty shall not be chargeable on a legacy derived from a testator or intestate dying after the commencement of this Part of this Act or on a succession conferred after that commencement, nor on any other legacy or succession in so far as the duty would apart from this section be payable in connection with any such event as is mentioned in the next following sub-section. (2) The events referred to in the foregoing sub-section are any of the following events happening after the commencement of this Part of this Act, that is to say—(a) the death of any person; (b) the determination or failure of any charge, estate, interest or trust; (c) the exercise of a power of appointment; (d) the making of any payment or the application of any property, if the duty would apart from this section be chargeable—(i) under s. 11 of the Legacy Duty Act, 1796, or under that section as applied by s. 32 of the Succession Duty Act, 1853 (which deal with benefits of uncertain amount receivable from time to time); or (ii) under s. 25 of the Succession Duty Act, 1853 (which deals with premiums for the renewal of a lease or the grant of a reversionary lease); (e) any other event which, under the provisions of the relevant will or disposition or the rules governing the distribution of the intestate's estate, affects the right to the legacy or succession or to the enjoyment thereof or which changes the nature of the property comprised therein or any part of that property. (3) The reference in sub-s. (1) of this section to duty being payable in connection with an event shall, in relation to legacy duty, include its being payable when the legacy is paid, delivered, retained, satisfied or discharged in connection with that event, and for the purposes of this section the expression ‘legacy’ includes residue and share of residue.”

The contention of the executors in the present case is that, while the testator's death occurred some time before July 30, 1949, either a retainer or some other occurrence of that type has occurred or must necessarily occur after July 30, 1949, and, consequently, legacy duty is not payable in respect of the benefits in question received under the testator's will. The terms of s. 27 (2) of the Act of 1949 are the same as the provisions to be found in the Finance Act, 1947, s. 49 (3). That section was passed for the purpose of imposing additional legacy duty in the case of deaths or events happening on or after Apr. 16, 1947. The same arguments which might in the present case be put up to secure exemption from tax might conceivably have been put forward on that section (while it was material) on behalf of the Inland Revenue to secure a further burden of legacy duty.

The Legacy Duty Act, 1796, s. 6, provides:

“And . . . the duties hereby imposed, shall in all cases in which it is not hereby otherwise provided, be accounted for, answered and paid by the person or persons having or taking the burthen of the execution of the will or other testamentary instrument, or the administration of the personal estate of any person deceased, upon retainer for his, her or their own benefit, or for the benefit of any other person or persons, of any legacy or any part of any legacy, or of the residue of any personal estate or any part of such residue, which he, she or they shall be entitled so to retain either in his, her or their own right, or in the right or for the benefit of any other person or persons, and also upon delivery, payment or other satisfaction or discharge whatsoever of any legacy or any part of any legacy, or of the residue of any personal estate or any part of such residue, to which any other person or persons shall be entitled.”

The section further provides for the case where the retainer is either for the benefit of the person in question or for the benefit of other persons. Section 8 provides:

“ And . . . the value of any legacy given by way of annuity, whether payable annually or otherwise, for any life or lives or for years determinable on any life or lives, or for years or other period of time, shall be calculated and the duty chargeable thereon shall be charged according to the tables in the schedule hereunto annexed, and the duty chargeable on such annuity shall be paid by four equal payments, the first of which payments of duty shall be made before or on completing the payment of the first year's annuity, and the three others of such payments of duty shall be made in like manner successively before or on completing the respective payments of the three succeeding years annuity respectively; and the value of any such annuity, if determinable upon any contingency besides the death of any person or persons, shall be calculated without regard to such contingency: Provided always, that if any such annuity shall determine by the death of any person before four years payment of such annuity shall become due and payable, then and in such case the duty shall be payable in proportion only to so many of the payments of the said annuity as actually accrued and became due and payable . . . ”

Section 12 provides for the calculation of duty according to the appropriate rates.

In the present case, as all the persons were related within the same degrees for the purposes of legacy duty, it is plain that, so far as residuary estate is concerned, the duty will be calculated on the capital value, but there is a provision which I ought to read at the end of s. 12 which deals with that particular case and is as follows:

“ . . . and all and every person and persons who shall become absolutely entitled to any such legacy or residue or part of residue so to be enjoyed in succession shall, when and as such person or persons respectively shall receive the same or begin to enjoy the benefit thereof, be chargeable with and pay the duty for the same or such part thereof as shall be so received or of which the benefit shall be so enjoyed, in the same manner as if the same had come to such person or persons immediately on the death of the person by whom such property shall have been given to be enjoyed or in such manner that the same shall be enjoyed in succession.”

As regards the annuities, other than the annual sum of £800 a year which was to be paid out of the residuary trust fund, it appears that on Jan. 30, 1947, an appropriation was made to the respective annuities as was provided by the terms of the will. It seems to me, therefore, that in the case of the annuities the argument that an event occurred after the material date, July 30, 1949, could not succeed because the appropriation on Jan. 30, 1947, had caused legacy duty to become payable in respect of annuities to be calculated in accordance with the provisions of the Legacy Duty Act, 1796, s. 8. Counsel for the executors contended, however, that an event occurred on the anniversary of the testator's death, that is to say, on Dec. 1 in each year on which a new amount (as I understood his argument) became payable in respect of each annuity, and in the case of the first four years one set of instalments of legacy duty became payable. Accordingly, in each successive year fresh events occurred within the meaning of s. 27 of the Act of 1949, and so, at any rate in the case of those events, as he described them, which occurred after July 30, 1949, there was an event which caused exemption, so far as material, under the provisions of s. 27. It seems to me that that is not treating an annuity according to its true nature. An annuity does not accrue (at any rate since the Apportionment Act, 1870) once a year. It accrues from day to day. If the annuitant dies in the middle of one of the appropriate years his estate does not lose the whole benefit of that year's annuity.

It receives a proportionate part of it. As was held by SIR RICHARD KINDERSLEY, V.-C., in *Scholefield v. Redfern* (1), the gift by will of an annuity of £400 a year is not a gift of a series of legacies of £400 payable at the end of each year. Therefore, it seems to me that that argument ignores the true nature of an annuity. So far as the provisions of s. 8 of the Act of 1796 are concerned and the proviso which provides for relief from further legacy duty or part of the legacy duty in the case of the annuitant dying before the expiration of four years from the death of the testator, those were simply provisions for relief in what was conceived to be a case of hardship, and, in my view, do not affect the true construction of the provisions of the section. Accordingly, as regards the annuities, in view of the appropriation which was made prior to July 30, 1949, the claim to exemption under s. 27 of the Act of 1949, must fail.

I turn to the trusts of the residuary trust fund, including the provision for the payment of the annual sum of £800 to the widow of Harold Vivian Gibbs, the testator's nephew. The argument as put forward against the claim of the revenue in this respect was that one cannot say that there is any right or claim to the residuary estate or to the enjoyment of it until the residuary estate is ascertained by process of administration. Until that event occurs all that the persons interested in the residuary estate have, according to law, is a right to have the estate of the testator or intestate duly administered. Therefore, when finally the residuary estate is ascertained, and still more when the executors assent to the trusts of the residuary estate and so put off the character of executors and assume that of trustees with the consequences which ensue, such as, for instance, the result which occurred in *Attenborough v. Solomon* (2), there is a change in the rights and title and position of the persons who are beneficially interested in the residuary estate. That has been laid down by the House of Lords and other courts in a series of cases, notably *Lord Sudeley v. A.-G.* (3); *Barnardo's Homes v. Income Tax Special Comrs.* (4) and *Corbett v. Inland Revenue Comrs.* (5), from which it appears that until the residuary estate has been ascertained by administration the beneficiaries entitled under the trusts of the will cannot claim that they have any right to any particular assets forming part of the testator's estate, nor that the income which may be acquired by the executors in respect of the residuary estate is in any way the income of the beneficiaries, at any rate for the purposes of income tax. Expressions have been used by certain of the learned Lords dealing with the matter which go as far as saying that until ascertainment the residuary estate has no existence. Therefore, it is said on behalf of the executors in the present case, that until ascertainment there is no right to the residuary estate, and the ascertainment of the residuary estate is an "event" within the meaning of s. 27 of the Act of 1949. Consequently, there was here an event which happened after the appropriate date, and the section applies to the whole of the residuary estate and the beneficial interests which arise in respect of it.

That argument receives some support from the terms of the testator's will where the whole of his real estate and the residue of his personal estate is given on trust for conversion and to pay the liabilities and legacies previously given, and, finally, to invest. Then, and not until then, is there created under the trusts of the will something which is called by the testator "my residuary trust fund," and the benefits which the beneficiaries are to get under the clauses in the will which are now material relate only to that residuary trust fund and to nothing else. Therefore, it is said, until the residuary trust fund is ascertained there has not occurred the event on which the beneficiaries become beneficially entitled to their interests. That argument seemed to me at one time to have considerable attraction, but I think, when one comes to examine carefully the terms of s. 27, that is not the kind of event which is there described. In the first place, sub-s. (2), which defines the events which are referred to in sub-s. (1), enumerates a number of things which are not administrative events, though whether the term which was used by counsel for the Crown, *viz.*, "actual events," is quite

accurate, I am not sure, but, at any rate, they are events, as it seems to me, of a different kind from the mere completion of the administration of the estate. Again, when one turns in particular to para. (e) of sub-s. (2), which is the most important one for the present purpose,

“any other event which, under the provisions of the relevant will or disposition or the rules governing the distribution of the intestate’s estate, affects the right to the legacy or succession or to the enjoyment thereof or which changes the nature of the property comprised therein or any part of that property,”

I think it is evident, as was contended by counsel for the Crown, that that paragraph refers to matters which are not administrative, but affect the beneficial interests of persons concerned either under the provisions of the relevant will or under the rules governing the distribution of an intestate’s estate.

It was hardly necessary to cite authority for the proposition that in the case of an intestacy there is a distinction between the rules governing the distribution and the rules which govern the administration of the estate. I think that the distinction in the case of an intestate’s estate in para. (e) must be deliberate. I think that the references to the provisions of the relevant will or disposition are again references to the beneficial provisions which one finds in the will or disposition and do not include the administrative requirements and rules which the law imposes in regard to a particular estate or trust. Notwithstanding the argument which was put forward by counsel for the executors that one must read into the will all that the law would apply or imply, apart from that which one finds set out expressly in the will, it seems to me that the title of the residuary legatee to a residuary estate remains the same both before and after the completion of administration notwithstanding that it is not until it is complete that he can say that any particular asset or any particular income is his and not merely part of the general estate of the testator. When I turn to sub-s. (3) which refers back, not to sub-s. (2), but to sub-s. (1), it seems to me that the argument which was put forward by counsel for the Crown that the administrative act was not an event within the meaning of the section is plainly right. It would have been easy for the legislature, if they had so intended, to say that the reference to duty being payable in connection with an event should be a reference to duty being payable in connection with the payment, delivery, retainer, satisfaction, or discharge of the legacy. That would have brought in the rules about payment which are contained in the Legacy Duty Act, 1796, but that is not what the sub-section says. The sub-section refers to the duty being payable in connection with the event. Then, when s. 27 deals in sub-s. (3) with delivery and retainer, the words are

“shall, in relation to legacy duty, include its being payable when the legacy is paid, delivered, retained, satisfied or discharged in connection with that event . . .”

In other words, the event is something different from the delivery, retainer, satisfaction, discharge or payment.

Accordingly, it seems to me that that sub-section does not support the contentions which have been put forward on behalf of the executors. In the result, therefore, I come to the conclusion that the event which is material in the present case was the death of the testator, and the death of the testator occurred before July 30, 1949. Therefore, it seems to me that legacy duty will be payable in connection with the residuary estate in due course, including the annual sum of £800 a year which is given on trust for the widow of the testator’s nephew, and that the claim to exemption is not made out.

Order accordingly.

Solicitors: *Arthur W. Coleman* (for the executors); *Solicitor of Inland Revenue.*

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

Re DULLES' SETTLEMENT TRUSTS. DULLES v. VIDLER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., and Denning, L.J.), May 2, 3, 10, 1951.]

Court—Jurisdiction—Submission to jurisdiction—Claim resisted on ground of court's lack of jurisdiction.

On May 28, 1946, the father, an American citizen, obtained a decree of divorce in the French courts against the mother, who subsequently brought the infant child of the marriage to England to reside. The father later obtained an order in France awarding him custody of the infant. On Feb. 6, 1948, an action was brought by the infant (by his mother as next friend) against his maternal grandparents claiming to become a ward of court. On June 28, 1948, the infant (by his mother as next friend) took out a summons in the action asking for the mother to be given the custody of the infant and also that provision be made for his maintenance. No direct claim was made on the father for maintenance, but (although he was not a party to the action) a copy of the summons was sent to the father's solicitors. At the hearing of the summons the father, who was then living in the United States of America, contested the mother's claim for custody, but custody was awarded to the mother. The father also opposed any order for maintenance being made against him on the ground that the court had no jurisdiction to make such an order, and he took the further objection that the infant and not the mother had made the application. At first instance the father's contention was upheld, but the infant's appeal was allowed, the Court of Appeal holding that the English courts had power to order maintenance against the father if he had voluntarily submitted to the jurisdiction in that respect. On the question whether the father had so submitted,

HELD: the father had not fought the claim for maintenance on the merits, and had not, by his technical objection as to parties, submitted to the jurisdiction on that claim; nor had he done so by contesting the claim for custody, because (a) that claim was distinct from that for maintenance and submission in relation to one claim would not amount to submission in relation to the other, and (b) in so doing he was merely seeking to protect the order for custody which he had obtained in France; and, therefore, the court could not order him to maintain the infant.

Harris v. Taylor ([1915] 2 K.B. 580), explained and distinguished.

Per DENNING, L.J.: If the claim on the father for custody and maintenance had been made by originating summons to which the father was a party, leave to serve him out of the jurisdiction could have been given under R.S.C., Ord. 11, r. 8A (b) (1). If the claim had been made by writ by which the father was made a party to the proceedings, leave to serve him out of the jurisdiction could have been given under R.S.C., Ord. 11, r. 1 (g). In either case, there having been proper service, the court would have had jurisdiction to make the order asked.

AS TO JURISDICTION AS TO AREA, see HALSBURY, Hailsham Edn., Vol. 8, pp. 535-537, paras. 1184-1190; and FOR CASES, see DIGEST, Vol. 16, pp. 103, 104, Nos. 37-42.

Cases referred to:

- (1) *Harris v. Taylor*, [1915] 2 K.B. 580; 84 L.J.K.B. 1839; 113 L.T. 221; 11 Digest 449, 1072.
- (2) *Re B.'s Settlement*, [1940] Ch. 54; 109 L.J.Ch. 20; 2nd Digest Supp.
- (3) *McKee v. McKee*, [1951] 1 All E.R. 942.
- (4) *Re Dulles' Settlement Trusts*, [1950] 2 All E.R. 1013; [1951] Ch. 265.
- (5) *Tallack v. Tallack & Broekema*, [1927] P. 211; 96 L.J.P. 117; 137 L.T. 487; Digest Supp.

APPEAL by an infant (by his mother as next friend) against an order of ROMER, J., dated Mar. 6, 1951.

In an application by the infant for an order that the mother be awarded custody of the infant and for an order directing the father to provide proper maintenance for the infant the father contested the claim for custody, and on the question of maintenance submitted that the court had no jurisdiction to make an order against him, an American citizen not residing within the jurisdiction. ROMER, J., upheld the father's submission on the question of maintenance. The Court of Appeal held ([1950] 2 All E.R. 1013) that the court could order the father to maintain the infant provided that he had submitted to the jurisdiction. The question of submission was referred to ROMER, J., who rejected the contention that the father by his conduct had submitted voluntarily to the jurisdiction.

M. J. Albery for the infant.

Bonner and *C. P. Hutchinson* for the father.

Cur. adv. vult.

May 10. **SIR RAYMOND EVERSHERD, M.R.:** In this case I have had the advantage of reading the judgment about to be delivered by DENNING, L.J., and, agreeing with him in his conclusion that the appeal fails and with the reasons for his conclusion, I will confine myself to but few observations. The question is whether, on the plaintiff's application for an order for maintenance under the Guardianship of Infants Acts, 1886 and 1925, of which application notice was given to the defendant's solicitors, the defendant, who is an American citizen resident at all material times outside the United Kingdom and is the father of the plaintiff, has submitted to the jurisdiction of the High Court—*i.e.*, voluntarily rendered himself amenable to the court's jurisdiction. There can be no doubt that from the first, consistently and vigorously, he has protested against the jurisdiction, and no other question on the application for maintenance has yet been canvassed by the court. ROMER, J., before whom came each of the three hearings of the matter prior to the case coming on the last occasion before the Court of Appeal, and who, therefore, heard all that was said on behalf of the father, held that he had not so submitted himself. In those circumstances I should be most reluctant to hold that the father, nevertheless, by some tactical or other false step, must be taken, contrary to his avowed intention, voluntarily to have cut the ground from under his feet, but it is just that that counsel for the plaintiff says that the father has done.

The proceedings out of which the question arises are of an essentially informal character. The action is one by writ to administer the trusts of the settlement to which the father is no party. The object, according to well-established Chancery practice, was to make the infant a ward of court. In accordance with the same practice the plaintiff, an infant, by his mother as next friend, has issued an ordinary summons not *inter partes* asking that orders be made (i) for custody and (ii) for maintenance of the infant. There are no pleadings which formulate the issues. Affidavits were filed by the mother, and I understand by others on her side, constituting the evidence in support of the application under both heads. To such evidence the father, having made it plain that he was only concerned to challenge the right of the mother to an order for custody and that on the question of maintenance he protested against the jurisdiction of the court, put in evidence in reply.

The first point taken by counsel for the infant is that the father could not participate in the mother's claim to custody without also accepting the jurisdiction of the court to make an order against him for maintenance. I do not agree. I think the two matters are in essence, as is pointed out by DENNING, L.J., distinct. Then it is said that since the mother's evidence covers indiscriminately the question of custody and maintenance, the father, by his answer, involved himself in the question of the merits of the application for maintenance as well as the question of the merits of the application for custody. It is, of course,

plain that where a question of jurisdiction arises a man cannot both have his cake and eat it. He cannot fight the issue on the merits, and at the same time preserve the right to say, if the worst comes to the worst, that the court has no jurisdiction to decide against him, and he cannot, consistently with that principle, take any step unequivocally referable to the issue on the merits. I agree with ROMER, J., that the passages in the affidavit fastened on by counsel for the infant cannot, taken at the highest in his favour, be regarded as so unequivocal.

A It is further said that the father argued the question of the construction of the statutes which was recently decided in this court, and further argued the point that, since the application for maintenance was made, not by the mother, but by the infant, it was outside the purview of the Acts. In my judgment, those questions were in the circumstances merely alternative grounds for protesting the jurisdiction, and the former was, indeed, only separated from the present question because this court, for reasons to which I will return, decided on the former occasion to limit its decision as it did. In *Harris v. Taylor* (1), to which I will later refer, the defendant's motion to set aside the service of the proceedings on him as being in excess of the jurisdiction of the Manx court was based on three grounds. I cannot think that the defendant's failure to establish any one of those grounds could have been suggested as having been fatal to the others.

C Finally, it is said that the father's proper course was to take out a summons to stay the proceedings *quoad* the claim for maintenance. I agree with the learned judge that such an application would, in the circumstances, have been wholly inappropriate and futile as a proceeding. Since on any view the court's powers under the Acts to order maintenance depended on the condition that it had first made the order for custody, it is clear that such an application would have been stood over until the latter question had been determined, and so the court would have arrived precisely at the present situation.

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I have said that the proceedings are properly of an informal character, and questions of substance ought to be decided and to be capable of being decided without recourse to formalities. I regret that, as things have turned out, two excursions to this court have been necessary, and that in the end no order can be made on the father to pay the infant's costs of the last excursion. I regret it the more since, as ROMER, J., justly pointed out, the material for the decision of the present question was all before this court on the last occasion. I venture, however, to observe that on that occasion our attention was drawn to language in the judgment then under appeal in which the learned judge expressed regret at the conclusion he had reached on the construction of the statute and which seemed to indicate that he might otherwise have made the order he was asked to make, and there was, moreover, some divergence of recollection between learned counsel on what had occurred before the learned judge. It was for those reasons that this court thought it best to refer the matter back. In conclusion, I add a sentence or two on *Harris v. Taylor* (1). I agree with DENNING, L.J., that that case can only be regarded as deciding that the matter of jurisdiction had, on the facts of the case, become *res judicata* between the two parties to it. As such it is, of course, binding on this court. Its correctness may, however, fall at some time to be considered in the House of Lords, for, as I understand the principles of private international law applied in these courts, a foreign judgment can be treated as so conclusive only if *inter alia* it was pronounced by a court of competent jurisdiction, and the question of the court's competence will *prima facie*,

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H I should have thought, be open to the consideration of our own courts. I think the appeal should be dismissed.

DENNING, L.J., read the following judgment. On Dec. 23, 1930, in Paris, Mrs. Dulles, an Englishwoman, married her husband, who was an American then domiciled in France. On May 5, 1940, a son was born to them. On May 28, 1946, the husband obtained in the French courts a decree of divorce against the wife. On Sept. 5, 1947, the mother brought the child to England and she has remained

here with him ever since. The father afterwards obtained an order from the French courts giving him the custody of the child, but this order has never been put into operation, because on Feb. 6, 1948, an action was brought in England in the Chancery Division by the infant (by his mother as his next friend) against his maternal grandparents claiming to become a ward of court. On June 28, 1948, the infant (by his mother as his next friend) took out a summons in that action asking for the mother to be given the custody of the child and also

“that such provision may be made for the maintenance of the said infant as to this court may seem meet.”

A copy of that summons was sent to the father's solicitors and they acknowledged it. It is to be noted that in that summons no direct claim was made on the father for maintenance. He was no party to the action, and he was only given notice of the application so that he could attend if he wished. The father himself had by this time gone back to America. He is a very rich man and is said to have assets in England worth £40,000.

When the summons came on for hearing the father, by his counsel, attended and strongly contested the wife's claim for custody, relying on the order which he had obtained from the French courts, but, nevertheless, the wife was awarded the custody. The judge must have been of opinion that that was best in the interests of the child: see *Re B.'s Settlement* (2), *McKee v. McKee* (3). So far as maintenance of the child was concerned, the father by his counsel vigorously opposed any order for maintenance being made against him. He said that the court had no jurisdiction to make an order against him. The judge upheld this view, but the Court of Appeal reversed his decision, holding that the English courts had power to order maintenance against him if he had voluntarily submitted to the jurisdiction in that respect: see *Re Dulles' Settlement Trusts* (4). The Court of Appeal, therefore, referred the case back to the judge to see if the father had submitted to the jurisdiction. The judge has held that the father has not submitted to the jurisdiction and I agree with his decision. I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all. I quite agree, of course, that if he fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the jurisdiction, because he is then inviting the court to decide in his favour on the merits, and he cannot be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable. But when he only appears with the sole object of protesting against the jurisdiction, I do not think he can be said to submit to the jurisdiction: see *Tallack v. Tallack & Broekema* (5) ([1927] P. 222) *per* LORD MERRIVALE.

It may be said that in this case the father did more than protest against the jurisdiction, because he contested the issue of custody, but in that respect he was only seeking to protect the order for custody which he himself had obtained in the French courts. That is not sufficient to amount to a submission to jurisdiction on the maintenance claim. So, also, it is said that he did more than protest against the jurisdiction, because he took the technical objection that the application was not made by the mother: see [1950] 2 All E.R. 1019, 1020; but that was not an objection on the merits. It was another objection going to jurisdiction and was not sufficient to amount to a submission to the jurisdiction.

Harris v. Taylor (1) appears at first sight to conflict with the views I have expressed, but a careful examination of that case shows that it is distinguishable. The plaintiff there sued the defendant in the Isle of Man for a tort committed there. The defendant was not in the island, but the Manx court gave leave to

serve him out of the jurisdiction of the Manx court on the ground that the cause of action was founded on a tort committed within their jurisdiction. The defendant entered a conditional appearance in the Manx court and took the point that the cause of action had not arisen within the Manx jurisdiction. That point depended on the facts of the case, and it was decided against him, whence it followed that he was properly served out of the Manx jurisdiction in accordance with the rules of the Manx court. Those rules correspond with the English rules for service out of the jurisdiction contained in R.S.C., Ord. 11, and I do not doubt that our courts would recognise a judgment properly obtained in the Manx courts for a tort committed there whether the defendant voluntarily submitted to the jurisdiction or not, just as we would expect the Manx courts in a converse case to recognise a judgment obtained in our courts against a resident in the Isle of Man on his being properly served out of our jurisdiction for a tort committed here. *Harris v. Taylor* (1) is an authority on *res judicata* in that the defendant was not allowed in our courts to contest the service on him out of Manx jurisdiction, because that was a point that he had raised unsuccessfully in the Manx court, and he had not appealed against it. To that extent he had submitted to the jurisdiction of the Manx court and was not allowed to go back on it, but the case is no authority on what constitutes a submission to jurisdiction generally.

Relieved of *Harris v. Taylor* (1), I think it plain that the father here did not voluntarily submit to the jurisdiction of the Court of Chancery in regard to the claim for maintenance. He appeared and protested vigorously against it. It would be contrary to the facts to say that he submitted to it. That is sufficient to decide the only issue which this court on the last occasion referred back to the judge, but I desire to point out that no application was made in this case to make the father a party to the proceedings or to serve him out of the jurisdiction under the provisions of R.S.C., Ord. 11, r. 1 (g), or r. 8A (b) (1). If it had been, I think that an order for maintenance might well have been made against him. Take the case of the English wife of an American, who is deserted by him and left here with a child and no means to maintain it, while the father goes off to America leaving assets here. If she brings a petition in a matrimonial cause, she can serve her husband out of the jurisdiction without leave: see the Matrimonial Causes Rules, 1947, r. 9. She can properly include in her petition a claim for custody and for maintenance of the child, and the Divorce Court would, undoubtedly, have jurisdiction to order him to pay maintenance for it. I see no reason why the Court of Chancery should not in its own sphere exercise a like jurisdiction. It could be done in one of two ways: (i) If a claim on the father for custody and maintenance were made by originating summons, he would have to be a party to the summons and leave could be given to serve him out of the jurisdiction under R.S.C., Ord. 11, r. 8A (b) (1). (ii) If the claim on him for custody and maintenance were made on the writ in an action to make the infant a ward of court and to execute the trusts of a settlement, the father would be a proper party to those proceedings, and leave could be given to serve him out of the jurisdiction under R.S.C., Ord. 11, r. 1 (g). In the present case, however, no such procedure was gone through. The father was not made a party to the proceedings. He was only given notice of a summons which did not make any claim on him at all. That is quite insufficient to found a jurisdiction under Ord. 11. That is a good reason why this court on the last occasion said that the judge would only have jurisdiction to order maintenance if the father voluntarily submitted to the court having jurisdiction in the matter. I take it to be clear that, if a child is within the jurisdiction of the Court of Chancery, it has power to order custody to the mother and maintenance against the father under the Guardianship of Infants Acts, even if the father is resident outside the jurisdiction, but it is essential that the father should be a party to the proceedings and should either be served here or be served out of the jurisdiction under

Ord. 11, or voluntarily submit to the jurisdiction. None of that has been done. The appeal, therefore, fails. I must say that I regret it, because it only fails on a technicality. I would willingly overcome it if I could, but I do not see how to do it, having regard to all that has happened. The process of the court can only be exercised against a person who is properly made a party to the proceedings and is properly served.

Appeal dismissed.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the infant); *Johnson, Jecks & Landons* (for the father).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Distinguished. R. v. FOLKESTONE
AND AREA RENT TRIBUNAL. [1951]
2 All E.R. 921.

FRANCIS JACKSON DEVELOPMENTS, LTD. v. HALL AND ANOTHER.

[COURT OF APPEAL (Denning and Hodson, L.JJ., and Lloyd-Jacob, J.), April 30, May 10, 1951.]

Rent Restriction—Possession—Whole of dwelling-house sub-let furnished—Notice to quit by head landlords to expire on Dec. 11, 1950—Notice to quit to sub-tenant to expire on Dec. 9, 1950—Application by sub-tenant to rent tribunal on Dec. 7, 1950—Action for possession commenced by head landlords on Dec. 13, 1950, while sub-tenant in occupation under statutory security of tenure—Application of doctrine in Prout v. Hunter—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 11 (2) (a).

Rent Control—Application—Validity—Misnomer of landlord—Landlord and Tenant (Rent Control) Regulations, 1949 (S.I., 1949, No. 1096), reg. 3 (2), as amended by Landlord and Tenant (Rent Control) (Amendment) Regulations, 1950 (S.I., 1950, No. 1763), reg. 2.

On Aug. 5, 1949, H., the tenant of a dwelling-house which was subject to the Rent Restrictions Acts, granted a furnished sub-tenancy of part of the house, retaining the rest of the house for herself. On July 24, 1950, the tenancy of the house was transferred from H.'s name into that of her mother, T., who had been living with her, but H. continued to live there and to manage the house on behalf of T. On Nov. 11, 1950, as a temporary measure for the convenience of the sub-tenant, H., on behalf of T., granted to the sub-tenant a furnished tenancy of the whole house, and H. and T. went to live elsewhere, with a clear intention of returning. On learning that the whole house had been sub-let, the head landlords determined the tenancy by a notice to quit, dated Nov. 28, 1950, to expire on Dec. 11, 1950. H., in her own name, then gave the sub-tenant notice to quit, dated Nov. 30, 1950, to expire on Dec. 9, 1950. On Dec. 7, 1950, the sub-tenant made an application to the rent tribunal to fix a reasonable rent and for security of tenure, H. being named as the landlord in the application. On Dec. 13, 1950, while the sub-tenant was still in occupation of the house pending the determination of his application by the rent tribunal, the head landlords commenced an action for possession against T. and H. They contended *inter alia* that the doctrine of *Prout v. Hunter* ([1924] 2 K.B. 736), applied, and that they were entitled to possession as the whole house was sub-let furnished on the date of the commencement of the action. T. and H. contended (a) that the sub-tenant was a trespasser when the action was commenced, his application to the rent tribunal being a nullity, as it named

H. instead of T. as the landlord, and (b) that, even if he were not a trespasser, the contractual sub-tenancy had expired on Dec. 9, 1950, and, therefore, the doctrine of *Prout v. Hunter* (*supra*), did not apply.

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HELD: (i) the Minister of Health, in making regulations under the Landlord and Tenant (Rent Control) Act, 1949, had no power to impose formal conditions of validity on an application to a rent tribunal, as the Act itself required none, and, therefore, the Landlord and Tenant (Rent Control) Regulations, 1949, reg. 3 (2), as amended by the Landlord and Tenant (Rent Control) (Amendment) Regulations, 1950, reg. 2, must be construed as directory and not imperative; accordingly, it was immaterial that the sub-tenant, in his application to the rent tribunal, had given H.'s name instead of that of T. as landlord, particularly as he had always regarded H. as the landlord and the notice to quit was in H.'s name; and, therefore, the application was effective and gave to the sub-tenant security of tenure under s. 11 (2) (a) of the Act of 1949, until the application was heard or withdrawn, and the sub-tenant was lawfully in occupation on Dec. 13, 1950, when the head landlords commenced the action for possession against T. and H.

(ii) where the sub-tenant of the whole of a furnished house made an application to a rent tribunal under s. 11 of the Act of 1949 the effect of s. 11 (2) (a) was not to extend the contractual tenancy as such, but only to give the sub-tenant a statutory security of tenure as against the tenant and during this statutory security the house was not sub-let furnished so as to bring the doctrine of *Prout v. Hunter* ([1924] 2 K.B. 736), into play, as that doctrine applied only to contractual sub-lettings, and therefore, as the contractual sub-tenancy expired on Dec. 9, 1950, the tenancy was within the protection of the Rent Restrictions Acts on Dec. 13, 1950, when the action was commenced, and the landlords' claim for possession failed.

Prout v. Hunter ([1924] 2 K.B. 736), distinguished.

FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 11, see
E HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1107.

Cases referred to:

- (1) *Skinner v. Geary*, [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 95 J.P. 194; Digest Supp.
(2) *Prout v. Hunter*, [1924] 2 K.B. 736; 93 L.J.K.B. 993; 132 L.T. 193; 31 Digest 557, 7040.
F (3) *Seaford Court Estates, Ltd. v. Asher*, [1949] 2 All E.R. 155; [1949] 2 K.B. 481; 2nd Digest Supp.

APPEAL by the landlords from an order of His Honour JUDGE TUDOR REES, made at Uxbridge County Court, and dated Feb. 13, 1951, dismissing an action for possession of premises to which the Rent Restrictions Acts applied.

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The defendants in the action were the tenant, Mrs. Tagg, and her daughter, Mrs. Hall, the tenancy having been in Mrs. Hall's name until July 24, 1950, and Mrs. Hall continuing to manage the house for her mother thereafter. The defendants, who had granted a furnished sub-tenancy of the whole house, served a notice to quit on the sub-tenant to expire on Dec. 9, 1950, after receiving a notice to quit from the head landlords to expire on Dec. 11, 1950. The sub-tenant thereupon made an application to the rent tribunal to fix a reasonable rent and for security of tenure, and on Dec. 13, 1950, while he was still in occupation of the house pending the determination of his application by the rent tribunal, the head landlords commenced an action for possession against the defendants, basing their claim on, *inter alia*, the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1), and sched. I, para. (d), *viz.*, that the defendants had sub-let the whole house without the landlords' consent and it would be reasonable to make an order. The county court judge held that, in the

circumstances of the case, it would not be reasonable to make an order and dismissed the action, but, in a note made by him after the judgment, he stated that, in his opinion, *Prout v. Hunter* ([1924] 2 K.B. 736), (to which he had no access during the hearing) covered the case, and, accordingly, he thought that his judgment was erroneous. On an appeal by the landlords to the Court of Appeal, the defendants contended (a) that the application by the sub-tenant to the rent tribunal was a nullity, as the name of the landlord was wrongly inserted therein, and, therefore, the sub-tenant was a trespasser when the action was commenced, and, alternatively (b) that the doctrine of *Prout v. Hunter* (*supra*) had no application to the case, as it applied only to contractual tenancies, and, when the action against the defendants was commenced, the sub-tenant was in occupation of the premises not under a contractual sub-tenancy, but only under s. 11 (2) (a) of the Landlord and Tenant (Rent Control) Act, 1949.

Gordon Hardy for the plaintiffs (the landlords).
Dare for the defendants.

Cur. adv. vult.

May 10. **DENNING, L.J.**, read the following judgment of the court. The plaintiffs are the owners of No. 120, Burnham Avenue, Ickenham, Middlesex. The defendants, Mrs. Hall and Mrs. Tagg, are members of a family which have occupied the house for twelve years at a rent of 18s. 6d. a week plus rates. On Aug. 5, 1949, Mrs. Hall, who was then the tenant, let part of the house furnished to a sergeant in the United States Air Force, named Perkins, at a rent of £5 a week, but she continued to live in the rest of the house herself. On July 24, 1950, the tenancy of the house was transferred from the name of Mrs. Hall into the name of her mother, Mrs. Tagg, but Mrs. Hall continued to live there and do all the business connected with the house on behalf of her mother. In the autumn of 1950 Sergeant Perkins wanted more room in the house because his wife was expecting a baby, so Mrs. Hall, on behalf of her mother, let him take over the rest of the house furnished on his paying an extra £1 a week, and Mrs. Hall went temporarily to live elsewhere. This new arrangement started on Nov. 11, 1950, and Sergeant Perkins on that day paid Mrs. Hall £12, being two weeks' rent in advance at the new rate of £6 a week. When the head landlords heard that Sergeant Perkins had taken over the whole house, they immediately gave Mrs. Tagg and Mrs. Hall notice to quit. They determined the tenancy by a notice to quit, dated Nov. 28, 1950, to expire on Dec. 11, 1950. Thereupon Mrs. Hall, on behalf of her mother, did all she could to rectify the position. She gave Sergeant Perkins notice to quit. The notice to him was dated Nov. 30, 1950, to expire on Dec. 9, 1950. If Sergeant Perkins had obeyed that notice, Mrs. Hall and her mother could have gone back into the house just in time before their own tenancy expired on Dec. 11, 1950, and there is no doubt that they would then have been protected by the Rent Restrictions Acts. Sergeant Perkins, however, soon showed that he did not intend to comply with the notice. He offered to pay the rent of £6 a week, but it was refused. Then he went to his solicitors (who were, incidentally, also the solicitors acting for the head landlords) and they took steps to protect him in his occupation. They made an application to the rent tribunal to fix a reasonable rent and for security of tenure. This application was made on Dec. 7, 1950, just two days before the notice to quit to him expired. The application named Mrs. Hall as the landlord, no doubt because she was the only one whom Sergeant Perkins knew in the matter. If that application was effective, it meant that Sergeant Perkins had security of tenure at any rate until the rent tribunal heard his application: see the Landlord and Tenant (Rent Control) Act, 1949, s. 11 (2) (a). The solicitors, having thus, as they thought, made Sergeant Perkins secure, then acted in their other capacity as solicitors for the head landlords, the plaintiffs. They issued a plaint in the county court against Mrs. Tagg and Mrs. Hall claiming possession of the whole house on the ground that it had been let furnished to Sergeant Perkins without

the knowledge or consent of the head landlords. The head landlords did not make Sergeant Perkins a defendant because, as they frankly admitted, they intended to let him stay there. If they got an order against Mrs. Hall and Mrs. Tagg, they intended to let the house to Sergeant Perkins unfurnished. It is important to notice that it was never suggested that Mrs. Hall and Mrs. Tagg had gone finally out of possession themselves. They had only gone temporarily so as to help Sergeant Perkins in a difficulty in which he found himself. They had left their furniture there, and some of their clothes. They also retained the key of the outside shed. They had a clear intention to return. It was not a case, therefore, where they had lost the protection of the Acts under the doctrine of *Skinner v. Geary* (1). That point was, indeed, not taken in the court below, nor in this court.

The claim for possession was put in the court below principally on the ground that the tenant without the consent of the landlords had sub-let the whole of the dwelling-house, and that it was reasonable to make an order: see the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1), and sched. I, para. (d). The judge found that she had so sub-let it without their consent, but he dismissed the claim because in all the circumstances (which he carefully investigated) it would not be reasonable to make an order for possession. The judge's finding on that point was not challenged in this court. At the hearing of the appeal before us the head landlords sought to gain possession on a ground where reasonableness does not matter, namely, on the ground that the whole house was sub-let furnished on Dec. 13, 1950, when they commenced the action. That point was taken before the judge, but he was not referred to any of the authorities and he rejected it. When he looked into the matter afterwards, he thought that he ought to have ordered possession. He made a note after the judgment in which he said:

"On subsequent reflection, and on a reference to the authorities (there is no library at the court), I have now come to the conclusion that the foregoing judgment is wrong in law. I had overlooked, and my attention was not drawn to, *Prout v. Hunter* (2). If that authority had been before me, I should have held that it completely covered this case."

On reading that note, we called on counsel for the defendants and asked him if he could support the judgment which was pronounced. He then sought to support it, as he was entitled to do, on the ground that the house was not sub-let furnished on Dec. 13, 1950, when the head landlords commenced this action, and that, therefore, *Prout v. Hunter* (2) did not apply. He said that the contractual sub-tenancy to Sergeant Perkins had expired on Dec. 9, 1950, four days before the landlords brought their action for possession, and that thereafter the house could not be said to be sub-let furnished, notwithstanding the application made by Sergeant Perkins to the rent tribunal. He put his argument in two ways.

The first contention of counsel for the defendants was that on Dec. 13, 1950, Sergeant Perkins was a trespasser. He said that the application by Sergeant Perkins to the rent tribunal on Dec. 7, 1950, was a nullity, because it named Mrs. Hall as the landlord instead of Mrs. Tagg. He said that every tenant who applies to a rent tribunal for security of tenure must, at his peril, comply with all the regulations made by the Minister of Health* under the provisions of the Act of 1949, and, in particular, the tenant must specify the name and address of the landlord and all other matters which are set out in the Landlord and Tenant (Rent Control) Regulations, 1949 (S.I., 1949, No. 1096), reg. 3 (2), as amended by the Landlord and Tenant (Rent Control) (Amendment) Regulations, 1950

* By the Transfer of Functions (Minister of Health and Minister of Local Government and Planning) (No. 1) Order, 1951 (S. I., 1951, No. 142), art. 3 (1) and sched., Part I, the functions of the Minister of Health under the Landlord and Tenant (Rent Control) Act, 1949, were transferred to the Minister of Local Government and Planning, as from Jan. 30, 1951.

(S.I., 1950, No. 1763), reg. 2. If the tenant failed to specify in his application any of the matters required by the regulations, as, for instance, if he failed to specify the name of the landlord or his address, or specified them wrongly, counsel contended that the application would be a nullity and the tenant would not have the security of tenure given by s. 11 (2) (a) of the Act of 1949. We cannot accept that contention. Take this very case. Mrs. Hall was the only person whom Sergeant Perkins knew in the matter. She managed the house on behalf of her mother. She let it to Sergeant Perkins and she gave him notice to quit in her own name. Counsel for the defendants admitted that the notice to quit in her name was good, but said that the application to the tribunal was not. We are quite sure that Parliament did not intend any such thing. The Act of Parliament does not require an application to a rent tribunal to be in any prescribed form. It contemplates that applications under the Act will often be made by tenants who have no lawyers to advise them and no regulations by their side, and for this very reason it does not prescribe any formalities. It gives the Minister power to make regulations with regard to proceedings before rent tribunals, and that, no doubt, includes power to give directions as to the form which applications should take, but the Minister has no power to impose formal conditions of validity on an application when Parliament itself has required none. The regulations must, therefore, be construed as directory and not imperative, for otherwise the Minister would be exceeding his powers. So construed, it follows that an application to a rent tribunal is not a nullity, even though the name of the landlord was wrongly given. The application of Sergeant Perkins on Dec. 7, 1950, was, in our opinion, an effective application under s. 11 of the Act of 1949, and gave him security of tenure until the application was heard or withdrawn. Accordingly, he was lawfully in occupation on Dec. 13, 1950, when the head landlords brought this action for possession.

The second contention of counsel for the defendants was that the doctrine of *Prout v. Hunter* (2) applies only to contractual furnished sub-tenancies, and that in this case, the contractual sub-tenancy having expired on Dec. 9, 1950, the house was not thereafter sub-let to Sergeant Perkins so as to bring the principle of *Prout v. Hunter* (2) into play. He said, quite correctly, that the right of Sergeant Perkins to occupy the house after Dec. 9, 1950, arose, not from any contract of letting by Mrs. Tagg or Mrs. Hall, but only from s. 11 (2) (a) of the Act of 1949. Sergeant Perkins thenceforward occupied the house against the will, and without the consent, of Mrs. Tagg and Mrs. Hall, as much as if he had been a trespasser. It would be strange if they should lose the protection of the Rent Restrictions Acts by his manoeuvre. In answer to this argument counsel for the head landlords points out that s. 11 (2) (a) of the Act of 1949 says that, on an application to a rent tribunal, "the notice to quit . . . shall not . . . have effect before the determination of the application" and he contends, therefore, that the furnished sub-letting continued. We agree that, if the words of s. 11 (2) (a) of the Act are given their literal meaning, it would seem that the house was still sub-let furnished on Dec. 13, 1950, because, owing to the statute, the notice to quit had not then taken effect. We are quite sure, however, that Parliament did not mean *Prout v. Hunter* (2) to operate in those circumstances, for the result would be that, owing to the furnished sub-letting, a head landlord would be able, as soon as his common law right to possession arose, to evict, not only the head tenant, but the sub-tenant also. In this particular case the head landlords have said that they do not intend to evict Sergeant Perkins, but the fact remains that they would have the legal right to do so. The result would be, therefore, that by reason of Sergeant Perkins' application for security of tenure, all the tenants, including Sergeant Perkins himself, would lose their security of tenure. We do not think that we should adopt a construction of the Act which would produce a result so opposed to the intention of Parliament. If the literal interpretation of a statute leads to a result which Parliament can never have intended, the courts must reject that interpretation and seek for some other

interpretation which does give effect to the intention of Parliament: see *Seaford Court Estates, Ltd. v. Asher* (3) ([1949] 2 All E.R. 164). This can be done here by holding that, when a sub-tenant of the whole of a furnished house applies to a rent tribunal under s. 11 of the Act of 1949, the effect is, not to extend the contractual sub-tenancy as such, but only to give the sub-tenant a statutory security of tenure as against the tenant. During the period of this statutory security, the house is not sub-let furnished so as to bring the doctrine of *Prout v. Hunter* (2) into play, because that doctrine only applies to contractual sub-lettings.

In our opinion, therefore, *Prout v. Hunter* (2) does not cover this case. The judgment which the judge gave at the trial was correct and should be affirmed. We were told that the rent tribunal have given Sergeant Perkins security of tenure until May 11, 1951, only. He will then have to leave, and Mrs. Tagg and Mrs. Hall will resume occupation, as they would have done on Dec. 9, 1950, if he had complied with the notice to quit. They will thus keep the protection of the Rent Restrictions Acts. The appeal must be dismissed.

Appeal dismissed.

Solicitors: *Champion & Co.*, agents for *Turberville Smith & Co.*, Uxbridge (for the plaintiffs); *Lucien Fior* (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

ROGERS v. HYDE.

[COURT OF APPEAL (Lord Asquith of Bishopstone, Birkett, L.J., and Lloyd-Jacob, J.), March 19, 20, May 10, 1951.]

Rent Restriction—"Separate dwelling"—Letting of rooms with "licence to use kitchen"—Declaration in agreement that tenancy to be within the Rent Acts.

As part of the terms of settlement of an action for possession brought by the owner of a house within the Rent Restrictions Acts against the statutory tenant of the premises it was agreed that the tenant was to give up her tenancy of the whole house and should be granted a weekly tenancy of part of it and that the owner and the tenant were to have joint use of the bathroom and certain other parts of the house which were not essential living accommodation. It was also provided that the tenant was to have "licence to use scullery (kitchen) at all reasonable times," and there was a declaration that the tenancy was to be within the Rent Acts. The owner having sold the house to the plaintiff subject to the tenant's rights, the plaintiff gave the tenant notice to quit, and sued for possession.

HELD: (LLOYD-JACOB, J., *dissentiente*): by providing that the tenancy should be within the Rent Acts the parties to the agreement could not of their own volition oust or reduce the jurisdiction of the courts to grant orders for possession, and, as the grantee of a licence to use a kitchen differed only in name from the grantee of a right to "share" or use it in common with the landlord, the tenant was not the occupier of a separate dwelling so as to be entitled to the protection of the Acts, and the plaintiff was entitled to possession.

Dictum of LORD REID in *Baker v. Turner* ([1950] 1 All E.R. 854), applied.

AS TO "SEPARATE DWELLING," see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-315, paras. 369, 370; and FOR CASES, see DIGEST, Vol. 31, p. 557, Nos. 7044-7048.

Cases referred to:

(1) *Foster v. Robinson*, [1950] 2 All E.R. 342; [1951] 1 K.B. 149.

- (2) *Baker v. Turner*, [1950] 1 All E.R. 834; [1950] A.C. 401.
- (3) *Neale v. Del Soto*, [1945] 1 All E.R. 191; [1945] K.B. 144; 114 L.J.K.B. 138; 172 L.T. 65; 2nd Digest Supp.
- (4) *Rainger v. Kerrison*, [1947] L.J.N.C.C.R. 288.
- (5) *Bowler v. Williams*, [1949] W.N. 180; 2nd Digest Supp.

APPEAL by the tenant from an order of His Honour JUDGE HAMILTON, made at Coventry County Court, and dated Jan. 22, 1951, whereby he granted to the land-
lord possession of certain rooms let to the tenant.

A. W. M. Davies for the tenant.

R. E. Megarry for the landlord.

Cur. adv. vult.

May 10. **LORD ASQUITH OF BISHOPSTONE** (read by BIRKETT, L.J.): This is the tenant's appeal against a decision of His Honour JUDGE HAMILTON in the Coventry County Court granting the landlord possession of certain rooms in a house (75, Allesley Old Road, Coventry) owned by the landlord. These rooms are within the limits of rateable value covered by the Rent Restrictions Acts. Possession was granted on the footing that the rooms were, nevertheless, not protected by the Act, because not "let as a separate dwelling." The appeal raises afresh the hydra-headed problem whether and in what circumstances the Acts fail to protect a tenant because the letting of certain rooms to the tenant for his exclusive use is accompanied by the grant of a right to use some other essential living room in common with someone.

The facts are hardly in dispute. In June, 1940, the tenant became the contractual tenant of the whole dwelling-house from its then owner, one Cleaver. She remained so for five years, when Cleaver served a notice to quit. On its expiration the tenant became a statutory tenant. Cleaver, who wanted the house for his own occupation, sued for possession. The proceedings came on before the county court judge at Coventry on July 23, 1945. According to a practice then not uncommon, the proceedings were adjourned in the hope of a compromise, with liberty to either party to apply, and (whether by order of the court or otherwise) an *interim modus vivendi* was brought into operation whereby Cleaver was to share the house or part of it with the tenant. Cleaver moved in, occupied certain rooms for himself, but "shared" the use of the kitchen with the tenant. I will defer for the moment my apologia for using the discredited expression "share." This arrangement (to call it by a neutral name) lasted for nearly four years. In April, 1949, Cleaver wanted to get possession of the whole house, and, in pursuance of the liberty to apply, restored the case to the list. Between 1945 and 1949 a number of cases had been decided which may well have encouraged Cleaver to suppose that the sharing arrangement which obtained during that period would entitle him to obtain possession. However, the case was again adjourned for terms, if possible, to be agreed. Agreed in the end they were, and embodied in a document of Apr. 11, 1949. This is the crucial document in the case. These terms, so far as relevant, are as follows:

"(1) Present action to be withdrawn upon following terms . . . (3) Miss Hyde to be granted weekly tenancy of part of house at 75, Allesley Old Road, Coventry . . . (5) Mr. and Mrs. Cleaver to have sole use of front bedroom and front sitting-room. (6) Parties to share: (a) Cupboard on stairs and boxroom. (b) To have joint use of bathroom, w.c., hall, pantry, 'bogey-hole' and garage . . . (9) Miss Hyde to have licence to use scullery (kitchen) at all reasonable times. (10) Mr. and Mrs. Cleaver to pay rates. Miss Hyde's tenancy to be within Rent Acts."

A few months later Cleaver sold the house to Rogers, the present landlord, who bought it subject to the presence of the tenant there. He stepped, in effect, into Cleaver's shoes. That situation persisted till January, 1951, when, having given a notice to quit, the landlord sued for possession on the ground that there was

in existence a "sharing" arrangement, and hence the premises were not "let to the tenant as a separate dwelling."

A The whole case, in my view, turns on the construction of the terms of the settlement of Apr. 11, 1949. There is no doubt that the tenant was a statutory tenant just before July, 1945. There was at certain stages in these proceedings some debate whether the tenant was divested of that character by what I have called the *modus vivendi* of 1945-49, with its *de facto* sharing of the kitchen. I do not think it matters whether during that period the tenant was a statutory tenant or not. In either case the possession from Apr. 11, 1949, on was governed by the instrument of that date. If the preceding tenancy was contractual, this is obvious. If it was a statutory tenancy, there is recent and binding authority for the proposition that a contractual (and non-protected) tenancy can replace a statutory tenancy by a notional surrender and re-grant or by other means: see, B for instance, *Foster v. Robinson* (1), a case recently decided by the Court of Appeal.

The question is what the terms of settlement of Apr. 11 mean. Do they, on their true construction, provide for a "sharing" of the kitchen in the pejorative sense of the word "share"? If they do, the tenant is unprotected, for the law, even since *Baker v. Turner* (2) and the Landlord and Tenant (Rent Control) C Act, 1949, seems to me to leave intact the proposition that where a landlord confers on a tenant the right to use in common with himself an essential living room, for example, the kitchen, the tenant is not the tenant of a dwelling-house "let as a separate dwelling." I will deal with *Baker v. Turner* (2) more fully in a minute. In using the term "sharing" in this connection I have been careful to enclose it in inverted commas to show I am not unmindful of the strictures which D LORD PORTER, in *Baker v. Turner* (2), has passed on its misleading implications. I have, nevertheless, retained it, because it is so inveterately embedded in the *Neale v. Del Soto* (3) set of decisions that it is difficult to dislodge or to replace with any paraphrase of comparable brevity.

To return to the "terms" of Apr. 11, 1949. Two points stand out in relation to these terms. First, by No. 10 of them, the parties are attempting by a contractual provision to bring the house within the protection of the Rent Restrictions Acts. This, in my view, they cannot do. Parties cannot of their own volition oust or reduce the jurisdiction of the courts to grant orders for possession. Secondly, the draftsman is clearly familiar with the *Neale v. Del Soto* (3) series of cases and is trying so to frame his terms as to effect a "sharing" without divesting the house of any protection it may enjoy under the Acts. He realises E that under the decisions the kitchen is, but that neither the bathroom, w.c., nor garage is, an "essential living room"; he realises that one can safely "share" the latter, but not the kitchen. He, therefore, provides that the bathroom, w.c., and garage shall be shared, or used in common, but is careful, in relation to the kitchen, (a) to avoid expressions such as "share" or "use in common with," (b) to employ the word "licence" instead, and (c) to deal with the kitchen and G the rights or liberties conferred in respect of it in a clause of the instrument which is in form self-contained and segregated from the corresponding provisions in respect of the bathroom, etc.

The first point to be determined is whether the grant by the landlord in respect of the kitchen of a right deliberately not described as one of "sharing" or of "joint or common user," but described as a "licence to use . . . at all reasonable times", distinguishes the case from the *Neale v. Del Soto* (3) type of case, and leaves it open to the tenant to claim the protection which in the *Neale v. Del Soto* (3) type is excluded. In other words, is the right given to a tenant in a *Neale v. Del Soto* (3) case something which differs from, and exceeds, a licence (I mean for this purpose a licence irrevocable for the term of the lease of the rooms exclusively let, for a licence determinable earlier will presumably create no "sharing")? There is no doubt that in some of the cases a distinction is drawn between these two things, "sharing" and "licence." A good example is the

county court decision in *Rainger v. Kerrison* (4). This case, though not technically binding on this court, is a carefully reasoned decision, to be treated with respect. There seems to have been a lease to a tenant of premises which included a kitchen, subject to a licence given by the tenant to the landlord, simultaneously, to use the kitchen. The county court judge held (a) that the terms of the letting, not the *de facto* arrangements as to the subject-matter let, governed the legal position *quoad* the Rent Restrictions Acts, and (b) that the licence granted to the landlord was a *de facto* arrangement which did not defeat the protection of the Acts. A The relevant question, said the learned judge, is: "What was demised?" The kitchen was demised. A licence to the landlord to use it given by the tenant, perhaps later, perhaps not to last as long as the lease, could not alter this position. In *Bowler v. Williams* (5), a Court of Appeal decision, the county court judge had found that the kitchen (or scullery) was among the rooms let to the tenant and that there was no agreement to share it, but that there was a temporary licence B granted by the tenant to the landlord to use the kitchen or scullery for a few weeks. The Court of Appeal on these facts held there was no "sharing" such as to remove the protection of the Acts. *Rainger v. Kerrison* (4) and *Bowler v. Williams* (5) are both cases in which the tenant, having exclusive possession of the kitchen, granted a licence over it to the landlord and not *vice versa*.

Before considering the argument advanced by counsel for the landlord in support of the order for possession, it is necessary to determine the impact on the issues involved of the decision of the House of Lords in *Baker v. Turner* (2). Until their Lordships decided that case, there was a tendency to assume that if A "shared" a subject-matter with B, B "shared" that subject-matter with A, C in a sense of the word "shared" which applied impartially as between them. D *Baker v. Turner* (2) in the present connection gives the quietus to this facile assumption and decides that where there are two people sharing they need not "share" in the same sense or on an equal basis. They may, if the barbarism can be tolerated, the one be "sharer" and the other "sharee." As between the parties to the sharing, the rights in the thing shared enjoyed by each may be disparate. Both LORD PORTER and LORD MACDERMOTT make this clear in relation to the facts before them in that case. A let to B. B sub-let to C, subject to liberty E on the part of C to use the kitchen in common with B. Here C is "sharing" with B, and for that reason is unprotected by the Acts, but B is not sharing with C, and he retains protection of the Acts. Why? Because the quality of B's rights in the kitchen differs wholly from the quality of C's rights in it. B can (it may be, must) F repair and re-decorate the kitchen. He can hang in it what pictures he likes, can turn on the wireless, and can admit other licensees to use it. C cannot do any of these things. B in this connection is dominant, C is servient. B can say of C: "You are a mere sharer. I can extrude you. You cannot say I have let to you a separate dwelling." But A cannot say the same to B, for B retains a general exclusive dominion of the kitchen, subject only to the licence given by him to C.

In *Baker v. Turner* (2) it so happened that three parties were involved—the lessor, the lessee, and a sub-lessee, but the logic of the decision must necessarily G apply to a case in which there are only two parties, X lessor, and Y lessee. As between these two, if there be a lease to the lessee of, say, the whole house less the kitchen and the grant of a right to the lessee to use the kitchen along with the lessor, then the lessee is unprotected. But if all the house, including the H kitchen, is let to the lessee, who then grants the lessor a right or licence to use the kitchen in common with himself, the lessee continues protected. In other words, the grantor of the right to share is in a very different position from the grantee. The grantee of such a right is not the lessee of a separate dwelling. *Baker v. Turner* (2) does not expressly decide this, but it seems to me firmly explicit in its logic.

This is the foundation of the argument for the landlord in the present appeal. Counsel argues that the subject-matter of a so-called "sharing" must be a recognised juridical entity. The subject-matter of a demise is a physical item of

realty. A demise confers on Y exclusive possession of this item and an "estate" in it. A licence confers neither, but only permission to use this item of realty without being guilty of a trespass. But he contends that any right intermediate between the two, a right of joint or common user capable of being demised, is a legal chimera. Counsel, accordingly, boldly argues that where a demise of certain rooms is accompanied with a grant of user of other rooms in common with the landlord, the right of user of the other rooms, though sometimes spoken of as "let," is nothing more or less than a licence to use them, co-extensive in duration with the lease. In my view, his submission is supported by the following passage from the speech of LORD REID in *Baker v. Turner* (2) ([1950] 1 All E.R. 854):

"If a tenant has to share with another person a living room which is not let to him, it is, in my view, impossible to find anything which is let to him as a separate dwelling. It cannot be the let rooms plus the right to use the other room, because that other room is not let to him at all—he is only a licensee there."

Counsel couples this submission with another, *viz.*, that the recipient of such a licence from his landlord is a "sharer" or "grantee" disabled as such from enjoying the protection of the Acts while the grantor of the licence is not. Of course, where the landlord is the grantor, as in the present case, he does not need this particular kind of immunity, but where, as in *Baker v. Turner* (2), the position of a head lessee who has sub-let, as against the head landlord, has to be determined, his possession of that immunity may make all the difference to him.

For myself, I accept the argument of counsel for the landlord in its essentials so far as they are applicable in this case. The grantee of a licence to use a kitchen seems to me to differ in name only from the grantee of a right to "share" or use it in common with the landlord. I asked counsel for the tenant to indicate what the grantee of either right could do to the room which the grantee of the other right could not, and I do not consider that he had any real answer to this question. If we decided otherwise, the effect of *Neale v. Del Soto* (3), which has been accepted by the House of Lords, could be circumvented in every case by simply substituting the word "licence" for "share" or for "right to use in common." For these reasons I consider the appeal should be dismissed.

BIRKETT, L.J.: I have had the advantage of reading the judgment of LORD ASQUITH. I agree entirely with the reasons there formulated and the decision there announced, and for myself do not desire to add anything further.

LLOYD-JACOB, J., read the following judgment. It is with regret that I find myself unable to concur in the conclusion reached by my brethren. The decision of the House of Lords in *Baker v. Turner* (2) has now made manifest that the fact of multiple use of an essential living room does not necessarily result in depriving the portion of a house which includes that living room of its character of a separate dwelling and that protection by the Rent Acts is only lost if the occupation enjoyed by the statutory tenant is not of a separate dwelling. The tenant was possessed of a statutory tenancy of the whole premises at 75, Allesley Old Road, Coventry, in 1940, and continued in full possession until after an initial hearing of a summons for possession issued by her then landlord, one Cleaver, in July, 1945. That hearing was adjourned, apparently, to enable the parties to arrive at some suitably acceptable arrangement by which both could occupy the property and was restored for further hearing in April, 1949. After a partial hearing terms of settlement of the proceedings were agreed. These terms were carried into practice for a short time, and in August, 1949, the plaintiff purchased the house from Cleaver, with knowledge of the terms of settlement. Cleaver vacated such portion of the premises as he had been permitted to occupy under the terms of settlement, and the present landlord moved in. In March, 1950, the landlord became desirous of selling the property, and, doubtless to secure the

enhancement of price which is a consequence of vacant possession, purported to determine the tenant's tenancy by a notice to quit, and commenced the present proceedings.

In my judgment, the tenant was entitled to rely, during the pendency of the original summons for possession between 1945 and 1949, on the well-established rule of law that the material time for the determination of the issues between her and her landlord was the moment when action was brought, and it would be wrong, in my judgment, to penalise her for any consideration which she showed during those years to her landlord. The case must, therefore, be determined on the terms of settlement dated Apr. 11, 1949, made between the holder of a protected tenancy and her landlord. The terms provide, *inter alia* (see cl. 3 and cl. 10) that the tenant was to be granted a weekly tenancy, within the Rent Acts, of part of the house and not the whole. This reference to the Rent Acts is not, as I see it, an attempt by contract to limit the jurisdiction of the court, but an acknowledgment by the parties that forfeiture of protection under the Rent Acts was not contemplated or intended. The sole use of certain defined rooms and the joint use of certain ancillary accommodation is specified, and by cl. 9 it is provided that the tenant is to have licence to use the scullery (kitchen) at all reasonable times. Such scullery (kitchen) is admittedly an essential living room, and it is neither included within the accommodation expressly reserved either to the tenant or to the landlord, nor within that expressly recited as for joint use. The evidence that both landlord and tenant have enjoyed the use of the scullery (kitchen) since the conclusion of the litigation is no more determinate of the issue than the absence of reference to it in the list of exclusively and jointly used accommodation.

To justify an order for possession, the landlord must establish that the tenancy enjoyed by the tenant does not extend to a separate dwelling, which includes an essential living room, namely, a kitchen. If he carried out the provisions of cl. 3 and cl. 10, clearly such a tenancy would be created. It is contended that the presence of cl. 9 is inconsistent with such a tenancy. I cannot so regard it, particularly where, as here, the scullery (kitchen) was at the date of the settlement in fact within the tenant's tenancy. No express words exclude it from the tenancy contemplated by the terms. The language of cl. 9 is consistent with the inclusion of the kitchen within the tenancy, but because, for example, of the supply of gas and electricity, to which the provisions of cl. 4 (c) relate, the user of the services therein provided should be kept within reasonable bounds. If the licence were determined or surrendered, no doubt separate supplies of gas and electricity would need to be provided. But it would be an unjustifiable extension of the *Neale v. Del Soto* (3) line of cases, in my judgment, to hold that the absence of a separate gas and electricity meter prevents a set of rooms from being a separate dwelling. Where, as here, the terms of settlement can be construed in a consistent fashion, it would be intolerable to adopt an alternative construction which not only evades the expressed intention of the parties, but deprives the tenant of a statutory provision. For my part, I would allow this appeal.

Appeal dismissed.

Solicitors: *White & Leonard*, agents for *H. T. Cooper*, Coventry (for the tenant); *Maddocks & Colson*, agents for *G. S. N. Richards*, Coventry (for the landlord).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

WILLIAM CORY & SON, LTD. v. CITY OF LONDON
CORPORATION.

[COURT OF APPEAL (Lord Asquith of Bishopstone, Birkett, L.J., and Harman, J.),
April 11, 12, May 10, 1951.]

*Contract—Repudiation—Anticipatory breach—Contract with corporation for removal
of refuse—Undertaking by contractors to observe bye-laws—Sealing of new
bye-laws—Substantial additional burden on contractors.*

The City of London Corporation, as the sanitary authority, made a contract for the removal of refuse from the city of London under which the contractors undertook to use lighters and barges fitted with "temporary coamings and coverings to be secured to the permanent coamings" and to comply with the bye-laws of the port health authority for the port of London as to removal of refuse. In April, 1948, when the contract still had a prospective life of some twenty years, the corporation, in their capacity of port health authority, sealed new bye-laws which were due to come into force in November, 1950. One of these bye-laws required every vessel transporting refuse to be provided with "permanent coamings and close-fitting hatches to such coamings, capable of completely covering the refuse, and . . . waterproof sheeting for covering such hatches." It was not disputed that the additional burden thrown on the contractors by this bye-law was such as would entitle them, when the bye-law came into force, to treat the contract as having been frustrated, but it was contended by the contractors that the making of the bye-law was an anticipatory breach of contract, entitling them forthwith to treat the contract as repudiated.

HELD: while it was an implied term of any contract that one party would not do anything to disable the other party from performing the contract, the implication of a term that the corporation would not make bye-laws of the nature of that now in dispute would impose an unwarrantable fetter on the corporation in the exercise of their statutory duties under the Public Health (London) Act, 1936, s. 84 (1) (a); such a term would be *ultra vires* the corporation; and, therefore, the sealing of the bye-laws was not a breach of a valid term of the contract and did not entitle the contractors immediately to treat the contract as repudiated.

Decision of LORD GODDARD, C.J. ([1950] 2 All E.R. 584), affirmed.

AS TO REPUDIATION OF CONTRACT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 227-230, paras. 311-315; and FOR CASES, see DIGEST, Vol. 12, pp. 338-345, Nos. 2830-2874.

Cases referred to:

- (1) *York Corpn. v. Leetham (Henry) & Sons, Ltd.*, [1924] 1 Ch. 557; 94 L.J.Ch. 159; 131 L.T. 127; Digest Supp.
- (2) *Southport Corpn. v. Birkdale District Electric Supply Co.*, [1925] Ch. 794; 94 L.J.Ch. 371; 133 L.T. 354; 89 J.P. 149; *affd. sub nom. Birkdale District Electric Supply Co. v. Southport Corpn.*, [1926] A.C. 355; 95 L.J.Ch. 587; 134 L.T. 637; 90 J.P. 77; Digest Supp.
- (3) *Ayr Harbour Trustees v. Oswald*, (1883), 8 App. Cas. 623; 11 Digest 103, 4.
- (4) *Mulliner v. Midland Ry. Co.*, (1879), 11 Ch.D. 611; 48 L.J.Ch. 258; 40 L.T. 121; 43 J.P. 573; 11 Digest 121, 139.

APPEAL by the claimants, William Cory & Son, Ltd., from an order of LORD GODDARD, C.J., dated July 4, 1950, and reported [1950] 2 All E.R. 584, made on a Case stated by the town clerk of the city of London pursuant to an arbitration clause in an agreement.

The claimants, a company of lightermen and barge-owners, had contracted with the City of London Corporation for the removal of refuse by barge, a term of the agreement being that they should comply with the bye-laws of the port

health authority of the port of London. The corporation were the sanitary authority for the city and also port health authority for the port. The company contended that they were entitled to treat the contract as immediately determined on the ground that it had been repudiated by the corporation when they sealed new bye-laws, one of which imposed (as from a certain future date) so substantial a burden on the company in equipping their barges as to entitle them, when it came into force, to treat the contract as frustrated. LORD GODDARD, C.J., held that the contract had not been repudiated.

Sir Walter Monckton, K.C., and Harvey, K.C. for the claimants.

Harold B. Williams, K.C., and Wilfrid Hunt for the corporation.

Our. adv. vult.

May 10. **LORD ASQUITH OF BISHOPSTONE** (read by BIRKETT, L.J.): This is an appeal from a decision of LORD GODDARD, C.J., resolving in favour of the respondents a point of law raised in an award in the form of a Special Case made in an arbitration between the claimants and the respondents. The arbitration took place in pursuance of an arbitration clause in a written contract between the parties dated Dec. 17, 1936.

The Corporation of London entered into this contract in its character as the sanitary authority for the purposes of the Public Health (London) Act, 1936, of the city of London, and, as such, the authority charged with responsibility for the removal of refuse from premises within the city. The corporation is also, by s. 5 of the same Act, the public health authority of the port of London, and, as such, charged with responsibility for making laws in relation, *inter alia*, to the disposal of refuse within the larger area of the port. The contract formulated the terms on which the claimants, William Cory & Son, Ltd., well-known barge and lighter owners, agreed with the corporation in its capacity as sanitary authority for the city to remove this refuse from Letts Wharf and to carry it in barges or lighters down the river to Hornchurch, where it was to be dumped. The most material of these terms for the present purpose were cl. 1 and cl. 13. Clause 1 provides:

"The contractors shall at all times during the continuance of this agreement provide at Letts Wharf on the River Thames such a number of staunch and strong lighters and barges which shall for the purpose of this agreement be fitted and maintained with temporary coamings and coverings to be secured to the permanent coamings as will be sufficient to remove the materials aforesaid from Letts Wharf aforesaid and in particular they shall at all times have so many lighters and barges moored alongside Letts Wharf aforesaid as will in the opinion of the director of public cleansing be sufficient for the reception of the materials aforesaid as the same are brought or conveyed to Letts Wharf aforesaid and are required by the director of public cleansing to be removed therefrom. Each lighter and barge shall be supplied by the contractors with sufficient hands tools and tackle."

Clause 13 of the agreement provides:

"Subject to the provisions of cl. 1 hereof the contractors shall at all times observe and comply with the bye-laws of the port health authority of the port of London for (a) the prevention of nuisances arising from refuse loaded into lighters or barges (b) the efficient cleansing of lighters or barges after discharge of loads and (c) the prescribed times during which loaded lighters or barges may remain in the district of the said port health authority. The contractors shall also at all times observe and comply with the provisions of all Acts of Parliament bye-laws rules regulations and orders of the Minister of Health Board of Trade Essex County Council the Port of London Authority River Police and/or any public

authority relating to the transport dumping and/or disposal of refuse traffic and/or offences on the River Thames and/or any matter or thing arising out of this agreement."

A The contract proved a bad bargain for the claimants. They were losing, even before the event next to be mentioned, about £7,000 a year on it. Then on Apr. 29, 1948, the corporation, acting in their other capacity (namely, as port health authority) on the advice of the medical officer of health of the port of London, sealed new bye-laws which were confirmed in July, 1948, by the Minister of Health. Number 2 of these bye-laws required that any vessel for removing refuse from the port of London must be provided with permanent coamings and close-fitting hatches capable of completely covering the refuse. Bye-law No. 2 was to take effect on Nov. 1, 1950. It is really unnecessary to B consider with precision or in any detail the various and contrasting requirements as to coamings, hatches and the like in the two sets of bye-laws and in cl. 1 of the contract. It is sufficient for the present purpose (i) that when the contract of 1936 was made the only relevant bye-laws in existence were those of 1897, the requirements of which were less stringent in this regard than those imposed by cl. 1 of the contract; (ii) that the requirements of the bye-laws C of 1948 were very much more stringent than those imposed by cl. 1, and *a fortiori* more stringent than those imposed by the bye-laws of 1897; (iii) that a compliance with the bye-laws of 1948 would have been in a commercial sense prohibitively onerous to the claimants who would have had to spend £400 or £500 on every barge and could no longer have used the barges which went to Hornchurch down river to return up river with cargoes of coal as theretofore; (iv) that in the ordinary course the contract would have run on for D another twenty-one years from 1948. (It was to continue for ten years and for a subsequent period until the Hornchurch dumps reached a specified height which they would have reached by 1969).

E On Sept. 21, 1948, the claimants wrote a letter to the corporation purporting to treat the act of the latter in sealing the bye-laws of 1948 as an anticipatory repudiation of the contract—and accepting that repudiation. The passage in the letter reads:

"I, therefore, write this letter to make it plain that my company regards the publication of the new bye-laws as amounting to a refusal by the corporation to allow the contract to run its natural course, and as entitling the company to treat the contract as at an end, which they hereby do."

F The attitude of the claimants then and thereafter was that the corporation, by making the new bye-laws in 1948, was then and thereby evincing an intention to prevent the claimants from performing the contract according to its tenor as from Nov. 1, 1950, when these new and crippling provisions were timed to take effect, and that this amounted to an anticipatory repudiation of the contract G by the corporation entitling the claimants to proceed immediately, in 1948, for a declaration that as from September, 1948, they themselves (the claimants) were no longer bound. This they did in the arbitration. The question of law arising on the award in the form of a Special Case was thus formulated by the arbitrator:

H "The question for the opinion of the court is: Did the act of the respondents in their capacity as port health authority in sealing and procuring the confirmation of the new bye-laws, confirmed on July 16, 1948, amount to a repudiation by the respondents of the said agreement dated Dec. 17, 1936, so as to entitle the claimants in law, notwithstanding that bye-law No. 2 is not to come into operation until Nov. 1, 1950, to treat the said agreement as determined on Sept. 21, 1948?"

The substantial question, therefore, is whether the act of the corporation in making Bye-law No. 2 of 1948 was a breach of the contract going to its root

and an anticipatory breach entitling the claimants to elect to say in 1948 that they were no longer bound by it as from 1948, even though the bye-law was not to take effect till November, 1950. It is, apparently, not disputed by the corporation that, if the act in question was not a breach and not a repudiation, it was at the lowest a factor which made the contract commercially impossible of performance after Nov. 1, 1950, which frustrated it as from that date.

The first question, therefore, is whether the corporation's act in making Bye-law No. 2 of 1948 was a breach of the contract at all. I will consider this, first, in abstraction from cl. 13 of this contract. The claimants argue that it is an implied term of every, or almost every, contract between A and B (and certainly of this contract) that A shall not prevent or disable B from performing the contract and *vice versa*, and that this was just what the corporation did by the act in question. In general, no doubt, it is true that a term is necessarily implied in any contract, the other terms of which do not repel the implication, that neither party shall prevent the other from performing it, and that a party so preventing the other is guilty of a breach, but an act cannot be a breach of a term of the contract, express or implied, (let alone a repudiation) unless the term in question is valid. There can be no breach if the term in question is illegal, contrary to public policy, or (in the case of a corporation) *ultra vires* the contracting party, or for some other reason waste paper, because in such a case there is no binding obligation, and only a binding obligation can be violated. One cannot break a rope of sand. It starts broken.

The term sought to be implied in this case is one whereby the corporation, a legislative body charged by statute in imperative language with the duty of making bye-laws relating, *inter alia*, to the removal of the refuse in the interests of the public health in the port of London, or, to be precise, to prevent nuisances arising from such refuse, engages not to make any bye-laws for this purpose which should lay on the claimants burdens other and more severe than those provided for in cl. 1 of their contract with the corporation, and, therefore, prevent the claimants from fulfilling the contract by complying with cl. 1 without more. I consider that such a term, whether implied or even express, could not be valid. The language of the Public Health (London) Act, 1936, s. 84 (1) (a), is mandatory. The provision is:

"Every sanitary authority shall make bye-laws—(a) for the prevention of nuisances arising from snow, ice, salt, dust, ashes, rubbish, offal, carrion, fish or filth or other matter or thing in any street . . ."

If the suggested term were express, it would have to take some such form as this: "True we are charged by Parliament with the duty of making such bye-laws with reference to refuse as may be called for from time to time by considerations of public health, but, even if these considerations call, and call peremptorily, for a provision not less stringent than that made by the bye-laws of 1948, even if a second plague of London threatens unless such provision is made, we undertake in such an event to neglect or violate our statutory duty so far as the requirement of such a bye-law may exceed the requirements imposed by cl. 1 of our contract with Cory & Son, Ltd." Such a contractual provision would seem to be plainly invalid.

In *York Corpn. v. Henry Leatham & Sons, Ltd.* (1), RUSSELL, J., had to decide a somewhat similar point. The plaintiff corporation were entrusted by statute with the control of navigation in part of the Rivers Ouse and Foss with power to charge such tolls, within limits, as the corporation deemed necessary to carry on the two navigations in which the public had an interest. The corporation made two contracts with the defendants under which they agreed to accept, in consideration of the right to navigate the Ouse, a regular annual payment of £600 per annum in place of the authorised tolls. The contract as regarded navigation of the Foss was on similar lines. It was held by RUSSELL, J., that

the contracts were *ultra vires* and void because under them the corporation had disabled itself, whatever emergency might arise, from exercising its statutory powers to increase tolls as from time to time might be necessary. The learned judge based his decision on ([1924] 1 Ch. 572):

“ . . . the incapacity of a body charged with statutory powers for public purposes to divest itself of such powers or to fetter itself in the use of such powers.”

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It is obvious how relevant this case, if well decided, is to the present. It has been criticised in *Southport Corpn. v. Birkdale District Electric Supply Co.* (2). In that case it was pointed out that the body executing the statutory duties in the *York* case (1) (as in the *Southport* case (2) itself) was a trading corporation, and that the discharge of such duties by such a corporation would be facilitated rather than fettered by a reasonable latitude of discretion in fixing prices, charges or tolls. In *Ayr Harbour Trustees v. Oswald* (3) it was held by the House of Lords that where a statute confers power on any body, whether one which is seeking to make a profit for shareholders or one acting solely for the public good, to take lands compulsorily for a particular purpose, a contract purporting to bind such a body and their successors not to use the powers is void. Like the *Ayr Harbour Trustees* in that case, the corporation in the present case was a body acting solely for the public good: see also *Mulliner v. Midland Ry. Co.* (4).

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In the present case the corporation acts in a dual character, though in both characters it is a sanitary or health authority, not a body trading for profit. *Qua* sanitary authority for the city, it has to employ contractors, and it was in this capacity that it entered into its contract with the claimants. *Qua* health authority for the port of London, it is charged with making bye-laws for the prevention, *inter alia*, of nuisances arising from dust, ashes, rubbish, etc., in the port. Neither in the former capacity nor in the latter (which is the directly relevant one) is it a trading corporation. It is charged with the duty of making bye-laws to promote public health, *inter alia*, by dealing with refuse, and the considerations which were thought relevant in the *Southport* case (2) (so far as that decision threw doubt on the *York* case (1)) have no application here. In this setting, it would seem that the implied term relied on would impose an unwarrantable fetter on the corporation in the exercise of its statutory duties under the Public Health (London) Act, 1936, s. 84 (1) (a).

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The second argument on which the claimants rely is that, apart from any implied term, the express terms of cl. 13 of the agreement preclude the corporation from passing the bye-laws of 1948. The first few lines of the clause run:

“ Subject to the provisions of cl. 1 hereof the contractors shall at all times observe and comply with the bye-laws of the port health authority of the port of London . . . ”

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This, it is said, means that Corys bind themselves contractually to observe bye-laws which (like the only ones in force when the agreement was made) fall short in stringency of the obligations in cl. 1, but that the obligations set out in cl. 1 (as to coamings and the like), which must also be complied with, (owing to the words “ subject to ”) constitute the high water mark, or, to adopt the cant of today, the “ ceiling ” of Corys’ obligations in this matter. “ Subject to ” is read as meaning “ rising to but not exceeding. ” I am by no means convinced that that is the true construction. What may be meant is that in all events cl. 1 must be complied with and that any bye-laws passed from time to time, whether falling short of or exceeding cl. 1 in severity, must also be complied with. But even if Corys were right on the point of construction, it seems to me that the answer to this argument is in substance the same as the answer to the first argument. Corys have to have recourse once more to their implied term: “ Under the contract I am not bound to do more than cl. 1

prescribes; that is the 'ceiling'; you are bound not to prevent me from fulfilling my obligations by a simple compliance with cl. 1. You have done this by passing the bye-laws of 1948." Such an implied term, for reasons I will not repeat, would, in my view, be *ultra vires*. In the result, I am of opinion that the decision of the Lord Chief Justice was well founded, and that the appeal should be dismissed.

BIRKETT, L.J.: I entirely agree with the judgment of LORD ASQUITH which I have read, in the reasons given and in the conclusions, and for my own part have nothing further to add. A

HARMAN, J.: I agree with the result arrived at by my Lord and with the reasoning by which he reaches it. Counsel for the claimants argued that the term to be implied in this contract is that the corporation will not seek to hold the company to it while imposing an obligation more stringent than that imposed by cl. 1, and that, in effect, the corporation has admitted the existence of this term by agreeing that it cannot hold the claimants to the contract after the new bye-laws come into force. So far I follow him, but when he goes on to submit that the duration of this contract is an essential term and that in effect, by passing the new bye-laws, the corporation has shortened the term and thereby committed a breach which entitled the claimants to treat the contract as at an end from the time when the bye-laws were passed, I part company with him. It seems to me that the corporation, by deferring the coming into force of the bye-laws, did no more than give notice of them in advance for the convenience of lightermen using the river, and that this act of courtesy cannot put the claimants in a better position than they would be in if no such notice had been given. In fact, this contract, when made, was indefinite in duration and might have expired before now, and it is only subsequent events which have shown that it might have lasted for some time yet. The making of the new bye-laws has been looked on by both parties as a supervening event not contemplated by either of them when the contract was made, and, therefore, producing what is usually called frustration. From this point of view it is irrelevant that the supervening event was brought about by the corporation itself in another capacity. The argument seems to me an attempt to import into the doctrine of frustration the doctrine of anticipatory breach. In my judgment, this attempt fails because the two cannot be married in the way suggested. B
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As to the question of construction, in my judgment, counsel for the corporation provided the right answer when he said that cl. 13 adds a contractual obligation to the statutory liability of the claimants to observe the bye-laws, and that, whereas the contractual obligations are limited by cl. 1, and, therefore, subject to it, the statutory obligations are not. In effect, the words "subject to the provisions of cl. 1 hereof" mean "without prejudice to the obligations of the contractors under that clause." So read, the contract has not been broken by the corporation and the doctrine of anticipatory breach has no place. F
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Appeal dismissed.

Solicitors: *E. F. Turner & Sons* (for the claimants); *Desmond Heap*, Comptroller and City Solicitor (for the corporation).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

TULIP v. TULIP.

DOWELL v. DOWELL. Lord Asquith of Bishopstone, Birkett, L.J., and Harman, J.),
[1952] 1 All E.R. 141. [1951.]

Husband and Wife—Maintenance—Application to High Court—Wilful neglect to maintain—Deed of separation—Covenant by husband for periodical payments—No default in payments—Improvement in husband's financial position—Law Reform (Miscellaneous Provisions) Act, 1949 (c. 100), s. 5 (1).

In June, 1932, the husband and wife entered into a deed of separation under which the husband covenanted to pay to the wife during her life for her separate use £156 a year free of income tax. The deed did not contain an undertaking by the wife not to take any proceedings for maintenance in the future. The husband made no default in payments, but since the deed his financial position had materially improved, while that of the wife had worsened. Also she had become a partial invalid, and the cost of living had greatly increased since the date of the deed. On an application by the wife under s. 5 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949, for an order for a larger amount of maintenance,

HELD: the words "wilful neglect to provide reasonable maintenance" used in s. 5 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949, being the same as the words in s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, decisions of the Divisional Court construing the Act of 1895 should be followed unless they were plainly wrong; (HARMAN, J., *dissentiente*) from a consideration of those decisions it was clear that the existence of a separation deed providing for the wife's maintenance was no bar to her application under s. 5 (1) of the Act of 1949; the real question which arose was whether at the time of the application the husband had wilfully neglected to provide reasonable maintenance; and the wife was entitled to have the husband's covenant reviewed in the light of the existing circumstances.

Morton v. Morton ([1942] 1 All E.R. 273), approved.

Hyman v. Hyman ([1929] A.C. 601), followed.

Decision of BARNARD, J. ([1951] 1 All E.R. 563), reversed.

EDITORIAL NOTE. Section 5 of the Law Reform (Miscellaneous Provisions) Act, 1949, has been repealed and replaced by s. 23 of the Matrimonial Causes Act, 1950.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 23, see HALSBURY'S STATUTES, Second Edn., Interim Service, 1950, p. 321.

AS TO MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, p. 838, para. 1340; and FOR CASES, see DIGEST, Vol. 27, pp. 558, 559, Nos. 6134-6150, and Digest Supps.

Cases referred to:

- (1) *Matthews v. Matthews*, [1932] P. 103; 101 L.J.P. 41; 147 L.T. 240; 96 J.P. 290; Digest Supp.
- (2) *Morton v. Morton*, [1942] 1 All E.R. 273; 111 L.J.P. 33; 166 L.T. 164; 106 J.P. 139; 2nd Digest Supp.
- (3) *Whittaker v. Whittaker*, [1939] 3 All E.R. 833; Digest Supp.
- (4) *Jones v. Jones*, [1924] P. 203; 93 L.J.P. 94; 132 L.T. 63; 27 Digest 565, 6241.
- (5) *Diggins v. Diggins*, [1927] P. 88; 96 L.J.P. 14; 136 L.T. 224; 90 J.P. 208; Digest Supp.
- (6) *Hyman v. Hyman*, [1929] A.C. 601; 98 L.J.P. 81; 141 L.T. 329; 93 J.P. 209; Digest Supp.
- (7) *Besant v. Wood*, (1879), 12 Ch.D. 605; 40 L.T. 445; 27 Digest 238, 2090.
- (8) *Eastland v. Burchell*, (1878), 3 Q.B.D. 432; 47 L.J.Q.B. 500; 38 L.T. 563; 42 J.P. 502; 27 Digest 196, 1661.

- (9) *Ozard v. Darnford*, (1779), 1 Selwyn's N.P. 13th. ed. 229; 27 Digest 196, 1656.
- (10) *Dewe v. Dewe*, *Snowdon v. Snowdon*, [1928] P. 113; 97 L.J.P. 65; 138 L.T. 552; 92 J.P. 32; Digest Supp.
- (11) *Iles v. Iles*, [1931] 145 L.T. 71; 95 J.P. 136; Digest Supp.
- (12) *Gandy v. Gandy*, (1882), 7 P.D. 168; 51 L.J.P. 41; 46 L.T. 607; 27 Digest 237, 2085.
- (13) *Rose v. Rose*, (1883), 8 P.D. 98; 52 L.J.P. 25; 48 L.T. 378; 27 Digest 362, 3470. A

APPEAL by the wife from a judgment of BARNARD, J., dated Jan. 31, 1951, and reported [1951] 1 All E.R. 563, dismissing an application by the wife under s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949, for increased maintenance.

John Latey for the wife.

Temple, K.C., for the husband.

Cur. adv. vult.

May 10. The following judgments were read.

BIRKETT, L.J.: This is an appeal from a judgment of BARNARD, J., delivered on Jan. 31, 1951. He dismissed the claim of the wife, Ellen Tulip (the wife of Joseph Edwin Tulip), made by way of an originating summons under s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949. The wife alleged that her husband had wilfully neglected to provide reasonable maintenance for her, and asked that he should be ordered to make such payments for her maintenance as might be just and that he be further ordered to secure such payments. C

Section 5 of the Law Reform (Miscellaneous Provisions) Act, 1949, reads: D

"(1) Where a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the High Court in England, if it would have jurisdiction to entertain proceedings by the wife for judicial separation, may, on the application of the wife, order the husband to make to her such periodical payments as may be just; and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation. (2) Where the court makes an order under this section for periodical payments it may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife the periodical payments, and for that purpose may direct that a proper deed or instrument to be executed by all necessary parties shall be settled and approved by one of the conveyancing counsel of the court." E F

Section 6 of the Act provides for the extension of the power to discharge or amend orders for maintenance. No question arose in this case on the words in s. 5 (1),

"... if it would have jurisdiction to entertain proceedings by the wife ...,"

for it was conceded that the High Court had jurisdiction in this case. Before the Act of 1949 the procedure to be followed by a wife seeking to show wilful neglect to provide reasonable maintenance was to apply under the provisions of the Summary Jurisdiction (Married Women) Act, 1895, and the Acts extending and amending them. Strict limitation was placed on the amount of maintenance that the justices could order the husband to pay, but by the Married Women (Maintenance) Act, 1949, justices may now award up to £5 per week instead of £2 per week. Under the Act of 1949 the High Court can order the husband to pay any sum which it thinks reasonable, and, if it thinks fit, it can also direct that that amount shall be secured. The Matrimonial Causes Act, 1950, s. 23, now gives to the wife the right to apply to the court which had been given under the Act of 1949. G H

For the purposes of this appeal, the facts, which were not in dispute, were these. The parties were married in June, 1916, and there have been no children of the

marriage. In 1931 the husband left his wife, and shortly afterwards he brought a petition praying for the dissolution of the marriage on the grounds of nullity. This petition was dismissed. Thereafter, on June 30, 1932, the parties entered into a deed of separation. The material clauses for the purpose of this appeal are as follows:

“ 1. The wife may and shall henceforth during the life of the husband live separate and apart from him as if she were unmarried and shall be free from his marital control and neither of them the husband and the wife shall in any way molest or interfere with the other of them or the relations or friends of either nor shall require nor by any proceeding whatever attempt to compel the other of them to return to cohabitation nor shall take any proceedings to obtain a divorce or judicial separation on account of anything already done by the other of them . . . 3. The husband hereby covenants for himself that if the wife shall so long perform and observe the stipulations herein on her part contained he during his life will pay to the wife during her life (if he shall so long live) for her separate use without power of anticipation such a sum as after deduction of income tax at the current rate shall amount to and leave the clear net yearly sum of £156 such sum to be considered as accruing from day to day and to be paid by equal monthly payments on the first day of every month the first of such payments to be made on July 1 next but no allowance or return of money shall be made in respect of anything once paid under this present clause if the said annual sum shall cease on any other day than the first day of any month. 4. The wife shall out of the provision made for her by these presents and out of her separate estate or otherwise in all respects support and maintain herself and pay and discharge all the debts engagements and liabilities which she may incur or enter into and shall indemnify the husband his heirs executors and administrators therefrom and from all actions proceedings costs damages expenses claims demands and liabilities on account thereof.”

The sum for maintenance was, therefore, the clear net sum of £156 per year to be paid monthly, and, no doubt, in 1932—nearly twenty years ago—it was regarded by both parties as a reasonable sum for the purpose. There was no clause in the agreement whereby the wife undertook not to take any proceedings in the future for maintenance. It was admitted that the husband had faithfully performed on his part all the provisions of the deed, and, in particular, had paid the agreed sum of £156 with complete regularity from 1932 onwards, and was doing so at the date of the hearing. There were the usual affidavits before the judge as to the financial position of the parties, and he found that the financial position of the husband had improved since the date of the deed and the wife's position had worsened. The wife, moreover, had become something of an invalid from spinal arthritis. BARNARD, J., appears to have taken judicial notice of the fact that the cost of living had greatly increased since the date of the deed.

On Dec. 7, 1949, the solicitors for the wife wrote the following letter to the husband:

“ Mrs. Tulip has instructed us to approach you with regard to the allowance of £3 a week which she is receiving under the deed which was entered into between you many years ago. We feel sure that you will readily understand that in the conditions of the present times this allowance is not adequate properly to maintain our client, and we think that in the circumstances you may be disposed to agree to increase it.”

On Dec. 22, 1949, Mr. Tulip wrote in reply to that letter:

“ Please remind your client that I do fully appreciate the changed conditions, particularly so in regard to the very much higher rate of income tax now pertaining than was the case when the deed was entered into. In the circumstances you will, of course, explain to your client that as the

allowance is paid 'free of income tax' it now costs me considerably more than originally—actually on the present rate of income tax the allowance costs me £5 9s. 1d. per week, plus tax at 9s. in the £ on £70 being the difference between being assessed as a single man instead of as being married. So that the total cost to me of the allowance works out at over £6 per week. In view of the depression in trade which is now imminent I regret I cannot agree to any departure from the terms of the deed."

It was admitted that the husband had been guilty of no matrimonial offence in the ordinary acceptation of that term, unless, as it was submitted, the refusal contained in his letter of Dec. 22 constituted the matrimonial offence of wilful neglect to provide reasonable maintenance.

It was submitted for the wife (i) that the existence of the deed of separation of June 30, 1932, did not prevent the wife from coming to the court and making her application under s. 5 of the Act of 1949, and (ii) that the judge in his judgment had said in effect that the existence of the deed, together with the husband's faithful performance of his part under it, made it impossible for him to hold that there had been any matrimonial offence by the husband, and, though the learned judge had nowhere said that the wife was estopped from making her claim by the existence of the deed and the husband's performance of it, nevertheless, his judgment in fact was made on this basis. Counsel for the wife relied for this on the passage in the judgment of BARNARD, J. ([1951] 1 All E.R. 565):

"Of what matrimonial misconduct has the husband been guilty? He has faithfully carried out the terms of the deed. He has made his wife an allowance with which she was perfectly satisfied at the time, but in view of the present day cost of living she is not now satisfied with it. Can I possibly hold that he has been guilty of some matrimonial misconduct? I do not think I can. If I were to accede to the argument put forward for the wife it would not be safe for any parties to enter into an agreement. What counsel for the wife is seeking is to get the amount varied. The wife wants the best of two worlds. So long as she is satisfied with the agreement, it will remain at the amount specified, but if the husband's means increase, she wishes the payments to be increased. He has agreed to pay and the wife has agreed to accept the amount stated in the deed, and so the matter stands."

Counsel for the wife also said (iii) that the only importance of the deed for the purposes of this appeal is its evidential value. If, for example, a wife were to apply to the court the day after a deed had been entered into, when she had had proper independent advice, the evidential value of the deed on the question of reasonable maintenance would be overwhelming, whereas, after an interval of twenty years, it might be of little, or of less, or of no, value. (iv) Counsel for the wife said the duty of the court is to look at all the circumstances of the case at the time the application is made, including the date and the provisions of the deed and of any requests made by the wife, and then to decide the matter solely by the test: Has the husband wilfully neglected to provide reasonable maintenance for his wife? If the court finds, after consideration of all the circumstances, that the husband has so neglected, then the matrimonial offence has been committed, and the court may make any order it deems to be just.

Counsel for the husband submitted: (i) The provisions of the Act of 1949 gave the High Court the power to make the orders formerly made by the courts of summary jurisdiction and the provisions of s. 5 of the Act of 1949 only operate when a matrimonial offence has been committed. The decisions of the High Court in cases decided under the provisions of the Summary Jurisdiction Acts should be followed in cases brought under the provisions of the Act of 1949. (ii) Where there is a valid subsisting agreement, acted on by both parties for twenty years, and the husband has duly paid the agreed sum for maintenance, wilful neglect to provide reasonable maintenance for the wife ought not to be found by any court merely because conditions have changed since the deed was entered into,

and it is shown that the husband is in a position to pay more. (iii) Where it is shown that under an existing deed the husband has done all that he agreed to do and is willing to continue doing so, he is excused from doing anything more and has committed no matrimonial offence, and the provisions of the Act of 1949 cannot be invoked against him. (iv) Counsel for the husband finally submitted that the wife ought not to be allowed to approbate and reprobate the agreement by taking advantage of all the other provisions of it and disregarding only the provision relating to maintenance and refusing to be bound thereby.

Many cases were cited to us, and, as we do not propose to refer to them all specifically, perhaps a general word may be said about them. The words of s. 5 of the Act of 1949, "wilful neglect to provide reasonable maintenance," are precisely the same as the words in s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, and decisions of the Divisional Court construing the Act of 1895, though not strictly binding on this court, are yet so weighty and so authoritative, that we feel we ought to follow them unless any of them should seem to us to be plainly wrong. In none of the cases cited to us were the facts precisely the same as the facts before us. There had usually been some default in payment from one cause or another, though in *Matthews v. Matthews* (1) the agreement for the payment of a lump sum and instalments had been carried out. Even where, as in the present case, there is an agreement in existence, the terms of which have been faithfully performed by the husband, the principles on which the jurisdiction is to be exercised must be the same in all cases. I, therefore, refrain from a discussion of all the cases and the particular passages to which we were referred by the learned counsel, but there is one case to which I must refer in a little detail, and that is *Morton v. Morton* (2).

That was a decision of the Divisional Court consisting of LORD MERRIMAN, P., and HODSON, J. It was decided so recently as 1942 and reviews many of the cases which were cited to us. It seems to me to be decisive on what, after all, is the main question for our determination. The facts of the case were as follows. The marriage between the parties took place in 1913. The two children of the marriage are adults, one a married daughter and the other a soldier twenty-two years of age. The wife took out a summons at Merthyr Tydfil for maintenance in 1930 and it was withdrawn on the husband's agreeing to pay the wife 20s. a week for herself and 10s. a week for the son. The agreed terms were that, in consideration of the wife's withdrawing the summons against the husband, they agreed to enter into a separation deed containing the following clauses: (i) Husband to pay wife £1 a week and boy 10s. a week, the first payment to be made on Saturday next. (ii) While unemployed, husband to pay to wife for herself and boy amount of dependant's benefit only. (iii) Husband to deliver to wife her goods and furniture. (iv) Wife to have custody of boy with right of access by husband. (v) Usual clause that no proceedings be taken while terms of agreement kept. (vi) Mutual *dum casta* clause. (vii) Husband to contribute £3 3s. 0d. to wife's costs. The 10s. payment was stopped when the son started work. The wife summoned the husband for wilful neglect to provide reasonable maintenance and the summons was dismissed in February, 1934. She sued on the written agreement at the Merthyr Tydfil County Court in October, 1934, claiming £18 10s. 0d. as arrears of payments. The action was dismissed in January, 1935. Throughout the husband paid his wife £1 a week. In September, 1941, the wife again summoned the husband on the ground of wilful neglect to maintain. The magistrate granted her an order for 30s. a week. The husband appealed. In his judgment LORD MERRIMAN, P., said ([1942] 1 All E.R. 273):

"It is unnecessary to attempt, as other judges have consistently refused to do, to give an exhaustive definition of 'wilful neglect to provide reasonable maintenance.' I am not satisfied that cases dealing solely with the meaning of the word 'wilful,' or cases dealing solely with the meaning of the word 'neglect,' are of very great assistance. Justices have to be satisfied

affirmatively that the husband has been guilty of the subject-matter of the complaint, which involves, in the words of the statute, that he has been guilty of . . . 'wilful neglect to provide reasonable maintenance.' The phrase must be considered as a whole, and, as I have already indicated in *Whittaker v. Whittaker* (3) I agree with the view of LORD MERRIVALE, P., expressed in *Jones v. Jones* (4), that the phrase imports some element of matrimonial misconduct."

Later he said (*ibid.*, 276):

"After very helpful citation of the authorities by counsel on each side, I think that the position on this summons is now free from doubt. The existence of an agreement is not a bar to the jurisdiction of the magistrates, neither on the question whether the offence has been committed, or on the point of amount; but I think it is desirable to emphasise, as applied to the circumstances of this case, how high a value such an agreement should have had in guiding the magistrate in the exercise of his jurisdiction, which unquestionably remains notwithstanding the agreement. I think that it might be helpful to cite two passages from judgments of LORD MERRIVALE, P. The first . . . was in *Diggins v. Diggins* (5). I should like, first of all, to point out that this was a separation agreement providing for a weekly sum by way of maintenance, and the husband, after two weeks, had made no payment at all, basing himself on the fact that the wife had, contrary to the terms of the agreement, so he alleged, molested him and that the weekly sum had therefore ceased to be payable. The maintenance, in fact, had not been paid. Of course, even if it were open to us, it would be quite absurd to doubt the propriety of the decision that the jurisdiction of the justices was not barred in those circumstances. Having alluded to the fact that the man had not paid that which he was liable to pay under the agreement, LORD MERRIVALE, P., said ([1927] P. 92): 'Apart from the deed, the case is clear. The husband has wilfully neglected to provide reasonable maintenance for the wife. What remains is to ascertain whether the deed excludes the jurisdiction of the justices'. Then he says this: 'It must not be supposed that there is an unlimited right in a wife under the amended statute, where-ever she has entered into a deed, at her volition to proceed to the justices to get the terms of the deed reviewed. That would be contrary to good sense, and I do not doubt, if any case arise where a wife who has entered into a deed proceeds in disregard of it to seek something different from the justices, that she will meet with an answer which will prevent the possibility of further question. If she does not meet with it at first instance, she may meet with it here.' What LORD MERRIVALE, P., was saying in the plainest possible language was that, if it is shown that the deed provides for periodical payments which have been punctually made, the evidential value of that deed, as showing that the husband has, by making the payments regularly, been providing reasonable maintenance for his wife, is extremely high. To put it the other way, the wife will have the very greatest difficulty in making out a case in such circumstances; but the jurisdiction, as such, is not excluded."

It is clear from a consideration of that case, and, indeed, all the cases cited to us, that the existence of a deed is no bar to the wife's application under s. 5 of the Act of 1949. Indeed, all the discussion in the cases on the evidential value of the deed would be quite irrelevant if this were not so. The real question, therefore, in the present appeal is whether BARNARD, J., was right in saying, as I think it is plain that he did say from the passage cited by counsel for the wife, that because there was a deed of separation in existence providing for maintenance and that provision had been faithfully observed by the husband, it was impossible to say that he had been guilty of wilful neglect to provide reasonable

maintenance, and that, as no matrimonial offence had, therefore, been committed, the wife's application must be dismissed. I am of opinion that, in so deciding, BARNARD, J., was wrong. With great respect to him, he seems to have ignored several essential matters. He seems to have decided that a sum for maintenance, agreed to in 1932, was unalterable so long as the husband continued to pay it and was willing to go on paying it. The real question for his determination was not that, but whether at the time the application was made to him the husband had wilfully neglected to provide reasonable maintenance. That must mean reasonable at the time of the application, in the light of all the circumstances then existing. BARNARD, J., makes no finding on this at all. He does say ([1951] 1 All E.R. 565):

"He has made his wife an allowance with which she was perfectly satisfied at the time, but in view of the present day cost of living she is not now satisfied with it."

That might seem to indicate a possible view that the sum fixed for maintenance twenty years ago was not "reasonable maintenance" in 1951. BARNARD, J., continued (*ibid.*):

"What counsel for the wife is seeking is to get the amount varied. The wife wants the best of two worlds. So long as she is satisfied with the agreement, it will remain at the amount specified, but if the husband's means increase, she wishes the payments to be increased. He has agreed to pay and the wife has agreed to accept the amount stated in the deed, and so the matter stands."

BARNARD, J., makes no reference to the letters of Dec. 7 and Dec. 22, 1949, relied on by the wife to show the refusal of the husband to provide reasonable maintenance to be wilful. I think that BARNARD, J., never considered, or if he did consider, never decided, the two essential elements in the wife's application (a) whether the husband was neglecting to provide reasonable maintenance for his wife, and (b) whether his neglect was wilful.

I think it is plain why he never considered or decided these points. His judgment was based on the view that where a deed was in existence providing for maintenance and the provision for maintenance had been faithfully observed there could be no matrimonial offence of "wilfully neglecting to provide reasonable maintenance," however much the circumstances had changed. In a word, he said that, once a sum for maintenance had been fixed by mutual agreement and embodied in a separation agreement, it must be considered to be reasonable maintenance for all time. In my view, this way of deciding the application was wrong, because it amounted to saying that the wife was estopped by the deed from coming to the court and putting forward the changed circumstances, and, if she were allowed to state the changed circumstances, it would make no difference because the terms of the deed prevented the judge from considering the changed circumstances. The agreed sum could not be varied at all. BARNARD, J., said also (*ibid.*):

"If I were to accede to the argument put forward for the wife it would not be safe for any parties to enter into an agreement."

This, I think, is plainly contrary to all the decisions hitherto made under the Summary Jurisdiction Acts, and is in conflict with the decision of the Divisional Court in *Morton v. Morton* (2). I am of opinion that the terms of s. 5 of the Act of 1949 are wide enough to permit a wife who has entered into a deed of separation to make application to the court, as the wife has done in this case, and to have the matter decided on the facts as they exist.

Some attention was given to two other points about which it is necessary to say a word or two. Under cl. 4 of the deed the wife covenants to support herself, to discharge her debts, and to indemnify the husband from all claims in respect of those debts. Her present action, in my opinion, in no way conflicts with the

provisions of cl. 4 of the deed, which cannot be interpreted as a covenant not to bring proceedings in respect of the amount of maintenance set out in the deed. With regard to the argument addressed to us that the wife was seeking to approbate and reprobate the agreement between the parties—blowing hot and cold, as it was said—I do not think there is any force in the argument on the facts of this case. Nowhere does the wife covenant not to make any application for maintenance in the future. The essence of the agreement was that the parties should live separate and apart, and none of her covenants does she seek to evade. All that she asks is that the husband's covenant as to maintenance should be reviewed in the light of present conditions. The words of LORD ATKIN in *Hyman v. Hyman* (6) were ([1929] A.C. 629):

"In my view no agreement between the spouses can prevent the court from considering the question whether in the circumstances of the particular case it shall think fit to order the husband to make some reasonable payment to the wife . . . The wife's right to future maintenance is a matter of public concern, which she cannot barter away."

I am, therefore, of opinion that the wife's appeal should be allowed, and that there should be a new trial on the issue whether the husband has been guilty of wilful neglect to provide reasonable maintenance for his wife. I refrain from expressing any view of the merits of the application. It may be, in such a case as this, that the court might find it difficult to exercise its jurisdiction in favour of the wife, having regard to all the circumstances of the case, but with that we are not concerned. All that I am concerned with on this appeal is to say that the jurisdiction exists, and that the existence of a deed of separation is no bar to its exercise. If the court must weight the evidential value of the deed, as the decisions enjoin, it must be allowed to embark on the process and to consider the evidential value with all the other circumstances in the case.

I am authorised by LORD ASQUITH OF BISHOPSTONE to say that he has read my judgment and he desires me to state that he agrees with it and has no word of his own that he wishes to add.

HARMAN, J.: I have the misfortune to find myself in disagreement with the judgment just delivered. I would dismiss this appeal, but I need hardly say I put forward the reasons which follow with great diffidence. I need not re-state the facts, which are not in controversy, nor refer again to the statutes, except to express my agreement with the submission of counsel for the husband that s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949, did no more than extend to the High Court a jurisdiction already exercised for half a century by courts of summary jurisdiction. Cases, therefore, under the Acts from 1895 onwards seem to me to be in point, and an application like the present could, subject to the limits of amount imposed on the magistrates, have been made at any time since that year.

The question on this appeal is whether the court should, at the instance of a wife, relieve her from the obligation, imposed on her by a separation deed duly observed between her and her husband over the last twenty years, to maintain herself without making financial demands on him beyond that for which the deed provides. Change of circumstances since the deed was made has caused it to operate hardly on the wife, from whom one cannot withhold sympathy, but more than this is required to entitle her to be relieved of her contract. At one time separation deeds were looked askance at by the courts: see *per* SIR GEORGE JESSEL, M.R., in *Besant v. Wood* (7) (12 Ch.D., at p. 620); but it has long been established that they are unobjectionable and an order for specific performance will be made in a proper case. Moreover, it has now for some time been clear, as LUSH, J., said in *Eastland v. Burchell* (8), that in cases of separation by mutual consent it is not for the jury to consider the sufficiency or otherwise of the

allowance agreed to be made by the husband. He used these words (3 Q.B.D. 436):

“Where, however, the parties separate by mutual consent, they may make their own terms; and so long as they continue the separation, these terms are binding on both . . . and . . . no third person can claim to disturb the arrangement made between the husband and the wife . . .”

A The last words allude to the fact that the action was one by a tradesman, who had given credit to a wife, against her husband on the footing that she was in a position to pledge his credit. A similar view is expressed by LORD MANSFIELD in *Ozard v. Darnford* (9), where he said (1 Selwyn's N.P., 13th ed. 229):

B “ . . . if, upon separation, the husband agrees to make her a sufficient allowance, and pays it . . . the husband is not liable.”

It seems to follow that, so long as there is in force a separation deed binding on the parties and observed by each of them, the husband's obligation at common law to maintain his wife is discharged, or, rather, suspended. This is stated to be the law by LORD MERRIVALE, P., in *Dewe v. Dewe*, *Snowdon v. Snowdon* (10). The cases also show that the common law obligation revives where the contractual obligation comes to an end or is repudiated by the husband in the lifetime of the wife. Thus, in *Diggins v. Diggins* (5) the husband had ceased to pay the agreed allowance and claimed that the default of the wife in observing the terms of the agreement justified him in so doing. In that he may have been right. If so, his contractual liability was at an end, but the court held that the wife's common law right remained. This appears from the observations of LORD MERRIVALE, P., already cited by my Lord. These seem to me to show that the existence of a deed does not act by way of estoppel, for if it did the wife's only right would be to enforce her rights under the deed, but is a circumstance of evidence by way of answer.

In *Dewe v. Dewe*, *Snowdon v. Snowdon* (10) the husband (in each case) had become bankrupt, and the wife, by proving in the bankruptcy, had put an end to his contractual liability. Nevertheless, it was held that the common law right remained. A similar result was reached in *Iles v. Iles* (11), where the husband was not maintaining the wife on the ground that his contractual obligations under a deed did not oblige him to do so. In *Matthews v. Matthews* (1), which is, perhaps, the strongest case, the husband had agreed to pay his wife a lump sum in consideration of which she agreed not to ask for maintenance. He was not maintaining her, though he had paid the contracted lump sum, and it was held that he could not contract out of his common law obligation in that way. His contractual obligation had been fulfilled, but the wife was still living and in need of maintenance. In *Morton v. Morton* (2) the only decision was that the magistrate had no right to order the husband to pay more than the sum of £1 a week which he had agreed to pay, and had paid under an agreement. LORD MERRIMAN, P., made a number of observations *obiter* about the nature of the defence afforded by a separation agreement. He said the existence of such an agreement was very strong evidence. With that I see no reason to quarrel. He did not decide that the court could override the agreement, and it was not necessary for him to do so. Indeed, the decision, so far as it went, was to the contrary.

No case was cited to us, and I have found none, where a wife has obtained an order for maintenance by way of supplement to the sums being paid to her in compliance with an agreement. A wife, in order to set the machinery of the section in motion, has to prove as a condition precedent wilful neglect of her husband to maintain her, and, in my judgment, she does not overcome that obstacle if all that she proves be that the husband has declined to pay her more than she contracted to accept as sufficient. If this be right, the existence of a binding deed, the terms of which have been faithfully observed, is conclusive evidence that the husband has discharged his obligations. It has been said that

the words in question involve some degree of matrimonial offence, and this I accept, and I cannot see that there can, in these circumstances, have been any offence. If it be said that the agreement was made in 1932 and that circumstances have altered so that a maintenance sufficient then is insufficient now, and that the time at which the court is to inquire into the sufficiency is the time when the application is made, I still answer that the wife, who has agreed to accept this sum over the whole period of her husband's life should she so long live, ought not to be heard to say that it is now insufficient. It appears on the face of the deed that both parties contemplated that the agreement should endure for their joint lives. They must necessarily have contemplated the possibility of change in the circumstances of either or both of them, and have agreed to accept the chances whether for better or for worse on each side. It would, in my judgment, be unjust that, because the bargain has turned out to be not so good as the wife may have hoped, she should be entitled to have it revised in her favour, while the husband has no similar right if his circumstances should deteriorate.

I have not overlooked the fact that in *Hyman v. Hyman* (6) the House of Lords held that a wife who had been divorced could not be barred from obtaining maintenance from the court by the provisions of a separation deed entered into before the divorce and expressed to endure for her whole life. The grounds for this decision, however, were, as I see it, that there had been an entire change of status since the separation deed was made and that what might be appropriate and binding on the wife so long as she remained a wife was not necessarily the right figure when she was a wife no longer. Moreover, there is, in s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, which was the section there in question, no condition precedent necessary to be satisfied before the machinery of the law is set in motion. The House of Lords did not, in that case, overrule *Gandy v. Gandy* (12) (although LORD SHAW OF DUNFERMLINE would have wished to do so), and that is a decision of the Court of Appeal refusing to override a separation deed in a case of judicial separation where the parties remained husband and wife. I point out, also, that *Rose v. Rose* (13) is still the law and shows that the court will hold that it is bound by the stipulations of a separation deed.

I turn now to the deed itself, which, like most separation deeds, does not consist only of a covenant by the husband to pay maintenance to the wife. She obtains from it other advantages—the right to live apart, freedom from proceedings in respect of previous matrimonial offences, the right to retain her personal chattels, and, on her intestacy, to leave her property to her next of kin. All these advantages she proposes to retain and also the advantage of the covenant for the payment of money, but she asks the court at the same time to relieve her from the burden of cl. 4 of the deed which obliges her, out of the provision made for her, to support and maintain herself. This seems to me to be an impossible position: *qui sentit commodum, sentire debet et onus*. In my judgment, no court should make an order in favour of a wife in these circumstances without requiring that she should abandon her rights under the deed. I think, however, that the husband is entitled to object to that course where the deed has been entered into by parties on equal terms and at arm's length, and has always been observed since. Moreover, if the deed be set aside, the wife's right to live apart goes with it, and the husband can in due course sue her for desertion and thus rid himself of his obligation to maintain her. Lastly, cl. 4 of the deed contains a covenant by the wife to indemnify the husband against all liability on account of her support and maintenance, and I do not see what answer the wife would have to an action by the husband on this covenant for repayment of any sums which the court ordered him to pay to her beyond the covenanted sum. This would produce circuity of action, and it seems to me to be a plain indication pointing the same way as the other considerations I have mentioned and resulting in this, that where there is an agreement providing present maintenance which cannot be

impeached and which has not been repudiated, it ought to be considered as conclusive evidence that the husband has not failed reasonably to maintain his wife. I would, therefore, dismiss this appeal, because it seems to me that, if we send it back to the judge below and he refers it to a registrar for a report, there can be only one answer.

Appeal allowed.

A Solicitors: *Peacock & Goddard* (for the wife); *Hyde, Mahon & Pascall* (for the husband).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

B

MANTON v. BRIGHTON CORPORATION.

C [KING'S BENCH DIVISION (Slade, J.), May 1, 2, 1951.]

Local Government—Committee of local authority—Member appointed for one year—Power of local authority to revoke membership before expiration of year.

D Acting under the Local Government Act, 1933, s. 85, which empowers a local authority *inter alia* to "appoint a committee for any . . . general or special purpose," to delegate to a committee so appointed any functions exercisable by the local authority subject to certain limitations, and to fix the number of members of a committee and their term of office, and under sched. III, Part V, para. 4, which gives to a local authority a general power to make standing orders, a county borough council made standing orders dealing with the appointment of committees. Standing order 27 provided that at the annual meeting of the council in May certain standing committees

E "shall be appointed for the ensuing year to perform such duties as shall be then delegated to them by the council." At their annual meeting on May 25, 1950, the council appointed standing committees "for the period ending with the next annual meeting of the council," the plaintiff, who was a member of the council, being appointed a member of three of

F these committees to which were delegated some of the council's statutory duties. On Mar. 29, 1951, the council adopted a report of an *ad hoc* committee who were appointed to inquire into certain alleged conduct of the plaintiff and recommended that the plaintiff "should no longer serve on any committee of the council," and thereafter the council treated the plaintiff as having been removed from each of the three committees to which he had been appointed in May, 1950.

G

H **HELD:** the responsibility for the due discharge of the statutory duties delegated by the council to the committees remained with the council, the council had power to determine the authority of any of the committees, and, as they had the power to revoke the authority of a committee as a whole, they also had the power to revoke the authority of any single member thereof before the end of his prescribed period of office; the words, "shall be appointed for the ensuing year," in standing order 27, meant that no appointee should hold office after the end of the ensuing year, and not that the appointee should, in all circumstances, continue in that office throughout the ensuing year; no particular form of words was necessary to revoke the authority conferred on the plaintiff as a member of the committees, provided that it was made clear to him that the authority was determined, and the words of the recommendation of the *ad hoc* committee

which was adopted by the council on Mar. 29, 1951, clearly effected that purpose.

Huth v. Clarke (1890) (25 Q.B.D. 391), applied.

FOR THE LOCAL GOVERNMENT ACT, 1933, see HALSBURY'S STATUTES, Second Edn., Vol. 14, p. 353.

Cases referred to:

- (1) *R. v. Sunderland Corpn.*, [1911] 2 K.B. 458; 80 L.J.K.B. 1337; 105 L.T. 27; 75 J.P. 365; 33 Digest 61, 373.
- (2) *Huth v. Clarke*, (1890), 25 Q.B.D. 391; 59 L.J.M.C. 120; 63 L.T. 348; 55 J.P. 86; 33 Digest 17, 68.

ACTION for declarations and for an injunction.

The plaintiff was an alderman of the county borough of Brighton. At the annual appointment of members of the standing committees of the county borough council on May 25, 1950, he was appointed for one year as a member of three committees, the land and works committee, the staff committee, and the selection committee. On Dec. 21, 1950, the council appointed an *ad hoc* committee to inquire into certain alleged conduct of the plaintiff and of another person in relation to the allocation of housing accommodation at the disposal of the council. The committee presented a report to the council with findings, conclusions, and a recommendation that the plaintiff "should no longer serve on any committee of the council." On Mar. 29, 1951, the council adopted the recommendation and thereafter treated the plaintiff as having been removed from each of the three committees to which he had been appointed. The plaintiff claimed (i) a declaration that he was entitled to continue to exercise all his rights and privileges as a member of all committees of the council to which he had been appointed until his term of office on such committees expired, and a declaration that the resolution of the council on Mar. 29, 1951, was *ultra vires* the council and of no legal effect, and (ii) an injunction to restrain the defendants from in any way interfering with his exercise of his rights and privileges as a member of all committees of the council to which he had been appointed until his term of office therein expired. That matter came before SLADE, J., on a summons by the plaintiff for an interlocutory injunction. By agreement of the parties, the summons was treated as the trial of the action and was adjourned into open court for judgment.

Pollock, K.C., and *Stogdon* for the plaintiff.

Lamb, K.C., and *Widgery* for the defendants.

SLADE, J., stated the facts and continued: The Brighton Borough Council are a local authority within the meaning of the definition in the Local Government Act, 1933, s. 305. The power of a local authority to appoint committees is conferred by s. 85 of the Act, which provides:

"(1) A local authority may appoint a committee for any such general or special purpose as in the opinion of the local authority would be better regulated and managed by means of a committee, and may delegate to a committee so appointed, with or without restrictions or conditions, as they think fit, any functions exercisable by the local authority either with respect to the whole or a part of the area of the local authority, except the power of levying, or issuing a precept for, a rate, or of borrowing money. (2) The number of members of a committee appointed under this section, their term of office, and the area, if any, within which the committee is to exercise its authority, shall be fixed by the local authority. (3) A committee appointed under this section [other than a finance committee] may include persons who are not members of the local authority: Provided that at least two-thirds of the members of every committee shall be members of the local authority. (4) Every member of a committee appointed under this section who at the

time of his appointment was a member of the local authority by whom he was appointed shall, upon ceasing to be a member of the authority, also cease to be a member of the committee."

It is to be noted that up to one-third of the members of any committee, except a finance committee, may be persons who are not members of the local authority. Section 96 (1), which refers to standing orders, provides:

A "A local authority appointing a committee . . . may make, vary and revoke standing orders respecting the quorum, proceedings and place of meeting of the committee . . . but subject to any such standing orders the quorum, proceedings and place of meeting shall be such as the committee . . . may determine."

B Finally, by sched. III, Part V, para. 4:

"Subject to the provisions of this Act, a local authority may make standing orders for the regulation of their proceedings and business, and may vary or revoke any such orders."

That gives a general power to make standing orders as opposed to the special power conferred by s. 96 (1).

C The Brighton Borough Council have made standing orders, of which No. 22 to No. 28 deal with the appointment of committees. Standing order 26 provides, in substance, that all nominations of candidates for appointment to the committees in May for the ensuing year, including the members of the several committees for the preceding year who have not retired and are willing to serve and eligible for re-appointment, "shall be submitted by the town clerk to a meeting"

D of the selection committee, who are to consist of sixteen members of the council and are to be deemed to be a standing committee. The selection committee, having considered all the nominations, are to make recommendations to the council "as to the members of the council who shall constitute the several committees." The plaintiff was a member of the selection committee in 1949-50. Under the provisions of standing order 26, that committee made a report containing their recommendations which came before the full council on May 25, 1950, when the council passed two resolutions, which are set out as items No. 11 and No. 13 in the minutes of the council of that date. Item No. 11 reads:

E "Resolved: That pursuant to standing order 27 the following standing committees of the council be and they are hereby constituted and appointed for the period ending with the next annual meeting of the council, and are hereby vested with all the powers and duties in the terms of the appointments now submitted."

F Included in those standing committees were the three to which the plaintiff was appointed, *viz.*, the land and works committee, the selection committee, and the staff committee. Counsel for the plaintiff put that minute in the fore-front of his case, and I emphasise the words therein which form the basis of one of his arguments:

G "... the following standing committees of the council be and they are hereby constituted and appointed for the period ending with the next annual meeting of the council . . ."

H Item No. 13 records the resolution of the council approving and adopting the recommendations contained in the report of the selection committee as to the personnel of each of the committees, including the three to which the plaintiff was appointed. Therefore, in the case of each of those three committees, the personnel approved and adopted by the council included the plaintiff.

Standing order 27 provides:

"At the annual meeting of the council in May, the following standing committees shall be appointed for the ensuing year to perform such duties

as shall be then delegated to them by the council, and shall consist of the number of members or be constituted in the manner set opposite the names of such committees, with the addition of the mayor (where not specially mentioned), who shall be *ex officio* a member of all committees and sub-committees . . . ”

The words “ for the ensuing year ” are relied on by counsel for the plaintiff. The constitution of each committee is then set out. Some committees are to consist entirely of members of the council, while in others at least two-thirds of the members are to be members of the council and not exceeding one-third may be persons who are not members of the council. Included in standing order 27 are the land and works committee and the staff committee, but not the selection committee which is dealt with in standing order 26. Standing order 27 further provides that in addition to the standing committees specifically mentioned in that standing order

“ . . . it shall be lawful for the council from time to time to appoint any other committee or committees they think necessary.”

It was, no doubt, under that provision that the *ad hoc* committee was appointed on Dec. 21, 1950, to inquire and make a report in regard to certain alleged conduct of the plaintiff. Standing order 28 provides:

“ All delegations to standing committees other than those prescribed by statute and except where otherwise stated, shall be deemed to be pursuant to s. 85 of the Local Government Act, 1933, and to all other powers enabling the council in that behalf, and such delegations shall in all things be subject to the standing order and regulations of the council relating to contracts and to the conduct of financial business.”

The standing orders contain the usual power to suspend standing orders, and under standing order 6 a motion to that effect may be moved without notice. Standing order 14, on which counsel for the defendants relies, is headed “ Rescission of preceding resolution,” and reads:

“ No motion or amendment shall be moved which has the effect of rescinding or reversing a decision of the council made within the preceding three months unless it is pursuant to the recommendation of a committee which appears on the agenda or unless notice thereof is given, which notice shall comply with the requirements of standing order 5 as to notices of motion and shall bear the signatures of at least fifteen members of the council.”

I construe that order to mean that any motion or amendment rescinding or reversing a decision of the council made within the preceding three months must comply with one of two requirements, *i.e.*, it must be made either on the recommendation of a committee appearing on the agenda or by notice of motion complying with a certain form and bearing the signatures of at least fifteen members of the council, but that no such fetters are required in the case of a motion or amendment to rescind or reverse a decision of the council which was made more than three months earlier. Counsel for the defendants says that that standing order makes it clear that the council can at any time rescind or reverse one of their previous decisions, and, where more than three months have elapsed since the decision was made, they can do so without either of the formalities prescribed by standing order 14. He contends, therefore, that, if a motion came before the council at any time seeking to rescind so much of the resolution which is set out in item 13 of the minutes of the council of May 25, 1950, as included the name of the plaintiff in the land and works committee, the selection committee and the staff committee for the ensuing year, the council would clearly have express power under standing order 14 to pass it, with the result that so much of the resolution of May 25, 1950, as appointed the plaintiff to those committees for the whole of the ensuing year would be annulled. Counsel for the

A defendants also contended that the reference to "the ensuing year" in standing order 27 merely limits the time for which the appointed members are to serve, viz., until the next annual meeting of the council and does not compel the council to continue to delegate their powers for the whole of that year to a committee containing all or any of the members appointed in May. No one suggests that any resolution was passed pursuant to standing order 14 annulling any part of the minute of May 25, 1950, and counsel for the defendants merely points to that order as showing that the council have full powers to annul or rescind any of their previous decisions, including those appointing members of committees. The powers and duties of the three standing committees of which the plaintiff was a member are set out in the BRIGHTON CORPORATION MANUAL. Those of the land and works committee appear under these words: "Delegated powers. The council do hereby delegate to the land and works committee . . ." Paragraph 1 consists, I think, entirely of statutory powers and duties, and there follow several other paragraphs. I emphasise the statutory powers and duties, because, although a council may have power to delegate the performance of their statutory duties to others, the responsibility for the due discharge of those duties remains with the council, and that fact seems to me to import the necessity for a measure of control by the council, who are primarily responsible for the due discharge of the duties, over the persons to whom the actual performance of those duties is delegated.

C Counsel for the plaintiff contends that a member of the council who has been validly appointed a member of a committee under standing order 27 can only cease to be a member of the committee in one of the following ways: (i) if he becomes disqualified under s. 94 of the Act of 1933, the rubric of which is: "Disqualification for membership of committees and joint committees"; (ii) by resignation under s. 62, which deals only with vacation of an office under the Act and not with vacation of a position on a committee, but, where a person has been appointed a member of a committee because he is a member of the council, by resigning his membership of the council he automatically vacates his appointment as a member of the committee; (iii) by statutory vacation of office through failure to attend meetings, under s. 63 (1); (iv) if the member of the committee becomes disqualified for office as a member of the local authority under s. 59. In regard to s. 63 (1), some support is lent to counsel's argument by the fact that, whereas s. 63 (1) provides for automatic vacation of office by a member of a local authority who fails for six consecutive months to attend any meeting of the local authority unless the failure was due to some reason approved by the local authority, by proviso (a) to the sub-section:

"attendance as a member at a meeting of any committee . . . of the local authority . . . shall be deemed for the purposes of this sub-section to be attendance at a meeting of the local authority."

G Thus, if a member of a committee can be removed from that committee, he will, even though his removal be arbitrary or capricious, nevertheless be deprived of the opportunity of preventing the six months running against him by attending the meetings of that committee. Counsel for the defendants admits that these statutory provisions are methods of disqualifying a committee member or causing him to vacate his office. They are, he says, automatic statutory disqualifications or vacations which operate independently of the volition of the council, but they are not the only methods, and he contends that a person who confers authority can always revoke it. He argues that the appointment of committees is nothing more than a permitted delegation by the council of their powers and duties, a conferment of authority on certain persons to exercise the powers and discharge the duties of the council, and that it is implicit in the conferment of any such authority that it can be revoked when desired, even capriciously—although it is not suggested that the council would act arbitrarily or capriciously—just as a principal can revoke the authority of his agent, even if the agent has a contract to

serve for ten years. The agent might be entitled to recover damages from the principal for breach of contract, but he could not obtain an injunction to restrain the principal from refusing to allow him to continue to act as agent, as such an injunction, though negative in form, would be really a mandatory order on the principal to allow the agent to continue so to act. Counsel for the defendants contends that his argument derives some support from standing order 14, to which I have already referred.

There is no authority directly on the point which I have to decide, but I think that some assistance is to be derived from *R. v. Sunderland Corpn.* (1) and *Huth v. Clarke* (2). In *R. v. Sunderland Corpn.* (1) it was held:

“that the rule of the common law, that a person who is qualified cannot refuse to serve a public office to which he is appointed, does not apply to the appointment of a member of a borough council to serve on a particular committee of the council.”

The ground of the decision is that membership of a committee is not an independent public office, and a person who has been appointed to serve on a committee may lawfully resign from it against the will of the council who appointed him. LORD ALVERSTONE, C.J., dealing with the argument that the common law imposed on the holder or the appointee of a public office the duty to serve in that office, distinguishes the position of a committee man in this way ([1911] 2 K.B. 462):

“But those cases are all clearly distinguishable from that of a committee man. They are all independent offices, which the position of a committee man is not. The appointment of the committees is merely machinery for the discharge by the council of its business, and the acts of the committee are all subject to the council's approval. The standing orders which have been made under sched. II, para. 13, for the regulation of the council's business do not deal with the subject of resignation from a committee; they rather contemplate that, subject to the exchange of committees with another councillor, a councillor who has once been appointed on a committee will in practice continue a member of that committee until his three years' term of office as councillor expires.”

I respectfully adopt those words, emphasising the words “in practice.” In connection with the last point, I hold that the words in standing order 27, referring to “the ensuing year,” provide a limit to the appointment, and that the words “shall be appointed for the ensuing year” mean that no appointee shall hold office after the end of the ensuing year. The use of the word “shall” in that phrase does not mean that the appointee shall continue in all circumstances in that office throughout the ensuing year. It merely indicates that in normal practice he will do so.

In *Huth v. Clarke* (2) it was held that delegation to a committee was not equivalent to a resignation by the appointors of their own powers. The appellant was convicted of the offence of failing to muzzle a dog in accordance with an order issued by the executive committee of a local authority who were responsible for carrying out the provisions of the Contagious Diseases (Animals) Act, 1878. The Act provided that the local authority might appoint an executive committee who were to have all the powers of the local authority and the executive committee might appoint a sub-committee and delegate to them all or any of the powers of the executive committee, with or without restrictions, and might from time to time revoke or alter any such delegation. The executive committee, who were responsible for carrying out the requirements of the Act, delegated all their powers and duties thereunder to a sub-committee. The sub-committee made no order in regard to the muzzling of dogs. Without in any way disestablishing the sub-committee or revoking or altering any of the powers entrusted to them (which comprised all the powers of the executive committee), the executive

committee themselves made an order requiring dogs to be muzzled. The appellant sought to have the conviction quashed on the ground that the executive committee, by the delegation to the sub-committee, had divested themselves of all their powers under the Act, and that, therefore, their making of the order was a mere nullity. LORD COLERIDGE, C.J., said (25 Q.B.D. 394):

A "It is suggested, however, that, because there was another authority which might (had it chosen) have violated good sense by making an inconsistent order, the executive committee had no power to make the regulation in question. But delegation does not imply a denudation of power and authority; sched. VI of the Act provides that the delegation may be revoked or altered and the powers resumed by the executive committee. The word 'delegation' implies that powers are committed to another person or
B body which are as a rule always subject to resumption by the power delegating, and many examples of this might be given. Unless, therefore, it is controlled by statute, the delegating power can at any time resume its authority. Here the executive committee has exercised the power which the sub-committee might have exercised—but did not—and no question of conflict of jurisdiction arises."

C Since the statutory power of revoking the authority entrusted to the sub-committee had never been exercised, the sub-committee, had they desired to violate good sense, could, apparently (as LORD COLERIDGE, C.J., suggested), have made an order that dogs need not be muzzled. What implication is necessary to prevent the possibility of such an absurd state of affairs? I would supplement the words of LORD COLERIDGE, C.J., by saying that, in my judgment, not only
D can the delegating power resume their authority—with which, indeed, they have never parted—but they can also revoke the authority which they have delegated. If they cannot do that, the two powers would exist side by side and, hypothetically, might be exercised in entirely irresponsible and contradictory ways. WILLS, J., said (*ibid.*, 395):

E "Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself. The best illustration of the use of the word is afforded by the maxim, *Delegatus non potest delegare*, as to the meaning of which it is significant that it is dealt with in BROOM'S LEGAL MAXIMS under the law of
F contracts: it is never used by legal writers, so far as I am aware, as implying that the delegating person parts with his power in such a manner as to denude himself of his rights. If it is correct to use the word in the way in which it is used in the maxim, as generally understood, the word 'delegate' means little more than an agent. The notion, therefore, that the use of the word 'delegate' implies that the executive committee parted with their own
G authority is misconceived."

Looking at the nature of the delegation in the case now before me (*e.g.*, the powers and duties entrusted to the land and works committee), I think that the council cannot divest themselves of their statutory duties. They can get other persons to perform them on their behalf, and, if those persons perform them properly, well and good, but, if they do not, the council will still have to perform
H them themselves. Most of the functions of the standing committees were to make recommendations to the council, but in some cases they were entrusted with the exercise of executive powers. In so far as they merely make recommendations, the remedy of the council is easy, as they may refrain from adopting any recommendation they do not like. In so far as the delegation is of executive powers, it seems to me that the appointor must be able to determine the authority of the appointee. If there is power to revoke the authority of a committee as a whole, in my judgment, there must be a power to revoke the authority of any

single member thereof, including a person who is not a member of the council. In the result, therefore, I hold that this action fails.

Counsel for the plaintiff referred to the form of the recommendation of the *ad hoc* committee which was adopted by the council on Mar. 29, 1951, *viz.*, that the plaintiff "should no longer serve on any committee of the council." I do not think that any particular form of words is necessary when a principal desires to revoke an authority which he has conferred, so long as it is made clear that the authority is being determined. In my view, that is what the words of the recommendation which was adopted by the council connote. They convey to the plaintiff that he shall no longer serve on any committee of the council, and that the council by their resolution have revoked any authority conferred on him as a member of the committees. The conclusion at which I have arrived is quite independent of any alleged conduct on the part of the plaintiff. It is merely that there is power to determine, arbitrarily or capriciously (if the appointor so requires), an authority which he has conferred on some other person or persons.

Judgment for the defendants.

Solicitors: *Haslewood, Hare & Co.*, agents for *Bosley & Co.*, Brighton (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *J. G. Drew*, town clerk, Brighton (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re A SOLICITOR.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Oliver and Sellers, JJ.), May 1, 1951.]

Solicitor—Professional misconduct—Scale of charges—Solicitor acting for both mortgagor purchaser and mortgagee—Purchaser charged less than scale fee—Solicitors' Remuneration Act General Order, 1882, sched. I, Part I, r. 6—Solicitors' Practice Rules, 1936 (S.R. & O., 1936, No. 1005), r. 1, r. 2 (A).

A trade union, which advanced money on mortgage to those of their members who wished to buy houses, had an arrangement with a solicitor whereby he was to act for the union in their capacity as mortgagees, and, at the same time, for the prospective purchaser of a house. The solicitor charged the union the appropriate scale fee for investigating title and preparing the mortgage deed, but he charged the purchaser less than the fee prescribed by the Solicitors' Remuneration Act General Order, 1882, sched. I, Part I, r. 6, in a case where a conveyance and mortgage of the same property are prepared by the same solicitor. In doing this he acted on the view that, having investigated the title of the property and done other work in connection with the matter on behalf of the union, he need not do that work again on behalf of the purchaser, and so he would not charge the purchaser in respect of it.

HELD: where in such a case a solicitor investigates a title, he does so for both the mortgagees and the purchaser and owes a duty to them both; in the present case r. 6 applied, and the solicitor ought to have charged the purchaser according to the scale there laid down; and in the circumstances the solicitor had done acts calculated to attract business unfairly and had held himself out to the union as being willing to do work for their members at fees which were below two-thirds of the scale fees in breach of the Solicitors' Practice Rules, 1936, r. 1 and r. 2 (A).

AS TO SOLICITORS' REMUNERATION ON SALES, PURCHASES AND MORTGAGES, see HALSBURY, Hailsham Edn., Vol. 31, pp. 142-145, para. 186; and FOR CASES, see DIGEST, Vol. 42, pp. 244-246, Nos. 2759-2771.

FOR THE SOLICITORS' REMUNERATION ORDERS, 1883 to 1944, see ANNUAL PRACTICE, 1949, Vol. 2, pp. 3076-3104.

A APPEAL by a solicitor from a decision of the Disciplinary Committee of the Law Society imposing a fine of £100 on the grounds of professional misconduct and breach of the Solicitors' Practice Rules, 1936, r. 1 and r. 2 (A).

Paull, K.C., and *Colin Duncan* for the appellant.

Havers, K.C., and *Cumming-Bruce* for the respondents.

B LORD GODDARD, C.J.: In this case the court is called on to exercise its appellate jurisdiction regarding a finding of the Disciplinary Committee of the Law Society which imposed a fine of £100 on the appellant and ordered him to pay the costs. The honesty of the appellant is not in any way in question, but it is suggested that he has offended against the rules of professional practice which have been drawn up by the Law Society under the provisions of the Solicitors' Acts. The complaint preferred against him was that he

C " (1) . . . permitted in the carrying on of his practice things calculated to attract business unfairly in that he (i) had for many years quoted to prospective clients in connection with transactions relating to real property fees lower than two-thirds of the scale of charges fixed by the general order made under the Solicitors' Remuneration Act, 1881, which came into force on Jan. 1, 1883 [the Solicitors' Remuneration Act General Order, 1882], and the general orders amending that order; (ii) permitted officials of the D Amalgamated Engineering Union to hold him out as being prepared to do professional business in non-contentious matters affecting an interest in land at less than two-thirds of the scale of charges fixed by the general order made under the Solicitors' Remuneration Act, 1881, which came into force on Jan. 1, 1883, and the general orders amending that order; (iii) allowed it to become common knowledge through the Amalgamated Engineering E Union that it was cheaper to instruct his firm to act for members of the union purchasing properties when his firm acted for the union on a mortgage of such property. (2) Failed to comply with the provisions of r. 2 of the Solicitors' Practice Rules, 1936, by reason of the matters referred to in sub-para. (1) (ii) above."

F The Solicitors' Practice Rules, 1936, provide in r. 1:

" A solicitor shall not directly or indirectly . . . do . . . any act or thing which can reasonably be regarded as . . . calculated to attract business unfairly."

By r. 2 (A):

G " A solicitor shall not hold himself out or allow himself to be held out directly or indirectly and whether or not by name as being prepared to do professional business . . . in non-contentious matters at less than the scale of charges (if any) prevailing in the district in which the solicitor practises, or if no such scale exists then at less than two-thirds of the scale of charges fixed by the general order made under the Solicitors' Remuneration Act, 1881 . . . "

H In conveyancing matters, with which we are concerned here, the Solicitors' Remuneration Orders, 1882 to 1944, prescribe a scale which solicitors may charge.

The appellant, or his previous firm, have for more than thirty years acted for a trade union which was formerly known as the Amalgamated Society of Engineers and is now known as the Amalgamated Engineering Union. As part of their activities the union carry out the purpose of a building society, and advance money on mortgage to their members who want to buy houses.

The gravamen of the charge here is that the appellant had an arrangement with the union under which he was to act for them in their capacity as mortgagees and charge them the appropriate scale fee, but, at the same time, he would charge the prospective purchaser—who would, of course, be a member of the union—a far smaller fee than would be chargeable under the scale. That arrangement was made, the appellant says, many years ago, and it is clear that the business which has been brought to him by the union has been done on those terms. The case was fought throughout on the footing that the appellant had been charging less than two-thirds of the scale fee to the prospective purchaser, and the only contention which was made was that he had not held himself out, or permitted himself to be held out, as doing work at, to use a convenient expression, “cut rates.” That point was never mentioned to the Disciplinary Committee. Counsel for the appellant has contended that, as this is a penal proceeding in the sense that a penalty has been imposed on the appellant, he can take any point here which shows that the decision below was wrong. I reserve my opinion on the question whether this court, sitting in its appellate capacity, ought to allow points to be taken which have never been adumbrated before the Disciplinary Committee, but, as the matter has been argued at some length and the point is not without importance, we propose to give a decision on it.

The point is simply this. The appellant has been acting in a way which, if he was free so to act, was beneficial to the purchaser. It must be remembered, however, that the orders which have been made under the Solicitors’ Remuneration Act, 1881, and the Solicitors’ Acts, 1932 to 1941, are designed not only to protect the clients of solicitors, but also to preserve proper standards among solicitors themselves. Under sched. I to the Solicitors’ Remuneration Act General Order, 1882, the purchaser’s solicitors is entitled, in addition to a negotiating fee, if he has earned one, to make a charge

“for investigating title to freehold . . . or leasehold property, and preparing and completing conveyance (including perusal and completion of contract, if any).”

The mortgagee’s solicitor, who is provided for in the same scale, is entitled to charge for negotiating a loan, if he has done so, and then

“for investigating title to freehold . . . or leasehold property, and preparing and completing mortgage.”

He is entitled to the same percentage as the other solicitor. If in such a case as the present the mortgagee employs his solicitor and the purchaser employs his solicitor, no doubt the mortgagee’s solicitor will investigate the title to see that the mortgagee is getting a good security and the purchaser’s solicitor will also investigate title, because it will be his duty to see that his client is getting a good title to the property he is buying. The rules under Part I of sched. I to the order of 1882 recognise, however, that the same solicitor may act both for the mortgagee and for the purchaser, and r. 6 provides:

“Where a conveyance and mortgage of the same property are completed at the same time, and are prepared by the same solicitor, he is to be entitled to charge only half of the above fees for investigating title and preparing the mortgage deed up to £5,000, and on any excess above £5,000 one-fourth thereof, in addition to his full charges upon the purchase money and his commissions for negotiating (if any).”

If one solicitor is to be instructed to carry out the dual transaction, he will, of course, only once investigate title. In the same way, if he finds it necessary to issue requisitions on behalf of the mortgagee or the purchaser, by whichever he is instructed first, he will not find it necessary to issue those requisitions on behalf of the other party to the transaction. The rule says, therefore, in effect, that where one solicitor is instructed for both the purchaser and the mortgagee he is to be entitled to charge scale and a half.

A The view on which the appellant has been acting is that he could charge the union full fee for the mortgage. In satisfying himself whether the union could properly lend money on mortgage he would have to investigate the title on their behalf, and, therefore, he would not have to investigate title on behalf of the purchaser. Accordingly, he would not make the full charge under the scale to the purchaser because he would not have done any work for him. That, however, is not what the rule says. If the appellant investigated the title, he did so not only for the mortgagee, but also for the purchaser. Counsel for the appellant at one time seemed to argue that, if it was shown by the bill that the solicitor was not charging the purchaser for investigation and if he were negligent in investigating the title on behalf of the mortgagee and so allowed the mortgagee to lend money on a property to which the mortgagor had no title, he would not be liable also to the purchaser for allowing him to buy a property which had no title. That argument does not commend itself to me. A solicitor, acting for both parties owes a duty to both. If he investigated the title on one day on behalf of the mortgagee he need not go through the farce of investigating it on the next day on behalf of the purchaser. He has investigated the title, and he has investigated it both on behalf of the purchaser and the mortgagee, and then r. 6 of the rules under Part I of sched. I to the order of 1882 prescribes what charges he is entitled to make. It follows that any solicitor who has been doing this work on behalf of both mortgagee and purchaser is entitled to the scale and a half. If a solicitor charges something very much less, he is doing just what the rules were intended to prevent.

D [His LORDSHIP stated that in the instance put forward under the scale £24 would have been payable by the purchaser for investigation of title and conveyance, but the appellant had only charged £4 15s., and he continued:] I find it extremely difficult to say that the appellant has not sought instructions for professional business or permitted or done something in the carrying on of his practice which is calculated to attract business unfairly, because he is offering to do business, and letting his client, the union, whose members are concerned, know that if they come to him the work will be done at far less than they would have to pay if an independent solicitor was instructed. In my opinion, the facts show a clear breach of r. 1 and r. 2 (A) of the Solicitors' Practice Rules, 1936. The latter rule does not say that the appellant is to hold himself out to any particular person. He has, undoubtedly, held himself out to the union as being willing to do work for the members of the union at under two-thirds of the scale fee. The committee say that they followed the ruling which had been given by the Law Society as far back as July, 1937, in which they said this:

"A solicitor does not 'hold himself out' to a *bona fide* client if he agrees to do the work of that client at a special fee where the circumstances justify it, but he would hold himself out if he agreed with a *bona fide* client to do the work of some third party for less than the scale laid down in r. 2."

G In considering whether or not the appellant has broken r. 2, it does not, in my view, make any difference whether the client induced the third party to come along or whether he did not. The appellant has told his client that he is willing to do work for other people at a "cut rate." That is a breach of r. 2 (A), which is the only conclusion to which the Disciplinary Committee could have come on the evidence. In my opinion, this appeal fails.

H OLIVER, J.: I agree.

SELLERS, J.: I agree. The fundamental ground on which counsel for the appellant sought to upset the findings of the Law Society was, as he contended for the first time in this court, that there had been no undercutting of the scale charge which the appellant was entitled to make. He referred to sched. I to the Solicitors' Remuneration Act General Order, 1882, made under the Solicitors' Remuneration Act, 1881, and said that not one of the items there applied, because

in each particular case there had been no investigation of title, but the only item was "to charges for preparing and completing transfer and/or lease, £4 15s." But when r. 6 of the rules under Part I of sched. I to the order is referred to, it is quite clear that that is the rule which applies. As my Lord has said, r. 6 makes provision for the costs both of the mortgagee's solicitor and of the purchaser's solicitor where the conveyance and mortgage are completed at the same time and are prepared by the same solicitor. The submission of counsel, as I understand it, was that, notwithstanding the rule, in fact the work of investigating the title was not done, and, therefore, no schedule has been infringed by the charge. The fundamental fallacy of that submission is that there has been an investigation of title by the same solicitor for the benefit of both the mortgagee and the purchaser. In those circumstances it is not right to say that there has been no investigation of title. The one investigation has served for both, and r. 6 applies. For the reasons given by my Lord I think that the Disciplinary Committee were entitled on the evidence to find that there had been established breaches of r. 1 and r. 2 (A) of the Solicitors' Practice Rules, 1936.

Appeal dismissed.

Solicitors: *Sydney Redfern & Co* (for the appellant); *Hempsons* (for the respondents).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

NOTE.

R. v. WOOD.

[SALOP WINTER ASSIZES (Morris, J.), February 26, 1951.]

Criminal Law—Evidence—Character of prosecutor—Prosecutor cross-examined as to alleged act of indecency—Admissibility of evidence of his general good reputation.

AS TO EVIDENCE OF THE CHARACTER OF THE PROSECUTOR, see HALSBURY, *Hailsham Edn.*, Vol. 9, p. 190, para. 274; and FOR CASES, see DIGEST, Vol. 14, pp. 364-366, Nos. 3857-3874.

SUBMISSION as to admissibility of evidence.

The defendant was charged in the first count of the indictment with robbing one C. of £1 3s. on Nov. 24, 1950, with violence, and in the second count with assaulting C. thereby occasioning him actual bodily harm. During the cross-examination of C. counsel for the defendant asked whether on the night relating to the charge he made an improper suggestion to the defendant and committed an act of gross indecency against him.

W. F. Hunt, for the Crown, proposed to call evidence in rebuttal to prove that C. was a person of good general reputation.

N. A. Carr, for the defence, submitted that such evidence was inadmissible. Even though C. might have behaved indecently on one occasion, that was consistent with his being of good general reputation, and evidence to prove that he was a person of good general reputation could only prejudice the jury in his favour against the defendant. The jury had to decide whether C.'s evidence about the incident on the night in question was true or whether the defendant's evidence was true.

Hunt contended that, in view of the questions put, it was relevant that the jury should know what kind of reputation C. had. There was an analogy in cases of rape where a defence of consent was set up, when it was usual to ask what kind of reputation the woman held.

MORRIS, J.: I think the evidence in the circumstances is not admissible.

Solicitors: *G. C. Godber*, Shrewsbury (for the Crown); *David Harris*, Shrewsbury (for the accused).

G.L.

BOGUSLAWSKI AND ANOTHER v. GDYNIA
AMERYKA LINIE.

[COURT OF APPEAL (Somervell, Denning and Morris, L.J.J.), May 10, 1951.]

Costs—Apportionment—Three actions—No order for consolidation—Agreement that evidence in one action deemed to be taken in two others—Judgment in first action and adjournment by consent of second and third.

The plaintiffs in three actions, who had served on board Polish ships, claimed against the owners sums which they alleged were due to them under agreements between the plaintiffs' trade unions and the Polish government acting on behalf of the owners. An order was made that the three actions should be fixed for trial on the same day and that evidence in the first case should be deemed to be taken in the others, but no order for consolidation was made, nor did the parties agree that the first action should be a test case. On the day of the trial the three cases were called on together, and eventually judgment was entered for the plaintiff in the first action with costs, the other two actions being adjourned by agreement. An appeal by the defendants in the first action was dismissed. The same solicitor acted for the plaintiffs in the three actions. On taxation of the plaintiff's costs in the first action, the defendants took the objection that certain of the costs—in particular brief fee and the costs of witnesses—should be apportioned between the three actions.

HELD: the mere fact that it was agreed between the parties that evidence taken in the first action should be treated as evidence in the second and third actions did not afford any ground for the apportionment of the costs.

AS TO TAXATION OF COSTS, see HALSBURY, Hailsham Edn., Vol. 26, p. 102, para. 192; and FOR CASES, see DIGEST, Practice, pp. 926-958, Nos. 4688-4980.

Cases referred to:

- (1) *Oppenshaw v. Whitehead*, *Mucklow v. Whitehead*, (1854), 9 Exch. 384; *sub nom. Mucklow v. Whitehead*, 23 L.J.Ex. 97; 22 L.T.O.S. 245.
- (2) *Re Metropolitan Coal Consumers' Assn.*, (1890), 45 Ch.D. 606; 59 L.J.Ch. 532; 62 L.T. 561; 9 Digest 138, 764.

INTERLOCUTORY APPEAL by the plaintiffs from an order of McNAIR, J., dated Apr. 13, 1951, on an application by the defendants under R.S.C., Ord. 65, r. 27, reg. 41, that the taxation of the costs of the action made by the master should be reviewed.

The first plaintiff was an officer and the second plaintiff a seaman in the Polish merchant navy, and on July 5, 1945, they were serving in a ship belonging to the defendants. Until midnight on that day the Polish merchant navy was under the control of the Polish government in London, but as from midnight the British government ceased to recognise the Polish government in London and recognised the government which had been set up in Poland. On account of the political situation the first plaintiff left his ship, which was then lying at a British port, on July 11, 1945, and the second plaintiff left the ship on July 7. In an action brought by them against the defendants the plaintiffs claimed compensation which, they said, was due to them on leaving the ship, basing their claims on an agreement alleged to have been made on July 3, 1945, between the Polish government in London, acting on behalf of the defendants, on the one side, and the plaintiffs' trade unions, acting on behalf of their members, on the other side, and, alternatively, on an offer made by the government on behalf of the defendants and accepted by the plaintiffs by their conduct. The defendants denied liability under Polish law and further contended that the recognition by the British government of the new Polish government operated retroactively to June 28, 1945, and, therefore, acts done by the old Polish government after that date would not be recognised by the British government. On Mar. 31, 1949, it was

ordered by HILBERY, J., that the action, with two other similar actions, should be fixed for trial on the same day and that evidence in one case should be deemed to be taken in the others. No order for consolidation was made. The same solicitor acted for the plaintiffs in the three actions. At the trial before FINNEMORE, J., the cases were called on together and on the twelfth day judgment was entered for the plaintiffs in the present action with costs, the remaining actions being adjourned. An appeal by the defendants to the Court of Appeal was dismissed ([1950] 2 All E.R. 355). On taxation of costs the master refused to apportion the plaintiffs' costs relating to, *inter alia*, brief fees and attendance of expert witnesses, between the three actions. In support of the master's decision the plaintiffs contended that there was no power to apportion as between separate actions unless an order for consolidation had been made or unless there was an agreement that the action in which the costs were being taxed should be treated as a test action governing the other actions. McNAIR, J., held that, as the relationship between the three actions so closely approximated to consolidation, an order for apportionment should be made.

Niall MacDermot for the plaintiffs.

Scott Henderson, K.C., and R. H. W. Dunn for the defendants.

SOMERVELL, L.J.: This is an appeal from a decision of McNAIR, J., in a matter relating to costs. Three actions were brought by the employees of certain Polish shipping companies. Up to a certain date the Polish merchant navy was controlled by the Polish government in London, but there came a time when that government ceased to be recognised by the British government and a new government in Poland obtained recognition. Shortly before that event an offer was made by the Polish government in London of a gratuity to officers and men employed in the ships of a number of Polish shipping companies if they left the service owing to the political situation. A number of the men did leave the service and a number of writs was issued claiming the gratuity. The first of the three actions with which we are concerned was brought by Jan Boguslawski and Stanislaw Krupka against Gdynia Ameryka Linie Zeglugowe Spolka Akcyjna. The second action was by one Hys against another company, Zegluga Polska Spolka Akcyjna, and the third action was Lech v. Gdynia Ameryka Linie. On an application before HILBERY, J., the parties agreed that evidence in the first case should be deemed to be taken in the others. There was a great deal of evidence, particularly as to Polish law, which was common to all the cases, but there were other matters which might have led one to fail where another succeeded. The three cases came into the list for hearing before FINNEMORE, J., they were all called on together, and for some days they were entered in the list as part heard. On the twelfth day it was agreed that the second and third actions should stand over, that FINNEMORE, J., should give his judgment in the first action, and that the other cases should remain in his list. Judgment was given in favour of the plaintiffs and an appeal by the defendants to the Court of Appeal was dismissed. Leave to appeal to the House of Lords was granted on the terms that the findings of the House of Lords with regard to Polish law in the first case should govern the other two cases. Up to that time the parties had not agreed that the first case should be a test case for such matters as were common to the three actions, nor had the actions been consolidated. The same solicitor was acting for the plaintiffs in all three cases.

When the bill of costs was drawn up, the defendants took the objection that certain of the costs—in particular, the brief fee and the cost of the witnesses—ought to be apportioned, *i.e.*, the plaintiffs in the first action ought not to recover the full costs of calling the witnesses because it was said that that work was done on behalf of all three plaintiffs. In answering the objections the master referred to the judgment of POLLOCK, C.B., in *Oppenshaw v. Whitehead* (1), where he said (9 Exch. 387):

“ We were desirous, in cases of this kind, to lay down some rule which

would be productive of economy in the administration of justice; but, after considering the subject with the greatest attention, we find it impossible to lay down any general rule which might not create more expense in discussing its application than would probably be saved by its adoption. We therefore think that, where the business has been actually done, the master ought not to take into consideration that the same attorney was employed by two or more plaintiffs, unless indeed there has been a consolidation of the actions. With respect to such matters as may be required to be done but once for both causes, such as subpoenaing a witness, making a journey, or the like, of course the charges must be divided according to the discretion of the master, exercised under the 'Directions to the Taxing Masters.' But in matters of this description, where the business is actually done in both causes, we think that, whether the causes are tried at the same or at a subsequent assize, the attorney is entitled to the same charges as if two different attorneys had been employed."

On the face of it *Re Metropolitan Coal Consumers' Asscn.* (2), to which the learned master also referred, was a very strong case for apportionment. KEKEWICH, J., said (45 Ch.D. 610):

"... if these two cases were in any way to be regarded as governing one another, it was for the defendants to come forward and say, 'Try one: and if you succeed in one, we will immediately submit, without argument, to judgment in the other'."

I would add that I think a defendant would have placed himself in a similar position if, instead of saying: "We will immediately submit to judgment," he had said: "We will treat the decision given in the first case as governing all the same issues raised in the second case." There might be some different issue in the second case which could be distinguished and dealt with separately. The learned master regarded that principle as applying in the main to the objections and refused to apportion.

From that decision the defendants appealed to the learned judge who reversed the decision. He took the view that the cases just referred to did not lay down any binding rule of law, and, having regard to the agreement made, he considered that the relationship between these actions closely approximated to consolidation. He said:

"I am satisfied that the bulk of the work involved in the items which are challenged can fairly be regarded as common to all three actions so that, if the plaintiffs in the second and third actions fail, it would be unfair to hold the defendants in the first action liable for the whole of the cost of this common work, and that, on the particular facts of these cases, the position was so closely equivalent to consolidation that apportionment should be made."

With great respect I do not follow that. The defendants contested the first action. Their contesting the first action compelled all this evidence to be called, and I cannot see why, if the second and third actions fail, which must be on some other ground, the defendants should not pay the costs which were incurred and had to be incurred if Boguslawski and Krupka were to bring their action. Approaching the matter from a somewhat different angle, it seems to me that the natural inference when an agreement like this is made is that it is made, not to diminish the defendants' potential liability for costs in the first action, but in order that the costs of the second and third actions should be diminished with regard to both parties.

It was suggested that there was authority for the proposition that in some circumstances a solicitor can require payment twice over for his work. There may be many cases where work done on one case is of some assistance in another, but that is not the type of case we are considering. In considering cases such as the present, no doubt the efforts made in one case make it necessary for very

much less evidence to be taken in the others. It was suggested that the solicitor for the plaintiff might be entitled to recover in the second action exactly as if he had never recovered the costs in the first action in respect of matters common to both. We have not to decide that today. If that is the consequence of our decision, it is a matter which might well be looked into, but I doubt whether that result does follow from our decision.

For these reasons I think the learned judge applied the wrong principle. The idea of close approximation to consolidation is a difficult one and I do not think that it applies in a case like the present. Here one has either to show that there was an agreement that a case should be a test case or that the actions had been consolidated. The mere fact that it is agreed between the parties that evidence taken in the first action should be treated as evidence in the second and third actions does not afford any basis for apportionment. For these reasons I think this appeal must be allowed and the order of the master restored.

DENNING, L.J.: It is important to notice that the first action was tried out fully and judgment given for the plaintiffs with costs. The other two actions stood over and have never been tried. In those circumstances I see no reason why the plaintiffs should not get their full costs in the action which has been tried. The position might well have been different if the plaintiffs in the other two actions had had their actions tried, perhaps very shortly afterwards, and had obtained judgment with costs. I cannot imagine that the solicitor would be entitled to get paid three times over for the same work because he had won the three actions. I know that in *Oppenshaw v. Whitehead* (1), the Court of Exchequer consisting of POLLOCK, C.B., PARKE, B., and ALDERSON, B., decided that where two actions had been fought and won on substantially the same ground for two plaintiffs "the attorney is entitled to the same charges as if two different attorneys had been employed,"—in other words, that he gets paid twice over. That is not a decision of the Exchequer Chamber, but only of the Court of Exchequer, and it is not binding on this court. As at present advised I should not be inclined to agree with it, but it does not arise here. I agree for the reasons given by my Lord that we should allow this appeal and that the plaintiffs should get their proper costs.

MORRIS, L.J.: I agree.

Appeal allowed.

Solicitors: *Constant & Constant* (for the plaintiffs); *Hilder, Thompson & Dunn* (for the defendants).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

Affirmed. H.L. [1952] 2 All E.R. 394

BEST v. SAMUEL FOX & CO., LTD.

[COURT OF APPEAL (Lord Asquith of Bishopstone, Cohen and Birkett, L.JJ.), January 24, 25, 26, February 1, May 10, 1951.]

Negligence—Wife's loss of consortium—Injury to husband causing sexual incapacity—Tortfeasor's liability to wife.

Husband and Wife—Consortium—Right of consortium—Husband injured and losing sexual capacity owing to defendant's negligence—Defendant's liability to wife.

An action by a wife based on loss of consortium owing to the negligent, but not malicious, act of a third party causing injury to her husband cannot succeed unless the wife can prove total loss of, as distinct from impairment of or interference with, that consortium. A wife cannot, therefore, recover

damages where there is only an impairment of consortium, due, for instance, to the husband being rendered incapable of sexual intercourse.

Per BIRKETT, L.J. (LORD ASQUITH, dissentiente and COHEN, L.J., dubitante): Today the rights of husband and wife in the consortium are fully mutual and completely equal, and, before the law, the wife is entitled to bring an action when she has been deprived of her consortium by the negligent act of a third person.

Decision of CROOM-JOHNSON, J. ([1950] 2 All E.R. 798), affirmed.

AS TO RIGHTS OF CONSORTIUM, see HALSBURY, Hailsham Edn., Vol. 16, pp. 610-612, paras. 956-960; and FOR CASES, see DIGEST, Vol. 27, pp. 78-83, Nos. 607-649, and Digest Supp.

Cases referred to:

- (1) *Hitaffer v. Argonne Co., Inc.*, (1950), 183 F. 2d, 811.
- (2) *Lynch v. Knight*, (1861), 9 H.L. Cas. 577; 5 L.T. 291; 11 E.R. 854; 27 Digest 82, 644.
- (3) *Davies v. Solomon*, (1871), L.R. 7 Q.B. 112; 41 L.J.Q.B. 10; 25 L.T. 799; 36 J.P. 454; 32 Digest 173, 2111.
- (4) *Winsmore v. Greenbank*, (1745), Willes 577; 125 E.R. 1330; 27 Digest 81, 640.
- (5) *Wright v. Cedzich*, (1929), 43 C.L.R. 493; (1930), V.L.R. 141; 3 A.L.J. 437; (1930) Argus L.R. 105; Digest Supp.
- (6) *Gray v. Gee*, (1923), 39 T.L.R. 429; 27 Digest 82, 645.
- (7) *Place v. Searle*, [1932] 2 K.B. 497; 101 L.J.K.B. 465; 147 L.T. 188; Digest Supp.
- (8) *Newton v. Hardy*, (1933), 149 L.T. 165; Digest Supp.
- (9) *Guy v. Livesey*, (1618), Cro. Jac. 501; 79 E.R. 428; 27 Digest 80, 632.
- (10) *Hyde v. Scyssor*, (1619), Cro. Jac. 538; 79 E.R. 462; 27 Digest 80, 633.
- (11) *Elliott v. Albert*, [1934] 1 K.B. 650; 103 L.J.K.B. 305; 151 L.T. 13; Digest Supp.
- (12) *Lumley v. Gye*, (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 118 E.R. 749; 42 Digest 987, 169.
- (13) *Re Compton*, [1945] 1 All E.R. 198; [1945] Ch. 123; 114 L.J.Ch. 99; 172 L.T. 158; 2nd Digest Supp.

APPEAL by the plaintiff from a judgment of CROOM-JOHNSON, J., dated July 20, 1950, and reported [1950] 2 All E.R. 798, dismissing the plaintiff's claim for damages for interference with her right to the consortium of her husband through personal injuries to the husband caused by the defendants' negligence.

Pritt, K.C., and *G. N. Black* for the plaintiff.

Paull, K.C., and *Leslie* for the defendants.

Shepherd, K.C., and *R. W. Payne* for the third party.

Cur. adv. vult.

MAY 10. COHEN, L.J.: I will ask BIRKETT, L.J., to deliver the first judgment.

The following judgments were read.

BIRKETT, L.J.: This is an appeal by the plaintiff, Mrs. Julia Best, from a judgment of CROOM-JOHNSON, J., at the Leeds Assizes on July 20, 1950, when he dismissed her claim against the defendants. Before stating the nature of the plaintiff's claim in the present action it is necessary to set out one or two preliminary matters. Mrs. Best is a young woman of twenty-five years of age, and she is the wife of Rex Holroyd Best, a man of about thirty years of age. Mr. Best was a steel erector, and on Mar. 23, 1946, he was employed by the Steel Constructor Co., The Steel Constructor Co. was carrying out certain work at the defendants' premises at Stocksbridge for the defendants, and Mr. Best was engaged in re-sheeting the roof of part of the defendants' steelworks.

In the course of his work he was obliged to go on the wheel track of an overhead travelling crane, and while he was there, owing to the negligence of the defendants, he was run into by the crane, knocked off the track, and, in falling, sustained the most grievous personal injuries. The agreed medical report makes it plain that as a result of his injuries Mr. Best is afflicted with a form of sexual impotence. He still retains the sexual urge, but he is unable to perform the sexual act. Mr. Best brought his action against the defendants, alleging breaches of statutory duty and negligence at common law, and on July 20, 1948, at the Leeds Assizes he was awarded the sum of £4,238 15s., with the costs of the action. On Jan. 12, 1949, the plaintiff issued her writ against the defendants. In her statement of claim she claimed damages from them on the ground that, because of their negligence, her consortium with her husband had been interfered with without justification in that she had been deprived of the opportunity of having further children and of ordinary marital relations. She alleged that the sexual impotence of her husband had had a most serious effect on her health. She suffered, and still suffers, from headaches, irritability, depression and a moderately intense anxiety neurosis. These ill-effects on her health were not disputed by the defendants.

The precise issue before the court in the present appeal may be thus stated. Are defendants who have been guilty of negligence causing injury to a husband liable also to the wife in the same or a separate suit for any injury to or impairment of her consortium with her husband arising from that negligence which she can prove? The novelty of the claim is not unimportant, and it naturally was discussed in the arguments before us, so that a few words on that topic might not be out of place here.

Our attention was drawn to *Hittaffer v. Argonne Co., Inc.* (1), decided in the United States Court of Appeals for the District of Columbia Circuit on May 29, 1950. The husband in that case had been injured through the negligence of the defendants. The wife brought an action against the defendants alleging that in consequence of her husband's injuries she had been deprived of "his aid, assistance, and enjoyment, specifically sexual relations," and the court held that the wife had a cause of action for her loss of consortium due to the injuries suffered by her husband through the negligence of the defendants. In the course of the judgment the court said (183 F. 2d. 812):

"Although this is the first time this question has been presented to this court, we are not unaware of the unanimity of authority elsewhere denying the wife recovery under the circumstances. As a matter of fact we have found only one case in which the action was allowed, and that authority has been effectively overruled."

Some thirty cases from different parts of the United States are mentioned in a footnote to show the unanimity of opinion and authority to which the court referred, and the court claimed in its judgment (*ibid.*, 813) to have pierced "the thin veils of reasoning" of the thirty cases mentioned, and added (*ibid.*, 819) that the reasoning was "specious and fallacious." In the RE-STATEMENT OF THE LAW OF TORTS, adopted and promulgated by the American Law Institute, vol. 3, at p. 695, the matter is thus stated:

"A married woman is not entitled to recover from one who, by his tortious conduct against her husband, has become liable to him for illness or other bodily harm, for harm thereby caused to any of her marital interests or for any expense incurred in providing medical treatment for her husband."

In the United States, therefore, the issue has been raised in the form in which it is raised before us, but, apart from the decision I have mentioned, the claim of the wife has been denied. The reasons for this denial, collected from the thirty cases mentioned in the *Hittaffer* case (1), are set out in the judgment and need not be referred to here. In two cases in England the issue has been

raised, but in a form quite different from the present case. In *Lynch v. Knight* (2) there was much division of opinion concerning the wife's right to consortium, but the case was decided against the plaintiff on the ground of remoteness of damage. In *Davies v. Solomon* (3) no decision was made on the point.

A The question at issue in the present case may, therefore, be said to be new, and the old question arises whether it is new in principle or merely new in the instance. CROOM-JOHNSON, J., after reviewing the evidence and examining and analysing the decisions in the relevant cases with great care, dismissed the plaintiff's claim. The grounds on which he did so appear to be: (a) Following the principles laid down in what are comprehensively termed the "enticement" cases the defendants had not done any active or intentional or deliberate act designed to break up or to injure the plaintiff's consortium, and, indeed, had no knowledge of the plaintiff at the date of the negligence in 1946. (b) If the plaintiff possessed a legal right to the consortium of her husband, the defendants' responsibility to her husband for their negligence towards him cannot be extended so as to make them responsible to the plaintiff when they had no intention "wilfully, knowingly or impliedly" of putting an end to, or, indeed, impairing, the consortium of the plaintiff. CROOM-JOHNSON, J., was also of opinion that, (c) if the plaintiff had been entitled to succeed because of the loss of consortium, she would have been equally entitled to succeed if she had only been able to show an impairment of the consortium and not a complete loss or deprivation, though, in view of his decision on the other points, he did not discuss the last point at any length.

D The submissions made to us on behalf of the plaintiff covered a very wide field, but, perhaps, they may be stated in this way: (a) The right to consortium by a husband or wife is now a well-recognised right at common law. It is fully mutual at this time of day, each spouse having equal rights, and the law relating to consortium is the same for husband and wife. (b) The right to consortium is quite distinct from *servitium*, *servitium* being an adjunct of consortium and not an essential ingredient. (c) Any unjustifiable interference with the consortium of the husband or wife gives the injured spouse a right of action against the party so interfering. This interference may arise from any tortious action, such as trespass or negligence, and applies also to the act of inciting a spouse to injure or destroy the consortium. (d) Inciting a spouse to injure or destroy the consortium is a separate tort, and knowledge of the consortium by the wrongdoer is an essential element, but, in the case of an injury to the consortium due to the negligence of the wrongdoer, knowledge of the consortium is not an essential element. (e) The view that the right of consortium depends on proprietary interest is now obsolete, and the growth and development of the law, particularly during the last seventy years, as evidenced by the changes in the position of married women made by statute, make the wife's position exactly the same as the husband's. The few remaining differences, such as the husband's right to sue for damages for adultery and the husband's liability to maintain his wife, whereas the wife has no right to sue for damages for adultery and is under no duty to maintain her husband, save in very special cases, make no difference in the matter of consortium. (f) In the present action it is not incumbent on the wife to show complete loss of the consortium. Any interference with it, or any impairment of it, or injury to one element of it, will suffice to support the cause of action.

H The submissions made by counsel for the defendants may also be shortly summarised in this way: (a) If the plaintiff has any cause of action in the present case (which is denied), then it must be based on the principles which gave rise to the old form of action *per quod consortium amisit*, and in law the plaintiff has no rights sufficient to sustain the action, the husband alone possessing these rights. (b) It is conceded that the status of the wife has been greatly changed by the growth of public opinion and the legislation of the last seventy years

and today she possesses all the rights which spring from the religious or quasi-contractual side of marriage, but she is still without the rights or liabilities which spring from the husband's proprietary rights in the consortium. (c) The injury to the wife's consortium in the present case was consequential on the injury to the husband, and, as the wife has no proprietary right to consortium, the defendants are under no liability to her. (d) Mere injury to the consortium is not enough; a total loss of consortium must be proved. The present action is merely a claim for damages for the loss of sexual intercourse, although it is recognised how grievous the loss of children may be, and the courts will not inquire into such matters between husband and wife. Consortium is one and indivisible, and there has been no loss of consortium in the present case, for the parties are still living together under the same roof.

The term "consortium" is nowhere defined with complete precision. CROOM-JOHNSON, J., defined it as ([1950] 2 All E.R. 800) "the comfort and the decent and proper enjoyment of the affection of her husband." In some cases it is defined as "comfort and society," in others as "society and service," as in *Winsmore v. Greenbank* (4). BLACKSTONE, in his COMMENTARIES ON THE LAWS OF ENGLAND, 4th ed., vol. 3, p. 140, says:

" . . . if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a separate remedy by an action upon the case for this ill-usage *per quod consortium amisit*, in which he shall recover a satisfaction in damages."

In BULLEN AND LEAKE'S PRECEDENTS OF PLEADINGS, 3rd ed., p. 340, is to be found a declaration by a husband for enticing away his wife, and it reads:

" . . . wrongfully enticed and procured the said G. unlawfully and without the consent and against the will of the plaintiff to depart and remain absent from the house and society of the plaintiff."

In *Lynch v. Knight* (2) the term used by LORD CAMPBELL, L.C., and LORD CRANWORTH is "conjugal society" and by LORD WENSLEYDALE "the society of her husband" and "society and affection." In JENKS' ENGLISH CIVIL LAW, 4th ed., vol. 1, p. 397, the words are "society and comfort," and in LUSH ON THE LAW OF HUSBAND AND WIFE, 3rd ed., p. 3, the duty of the wife is said to be to "reside and consort" with her husband.

It is important, therefore, to come to a clear conclusion about what meaning is to be given to the word "consortium." In a notable dissenting judgment given in *Wright v. Cedzich* (5), ISAACS, J., said (43 C.L.R. 510):

"The mass of indefinable duties and rights are conveniently gathered under the one word *consortium*, and that is a word of equality, subject only to natural, and not legal, diversities . . ."

In *Davies v. Solomon* (3), decided some ten years after *Lynch v. Knight* (2) and before the Married Women's Property Act, 1882, the husband and wife sued for a slander on the wife, and the damage alleged was said to be under two heads, (a) loss of cohabitation with her husband and (b) loss of hospitality of friends. BLACKBURN, J., with the approval and concurrence of MELLOR, J., and HANNEN, J., described the first head of damage as "loss to the plaintiff of the consortium of her husband," but the court found it unnecessary to decide whether that was temporal damage sufficient to maintain the action because they found the second head sufficient to do so. BLACKBURN, J., began his judgment by saying (L.R. 7 Q.B. 114):

"The sole difficulty in deciding the case is caused by the opinion of LORD WENSLEYDALE in *Lynch v. Knight* (2)."

Lynch v. Knight (2) is of great importance in this connection. The case was originally argued in the Irish Court of Queen's Bench and later in the Irish Court

of Exchequer Chamber. Both courts gave judgment for the husband and wife. The House of Lords reversed the decision on the ground of remoteness of damage. For a report of the arguments in Ireland see 5 L.T. 292, and for the decision of the House of Lords see 9 H.L. Cas. 577. On consortium, the view adverse to the wife's claim was thus stated. HUGHES, B., said (5 L.T. 292):

A "The consortium of husband and wife is, in my opinion, the right of the husband . . . The consortium is, as it were, the property of the husband."

FITZGERALD, B., said (*ibid.*, 294):

" . . . I can find nothing in the wife's loss of her husband's society affecting her material interests . . . the loss of conjugal society is a special damage to the husband, and the husband only, who has thereby lost the society of one who is in law considered as his servant."

B In the House of Lords, LORD WENSLEYDALE said that there was considerable doubt on the question, but he had made up his mind that no such action would lie. The important passage is (9 H.L. Cas. 598):

C "The relation of the husband to the wife is in most respects entirely dissimilar from that of the master to the servant, yet in one respect it has a similar character. The assistance of the wife in the conduct of the household of the husband, and in the education of his children, resembles the service of a hired domestic, tutor or governess; is of material value, capable of being estimated in money . . . It is to the protection of such material interests that the law chiefly attends."

D LORD CAMPBELL, L.C., took the opposite view, and expressly said (*ibid.*, 589):

"The wife is not the servant of the husband . . ."

LORD CRANWORTH was strongly inclined to think that LORD CAMPBELL's view was correct. LORD BROUGHAM was (*ibid.*, 593)

"rather inclined to think that the action would not lie."

E It is clear that the decision turned on the true meaning of "consortium," and in the present case counsel for the defendants did not hesitate to say that the reason the present action will not lie is the reason stated by LORD WENSLEYDALE. He cited in support of his argument the passage from BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, vol. 3, ch. 8, p. 142, and, in particular, the words:

F "We may observe that in these relative injuries, [*i.e.*, injuries suffered by a husband, a parent, a guardian or a master] notice is only taken of the wrong done to the superior of the parties related, . . . while the loss of the inferior [the wife, the child, the ward and the servant] by such injuries is totally unregarded."

G Counsel for the defendants was duly apologetic about quoting such language, which, it must be confessed, falls a little strangely on modern ears, but submitted that the husband's right to sue was because of his proprietary right, and the wife, lacking such proprietary right, had no such action.

H The decisions in what are usually called the enticement cases must be considered. *Winsmore v. Greenbank* (4) was an action brought on the case for enticing away and detaining the plaintiff's wife, for the loss of "the comfort and society" of the wife and "her aid and assistance in his domestic affairs." The Court of Common Pleas allowed the action, although the action for loss of consortium had formerly been considered as founded on trespass. In *Gray v. Gee* (6) it was held that a wife can maintain the action for enticement against anybody who persuades her husband to leave her. This was a most important decision, and would seem to be new in principle. It was followed in *Place v. Searle* (7) by the Court of Appeal. SCRUTTON, L.J., said ([1932] 2 K.B. 512):

"It seems to be clear that at the present day a husband has the right to

the consortium of his wife, and the wife to the consortium of her husband, and that each has a cause of action against a third party who, without justification destroys that consortium ”;

and later he said (*ibid.*, 513):

“ There being such a right it follows, and it has been so decided in numerous cases, that any person who, without justification, interferes with that right is liable to an action in tort.”

Whether SCRUTTON, L.J., intended to describe two different things in his use of the word “ destroys ” and the word “ interferes ” is not too clear. He may have meant an interference that destroys the consortium or he may have meant an interference that only injured and did not destroy. In *Newton v. Hardy* (8), SWIFT, J., held that a married woman had a legal right to the consortium of her husband and could recover damages from anybody who violated that right. He said (149 L.T. 166):

“ ... I cannot for myself think that now, as LORD CAMPBELL said in *Lynch v. Knight* (2) the right to sue for damaging the consortium is limited to the husband. It is a mutual right of husband and wife, and, if anybody breaks into it and violates it, then either of them, in my view, is entitled to sue for damages in respect of that wrong.”

I do not find that LORD CAMPBELL used the word “ damaging ”; it is always the loss of consortium. The passage is (9 H.L. Cas. 589):

“ Although this is a case of the first impression, if it can be shown that there is presented to us a concurrence of loss and injury from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of consortium, or conjugal society, can give a cause of action to the husband alone . . . But the loss of conjugal society is not a pecuniary loss, and I think it may be a loss which the law may recognise, to the wife as well as to the husband. The wife is not the servant of the husband . . . ”

As I say, I do not find that LORD CAMPBELL used the word “ damage.”

It would, therefore, appear to be plain that in the enticement cases the courts have recognised a legal right in the wife to the consortium of her husband, however the word is defined, but, in order to succeed in the action against anybody who procures, entices, or persuades the husband to forsake the consortium, she must show (a) that the person sued knew of the consortium; (b) that the person sued has done some wilful act to deprive the wife of the consortium; and (c) (more doubtfully) that a loss of the consortium must be proved, and not a mere impairment. Counsel for the defendants meets these formidable decisions by saying that they are consistent with the wife's rights in ecclesiastical law or the rights which spring from the religious or quasi-contractual side of marriage. The difficulty about that argument is that no such distinction is made in the cases, and SWIFT, J., was expressly basing himself on LORD CAMPBELL in *Lynch v. Knight* (2).

The second difficulty arises from applying the view of LORD WENSLEYDALE or the view of BLACKSTONE to the year 1951. As ISAACS, J., said in *Wright v. Cedzich* (5) (43 C.L.R. 505):

“ When we see that women are admitted to the capacity of commercial and professional life in most of its branches, that they are received on equal terms with men as voters and legislators, that they act judicially, can hold property, may sue and be sued alone, may and frequently have to provide a home and maintain a family, when too, they are organised in time of national danger as virtual combatants in defence of the country, it is time, I think, to abandon the assertion that in the eye of the law they are merely the adjuncts or property or the servants of their husbands . . . ”

This language was used twenty years ago, and the legislation of the past twenty years makes the position of the wife even stronger than it was when ISAACS, J., used the words quoted. The argument of counsel for the defendants must be carefully considered, because it may be thought that the word "consortium," when used in the enticement cases, has a much wider connotation than in the cases where the husband sued for loss of consortium, and, now that the wife may sue without joining her husband, it is reasonable to permit her to sue for the loss of the companionship of marriage. In *Guy v. Livesey* (9) the claim was for loss of consortium only for injuries done to the wife "*per quod consortium uxoris suae for three days amisit*" and in *Hyde v. Scysson* (10) the element of "servitium" does not seem to have been very prominent.

If I may assemble and summarise the arguments at this stage, for the wife it is said: (a) The enticement cases have established, as SCRUTTON, L.J., said in *Elliott v. Albert* (11), a well-established cause of action to a wife where the defendant has deprived her of the consortium of her husband. (b) "servitium" in the narrowest sense was never an essential ingredient of the husband's action for loss of consortium: it was at the most an adjunct. (c) The common law in 1951, in accordance with its flexible and adaptable characteristics, should take account of the modern status of the wife and the "services" which the husband renders to the wife as well as the "services" the wife renders to the husband, and say that it is no longer possible to view the wife as an inferior in BLACKSTONE'S use of the word, and that the historical precedents are no longer binding. (d) To allow the wife a right to recover for the loss of her consortium against those who have committed a wrong against her husband is not a new principle, but is merely new in the instance. The arguments against the wife would appear to be: (a) In no case has a wife ever succeeded in an action of this nature. (i) The wife is not, nor has she ever been, entitled to the services of her husband, which is the foundation of the action; (ii) although the wife has a similar interest in the society of and sexual relations with her husband as he has in such relations with her, the law has never recognised her right to recover against one who has caused harm to such interests by conduct not intended to harm them; (iii) the enticement actions are based on the intentional violation of a legal right and not otherwise, and have no bearing on the question of negligence towards a husband occasioning loss of consortium to the wife. (b) The husband is under a duty to support his wife according to his station in life, and recovers in his action for negligence as an element in his damages for any impairment of his ability to perform his obligation, and thus the wife recovers indirectly the value of any loss of her consortium. (c) The injury to the wife's consortium is not a direct consequence of the negligence alleged, and is too remote and consequential to be assessed in money. (d) Where the claim is for damages for loss of sexual intercourse the courts will not entertain it. If they did so, they would be faced with a multiplicity of actions in every case where a husband was injured for the loss of sexual intercourse for a fortnight or for a year, and into such relationships between husband and wife the courts will not enter. (e) The wife's interest in the marital relationship is not a right of property or derived from a contract, and it lies within an area into which the law will not enter except of necessity.

The conclusions to which I have come have not been reached without some hesitancy and doubt, which may, perhaps, be pardoned as natural in this highly controversial field. It would appear from the history of the husband's action for loss of consortium that it was a very anomalous thing, and, that being so, it ought not to be extended. This would leave the husband in the possession of a cause of action which was denied to the wife, and that is a position I am not prepared to take up. The husband's cause of action, if based on the idea of "servitium," is based on a view of the law which, in my opinion, is quite obsolete and discredited. It is quite impossible to reconcile it with modern thought and modern ideas. LORD WENSLEYDALE could say that the position of a wife resembled that of a hired domestic, tutor or governess. It is much to be doubted

whether anybody today would subscribe to such language or feel it to be in conformity with the recognised and established position of the wife. In so far, therefore, as a distinction in law is sought to be made between the position of a husband and that of a wife in the matter of consortium on the ground that the husband has a proprietary interest in the wife whereas the wife has no corresponding interest in the husband, I am of opinion that it no longer has any application. I think, further, that the decision in the enticement cases, and the character of the legislation passed in the last seventy years have made a decisive change. The cases which have given the wife the right to sue when an intentional or a malicious act has resulted in the loss of her consortium must apply, I think, when the action is negligent as distinct from intentional. If it is said that the services a wife renders to the husband are an element of the consortium. This would seem to be a most arbitrary separation of the elements of consortium, for it cannot be doubted that a husband renders services to the wife, and the exclusion of the wife from any remedy can only be based on what I regard as a quite obsolete view of proprietary interest. So long as the husband is given the cause of action, I cannot see any good reason why the wife should be deprived of it. I am of opinion, therefore, that today the rights of husband and wife in the consortium are fully mutual and completely equal, and, before the law, the wife is entitled to bring an action when she has been deprived of her consortium by the negligent act of a third person.

I have left to the last what I regard as the most important and the most difficult question in the case. The plaintiff claimed originally for loss of the consortium, but by an amendment of the statement of claim she claimed damages for interference with her consortium. The question is whether it is enough to show some impairment of the consortium or whether a loss must be proved. It was admitted in this case that the husband and wife were living together under the same roof and to that extent at least the consortium still existed. It was contended, not that the wife had lost the consortium of her husband, but that one element of it, and a most important element, that of sexual intercourse, had been taken away, with all the consequences that entailed in the loss of children and the full family life. It was contended that that was an unjustifiable interference with the consortium, for which the wife could claim damages. At first sight it would seem to be a logical thing to say that, if a wife has a legal right to the consortium of her husband, then she would have a remedy for any unjustifiable interference or disturbance or impairment of it, but I do not think that the matter is quite as simple as this. There would appear to be no case where damages have been recovered save for the loss, as distinct from any impairment, of the consortium. The American RE-STATEMENT OF THE LAW OF TORTS, vol. 3, p. 693, says that

"The husband is also entitled to recover damages for the loss of his wife's society and companionship in the home, including any impairment of her capacity for sexual relations"

and at p. 696:

"The wife has a similar interest in the society and sexual relations with her husband as he has in such relations with her. However, the law has not recognised her right to recover against one who has caused harm to such interests by conduct which is not intended to harm them."

This statement does more than assert the proprietary interest of the husband alone. It assumes that the consortium may be split up and the various strands which are interwoven into the whole may be separated and dealt with singly and apart. The view I am inclined to hold is that consortium cannot be dealt with in that way. The history of the action giving the husband his rights shows its somewhat artificial character. If consortium is to be capable of separation into many and extremely diverse elements, so that the impairment of any one element,

however slight, will give a cause of action, then the prospects are rather overwhelming. Companionship, love, affection, comfort, mutual services, sexual intercourse—all belong to the married state. Taken together they make up the consortium, but I cannot think that the loss of one element, however grievous it may be, as it undoubtedly is in the present case, can be regarded as the loss of the consortium within the meaning of the decided cases. Still less could any impairment of one of the elements be so regarded. Consortium, I think, is one and indivisible. The law gives a remedy for its loss, but for nothing short of that. For these reasons I think the plaintiff's case fails, and that this appeal should be dismissed.

COHEN, L.J.: I have had the opportunity of reading the judgment of BIRKETT, L.J. I agree entirely with the conclusion he has reached, that an action by a wife based on loss of consortium owing to the negligent, but not malicious, act of a third party causing injury to her husband cannot succeed unless the wife can prove loss, as distinct from impairment, of that consortium. I must, however, add that I entertain some doubt whether even proof of total loss of consortium would enable a wife to succeed where that loss was due to a negligent, as distinct from a malicious, act of the defendant.

The husband's right to recover in the converse case is, no doubt, now so clearly established that, at any rate in this court, it must be recognised. It seems to me, however, an anomaly. The whole idea of the right of consortium is a vague right. There is nothing concrete about it, with the consequence that a person may trespass on that right without knowing of its existence for he may not know that the wife is a married woman. It is difficult to see on what principle the right was recognised. It is to be observed, however, that, so far as I have been able to ascertain, in every case where the right was recognised the action was for loss of *consortium et servitium*. The *ratio decidendi* may, therefore, have been that, the husband being entitled to the services of his wife, she was in a certain sense to be regarded as his property. Anyone, therefore, who interfered with that property trespassed on it. This view derives support from BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND. Describing the nature of the action, he says, in vol. 3, at p. 140:

“... if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a separate remedy by an action upon the case for this ill-usage *per quod consortium amisit*, in which he shall recover a satisfaction in damages.”

Explaining why at that time no corresponding right was recognised in the wife, BLACKSTONE says (*ibid.*, 142):

“One reason for which may be this: that the inferior hath no kind of property in the company, care or assistance of the superior, as the superior is held to have in those of the inferior. The wife cannot recover damages for beating her husband, for she hath no separate interest in anything during her coverture.”

This view of the position of the wife is now, as BIRKETT, L.J., points out, entirely obsolete, and it is no longer true that a wife has no separate interest in anything during her coverture. None the less, I do not think it necessarily follows that the courts must now recognise a right in the wife entirely corresponding to that of the husband. No doubt, in the enticement cases we are bound to do so in view of the decision of this court in *Place v. Searle* (7), but in the enticement cases intentional infringement of the rights of the consort is an essential ingredient in the cause of action. The remedy in that case may, therefore, be treated as a natural extension of the principle in *Lumley v. Gye* (12). Moreover, no injustice can be done to the defendant, since, *ex hypothesi*, his action was

malicious. In cases such as the one before us, however, it is impossible to suggest any malice against the wife on behalf of the defendant or any intentional interference with her right of consortium. Moreover, the wife has never had any right of *servitium vis-a-vis* her husband. It seems to me, therefore, that it would be an extension of a line of decisions, in itself anomalous, if we were, in such cases as the present, to recognise a right of action in a wife corresponding to that which the courts have recognised as vested in a husband.

In *Re Compton* (13) an attempt was made to extend the line of decisions upholding gifts in favour of the poor relations of a testator to gifts providing for the education of a class of children descended from certain families related to a testatrix. In the lower court I upheld the validity of the gift, saying, in effect, that I could see no distinction in principle between gifts for poor relations of a testator and gifts for the education of a class of his relations since relief of poverty and education were both charitable objects in the eyes of the law. This court, however, reversed my decision. LORD GREENE, M.R., after suggesting a possible distinction on the ground of some special quality in gifts for the relief of poverty, said ([1945] 1 All E.R. 206):

"Failing such a ground of distinction, I can only regard the poor relations cases as anomalous and I prefer to let them remain as such rather than to extend the anomaly to a different class of case."

So, here, I think, it may be said that the right of the husband to recover damages in cases such as are indicated by the third count in *BULLEN AND LEAKE*, 3rd ed., p. 340, is an anomaly and ought not to be extended to the case of an action by the wife. True it is, as BIRKETT, L.J., points out, that this involves the recognition of a distinction between the respective rights of husband and of wife which is contrary to current opinion, but it has never been held that the wife has any right of *servitium* from the husband, and an extension of the principle to actions by the wife seems to me to involve real hardship on a defendant who will have already paid damages to the husband, in assessing which allowance will, I think, have been made for the impairment of his ability to perform his obligation to support his wife. I, therefore, agree that the appeal should be dismissed.

LORD ASQUITH OF BISHOPSTONE (read by COHEN, L.J.): I agree with the conclusions reached by BIRKETT, L.J., but reach them by a slightly different route. Until the nineteen twenties the overwhelming weight of the authorities, English and American, was opposed to the existence of any such cause of action in the wife as is claimed in this case. There is, in my mind, no doubt that, until that time at least, medieval notions persisted according to which the rights of a husband as against a wife were entirely different from those of a wife as against her husband. He was, and is still, under a duty to maintain her. She was, and is, under no duty, except in rare cases under statutes dealing with the poor law, to maintain him—a logical enough arrangement when the whole of her property vested in him on marriage. He was entitled to damages against any man with whom she committed adultery. She had no reciprocal right against an intervener. She owed him, theoretically, "*services*"—"*servitium*." He owed her none. The relationship still in law retained the impress of the primitive notion that the wife, her "*services*," and the comfort of her society—her "*consortium*" and "*servitium*"—were the property of the husband, any encroachment on which conferred on him a cause of action in the nature of trespass: see *BULLEN AND LEAKE*, 3rd ed., p. 340, and *BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND*, 21st ed., vol. 3, p. 138.

Among pre-1920 cases only in *Lynch v. Knight* (2) is it even suggested that the wife had a similar right to her husband's consortium, and in that case violation of consortium figured, not as a cause of action available to the wife, but as a possible head of damage in respect of a slander published concerning her, and

the main point was left undetermined since it was held that the husband's abandonment of the wife was not a natural or probable result of the slander. In the nineteen-twenties several cases were decided on the very different issue of enticement, and for the first time the wife was held to possess rights in the consortium of her husband sufficient to vest in her a right of action in respect of his enticement corresponding to the right of action which for centuries the husband had possessed for the wife's enticement. The cause of action was entirely different from that which a husband had for "trespass" to his consortium. It was a cause of action in case, and the action would not lie unless the enticer could be shown to have known that the enticed party was married and that the enticement was a conscious and intentional invasion of the consortium. In this different connection, two out of three judges of the Court of Appeal did in *Place v. Searle* (7) state that the wife had the same right to the husband's consortium as he had to hers. It seems questionable whether, in relation to the wholly different cause of action involved in this case, where knowledge and intention are, as in trespass generally, irrelevant, those statements amount to more than *dicta*. Ninety-nine per cent. of the American decisions, as well as the RE-STATEMENT OF THE LAW OF TORTS, emphatically negative any such right in the wife as is claimed in this case, and I agree with COHEN, L.J., whose judgment I have read, that, if the husband's own right had first come in question as *res integra* today, it would probably have been negatived. As it is, the husband's right being deeply entrenched in authority and the wife's never having been affirmed, I think that the intervention of the legislature would be needed to produce equity either by abolishing the husband's cause of action or by retaining it and conferring a similar cause of action on the wife. I do not believe that at present the wife has such a cause of action as is claimed. Whether she ought to is, of course, quite another question.

If I am wrong and she has, it requires, in my view, a total, even though temporary, loss of consortium to constitute it. No case can be found in actions by the husband where, some separable constituent element only of the consortium being destroyed, an action has been held to lie. Consortium is, in my view, one and indiscerptible. The alternative view, the view that you can disengage a particular strand in the consortial bond and say that, because that strand has been severed, that is enough—in other words, the view that impairment of the consortium as opposed to destruction of it will suffice—finds no support in the precedents and leads to insoluble problems in practice. Is a wife to be entitled to sue her husband's employer because, through his negligence, her husband has been lamed, and hence that element of their consortium which consisted in long country walks which they used to share has perished? This seems to me wrong. No one disputes the importance of the particular ingredient in the consortium which has been extinguished in this case, which includes the wife's capacity to bear children in wedlock, but, once you permit the segregation of a particular ingredient and say that when that has gone the consortium has gone, you enter a region of extreme perplexity and complication. For these reasons I am of opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *W. H. Thompson* (for the plaintiff); *Corbin, Greener & Cook*, agents for *Raworth, Lomas-Walker & Co.*, Harrogate (for the defendants); *Neal, Scorah, Siddons & Co.*, Sheffield (for the third party).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

LACEY v. W. SILK & SON, LTD.

[KING'S BENCH DIVISION (Slade, J.), January 12, 15, May 11, 1951.]

Legal Aid—Certificate—Power of local committee to ante-date—Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 2 (2), reg. 5 (14).

A local committee under the Legal Aid (General) Regulations, 1950, have no power to ante-date a certificate for legal aid, and any certificate so ante-dated is invalid.

FOR THE LEGAL AID AND ADVICE ACT, 1949, s. 1, see HALSBURY'S STATUTES, Second Edn., Continuation Vol., 1949, p. 469.

FOR THE LEGAL AID (GENERAL) REGULATIONS, 1950, regs. 1, 2 and 5, see BUTTERWORTH'S EMERGENCY LEGISLATION SERVICE, Second Binder, Title Courts [8], pp. 506, 507.

ACTION for damages for negligence and breach of statutory duty.

On the Saturday between the first and the second day's hearing of the action a certificate of legal aid under the Legal Aid (General) Regulations, 1950, made under the Legal Aid and Advice Act, 1949, was issued to the plaintiff. Judgment was subsequently given for the defendants and the question of costs was deferred. Two days later the plaintiff's solicitors obtained the issue of a second legal aid certificate, dated about a month before the hearing, in place of the original certificate. For the plaintiff it was contended that, the plaintiff having complied with the terms on which the local committee under the Act had decided to issue the certificate some time before hearing, the duty to issue the certificate arose at that time and the certificate must be deemed to have been issued on the date on which that duty arose. The defendants contended that there was no power to issue two legal aid certificates in respect of the same matter or to ante-date a certificate.

Chope for the plaintiff.

N. G. L. Richards for the defendants.

May 11. **SLADE, J.:** This is an industrial injury case in which I gave judgment for the defendants on Monday, Jan 15, 1951. Counsel concurred in an application that I should defer dealing with the costs of the action until the position had been investigated in the light of the provisions of the Legal Aid and Advice Act, 1949, and the Legal Aid (General) Regulations, 1950.

At some date between Oct. 2 and Nov. 24, 1950, the plaintiff applied under the regulations for legal aid, and on Nov. 24, 1950, the local committee decided to grant him a legal aid certificate on terms subsequently embodied in a form, B.1, dated Dec. 1, 1950. Those terms included a requirement that the plaintiff should consent to make a contribution towards the costs of prosecuting the action, which had been commenced on Feb. 2, 1950, in the form of specified weekly payments. Within the prescribed time the plaintiff accepted the requirements of Form B.1 and started to make payments in accordance with the specified contribution. The hearing of the action started on Friday, Jan. 12, continued throughout that day and was adjourned till the following Monday, Jan. 15. On Saturday, Jan. 13, the local committee issued to the plaintiff a legal aid certificate which was dated that day. Its existence was not communicated to counsel for the defendants until after I had concluded my judgment on the Monday. I have not seen the certificate issued by the local committee on Jan. 13. After I had adjourned the case for legal argument on the question of costs the plaintiff's solicitors were perturbed on finding that the legal aid certificate was not dated or issued until Jan. 13, *i.e.*, after the first day's hearing of the action had been concluded on Jan. 12, and a representative of the plaintiff's solicitors communicated with the authorities, as a result of which, on Jan. 17 the local committee issued what purported to be another legal aid certificate which was dated Dec. 15, 1950. The certificate of Jan. 13 was handed back to them and they retained it, and, no doubt, the certificate of Jan. 17 was issued to supersede it.

I need hardly say that the issue of the two certificates and the ante-dating of the second certificate from Jan. 17, 1951, to Dec. 15, 1950, was done with the best possible motive, but I have to consider the legal effect of that state of affairs on the liability of the unsuccessful plaintiff for the defendants' costs. Counsel for the defendants said that he was prepared to concede for the purposes of his argument that the certificate would operate from the date of its issue, Jan. 13, and not from the time when the fact of its issue was communicated to him, and, as the certificate was issued on Jan. 13, he would not ask for the costs of Monday, Jan. 15, but he claimed to be entitled to the costs of the action up to and including Friday, Jan. 12. Apart from matters affecting legal aid, I should have given judgment for the defendants with costs in the exercise of my discretion under R.S.C., Ord. 65, r. 1. Counsel for the defendants submitted that there was no jurisdiction to issue two legal aid certificates except where an emergency certificate was issued followed within the prescribed time by a definitive certificate. Secondly, he said that, if he was wrong in that contention, still less was there power to issue a certificate, whether a first certificate or a second certificate, and to ante-date it.

Regulation 1 (3) defines an "assisted person" as

"a person in respect of whom a certificate is in force."

The same paragraph defines a "certificate" as being

"a certificate issued in accordance with these regulations entitling a person to legal aid . . . and includes an emergency certificate issued under the provisions of reg. 10."

Reading those two definitions of "assisted person" and of the word "certificate" together I construe an "assisted person" as meaning a person in respect of whom a certificate issued in accordance with these regulations is in force, *i.e.*, the certificate must (i) have been issued and (ii) be in force. Regulation 2 (1) provides:

"Legal aid shall be available to any person to whom a certificate has been issued."

I emphasise the past tense because of the argument addressed to me by counsel for the plaintiff. Regulation 2 (2) provides:

"Any document purporting to be a certificate issued in accordance with these regulations shall, until the contrary is proved, be deemed to be a valid certificate issued to the person named therein."

To deal with the first contention for the defendants, *viz.*, that there was no jurisdiction to issue a second certificate, I refer to reg. 5. This regulation is headed "Issue of Certificates" and para. (14) provides:

"When an applicant has complied with such of the provisions of paras. (11), (12) and (13) of this regulation as are relevant to his case the local committee shall issue to him a certificate in Form 1 . . ."

I am unable to derive much assistance from the use of the singular number in that paragraph because reg. 1 (2) provides:

"The Interpretation Act, 1889, shall apply to the interpretation of these regulations as it applies to the interpretation of an Act of Parliament."

And the Interpretation Act, 1889, provides that the singular shall include the plural.

Counsel for the defendants next argued that in reg. 10, which deals with emergency certificates, there is provision in paras. (8), (9) and (10) for the issue of what I may call a substantive certificate to replace an emergency certificate, and an express provision in para. (10) that a certificate issued under para. (8) shall bear the same date as the emergency certificate. That is not strictly an ante-dating of a certificate. It is the issuing of a replacement certificate to relate

back to the date of the emergency certificate which it replaces. I do not find it necessary to decide whether in any circumstances a legal aid certificate once issued and dated can be superseded in respect of the same proceedings by another legal aid certificate bearing the date on which it is issued, because I think the second contention of counsel for the defendants is correct, that is, assuming, without deciding, that a local committee or an area committee have power to supersede by a second certificate, a legal aid certificate already issued, they have no power to ante-date the second certificate.

Counsel for the plaintiff said that the words in reg. 5 (14), "the local committee shall issue" a certificate to an applicant on his compliance with the requirements of that paragraph, impose a statutory obligation on the local committee to issue the certificate, and, if for some time after that duty has arisen they refrain from doing so, the certificate, when ultimately issued, must be deemed to have been issued at the time when the duty first arose. It is unnecessary to decide whether "shall" in that context, imposes on the local committee a duty to act in accordance with reg. 5 (14) which can be enforced by *mandamus*, or whether, if the non-performance of that duty results in damage, there is any remedy. Those are matters between the applicant and the authorities responsible for the administration of the Act and are *res inter alios acta* as between the plaintiff and the defendants to the action, but I am unable to accept the argument that "shall issue" means that from the moment the duty arises a certificate which has not in fact been issued shall be deemed to have been issued. I construe the words in reg. 2 (1) that

"Legal aid shall be available to any person to whom a certificate has been issued in accordance with these regulations,"

as meaning that legal aid shall not be available to any person to whom a certificate has not been issued in accordance with the regulations. Moreover, the grant of legal aid after proceedings have been commenced is dealt with by reg. 13 (1) which provides:

"Where, after proceedings have been instituted in any court, any party becomes an assisted person in regard to those proceedings, the provisions of s. 2 (2) (e) of the Act (which relates to the liability of an assisted person by virtue of an order for costs made against him) shall apply only to so much of the costs of the proceedings as are incurred while a certificate is in force."

These considerations are sufficient to decide the question before me.

Counsel for the plaintiff conceded that the certificate of Jan. 17, 1951, ante-dated to Dec. 15, 1950, could not be regarded as an amendment of the certificate originally issued on Jan. 13, 1951. Regulation 2 (2) provides:

"Any document purporting to be a certificate issued in accordance with these regulations shall, until the contrary is proved, be deemed to be a valid certificate issued to the person named therein."

I hold that by the agreed facts and dates the contrary has been proved, and that the certificate issued on Jan. 17, 1951, was not issued in accordance with the regulations and so was not valid because it bore a date ante-dating it by more than a month before the date on which it was in fact issued. I give judgment for the defendants with the costs of the action up to and including Jan. 12, 1951, and as counsel for the defendants does not ask for any costs under the Legal Aid and Advice Act, 1949, I direct there shall be no order as to the costs of the hearing of Monday, Jan. 15, 1951.

Judgment for the defendants.

Solicitors: *G. Houghton & Son* (for the plaintiff); *E. P. Rugg & Co.* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re WEBB. SANDOM *v.* WEBB.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.JJ.),
April 20, 23, May 11, 1951.]

*Easement—Implied reservation—Lease—Display of advertisements on outer wall
of demised premises—No reservation of advertising rights over outer wall—
Permissive user for more than ten years before grant of lease.*

The landlord was the head-lessee of business premises of which he occupied the ground floor where he carried on the business of a butcher and provision merchant. By a lease dated Aug. 11, 1949, the tenant held the first and second floors of the premises for a term of twenty-one years for use exclusively as a hairdressing saloon. The tenancy covered the outer walls of the upper floors of the premises so that they passed to the tenant for the term of the lease, but there was no covenant by either the landlord or the tenant to maintain the outer walls, nor was there any reservation in the landlord's favour of advertising or other rights as regards the use of the exterior surfaces of the walls. Between 1939 and 1949 the tenant had been in occupation of the two floors in question under tenancy agreements and during that time the landlord had maintained two advertisements on the outside of the demised premises with the full knowledge of the tenant and without any complaint or claim on his part.

HELD: *prima facie* the landlord could not assert against the tenant any right which was not expressly reserved to him in the lease; the maintenance of the advertisements during the term was not a necessary incident of his user of the ground floor for his business, nor the bare circumstance that the advertisements were not only present at the date of the grant of the lease, but had been continuously present without objection by the tenant since the commencement of his original tenancy in 1939, sufficient to raise an inference that at the date of the lease it was the common intention of the parties to reserve to him the right to continue to display the advertisements; and, therefore, the landlord had failed to discharge the onus, which was on him, to show that a reservation of the right must be implied and the general rule did not apply.

Suffield v. Brown (1864) (4 De G.J. & Sm. 185); *Wheeldon v. Burrows* (1879) (12 Ch.D. 31); and *Crossley & Sons, Ltd. v. Lightowler* (1867) (2 Ch. App. 478), applied.

Simpson v. Weber (1925) (133 L.T. 46), criticised and distinguished.

Per JENKINS, L.J.: As to the law applicable to the case, it is not disputed that as a general rule a grantor, whether by way of conveyance or lease, or part of a hereditament in his ownership, cannot claim any easement over the part granted for the benefit of the part retained unless it is expressly reserved out of the grant: see, e.g., *Suffield v. Brown*, *Crossley & Sons, Ltd. v. Lightowler*, and *Wheeldon v. Burrows*. There are, however, certain exceptions to the general rule. Two well-established exceptions relate to easements of necessity and mutual easements such as rights of support between adjacent buildings. It is, however, recognised in the authorities that these two specific exceptions do not exhaust the list, which is, indeed, incapable of exhaustive statement as the circumstances of any particular case may be such as to raise a necessary inference that the common intention of the parties must have been to reserve some easement to the grantor or such as to preclude the grantee from denying the right consistently with good faith, and there appears to be no doubt that where circumstances such as these are clearly established the court will imply the appropriate reservation.

Decision of DANCKWERTS, J. ([1950] 2 All E.R. 828), reversed.

AS TO IMPLIED RESERVATION OF EASEMENT, see HALSBURY, Hailsham Edn.,

Vol. 11, pp. 285-289, paras. 520-527; and FOR CASES, see DIGEST, Vol. 19, pp. 38-43, Nos. 201-229.

Cases referred to:

- (1) *Pwllbach Colliery Co., Ltd. v. Woodman*, [1915] A.C. 634; 84 L.J.K.B. 874; 113 L.T. 10; 36 Digest 199, 386.
- (2) *Jones v. Pritchard*, [1908] 1 Ch. 630; 77 L.J.Ch. 405; 98 L.T. 386; 19 Digest 43, 229.
- (3) *Lyttelton Times Co., Ltd. v. Warners, Ltd.*, [1907] A.C. 476; 76 L.J.P.C. 100; 97 L.T. 496; 31 Digest 138, 2741.
- (4) *Suffield v. Broun*, (1864), 4 De G.J. & Sm. 185; 33 L.J.Ch. 249; 9 L.T. 627; 46 E.R. 888; 19 Digest 42, 226.
- (5) *Aldridge v. Wright*, [1929] 2 K.B. 117; 98 L.J.K.B. 582; 141 L.T. 352; Digest Supp.
- (6) *Russell v. Watts*, (1885), 10 App. Cas. 590; 55 L.J.Ch. 158; 53 L.T. 876; 50 J.P. 68; 19 Digest 40, 215.
- (7) *Dann v. Spurrier*, (1802), 7 Ves. 231; 32 E.R. 94; 30 Digest 383, 475.
- (8) *Cotching v. Bassett*, (1862), 32 Beav. 101; 32 L.J.Ch. 286; 55 E.R. 40; 19 Digest 29, 133.
- (9) *Freeman v. Cooke*, (1848), 2 Exch. 654; 18 L.J.Ex. 114; 12 L.T.O.S. 66; 154 E.R. 652; 21 Digest 287, 1019.
- (10) *Wheeldon v. Burrows*, (1879), 12 Ch.D. 31; 48 L.J.Ch. 853; 41 L.T. 327; 19 Digest 45, 253.
- (11) *Crossley & Sons, Ltd. v. Lightowler*, (1867), 2 Ch. App. 478; 36 L.J.Ch. 584; 16 L.T. 438; 19 Digest 83, 494.
- (12) *Simpson v. Weber*, (1925), 133 L.T. 46; 41 T.L.R. 302; Digest Supp.
- (13) *Swansborough v. Coventry*, (1832), 9 Bing. 305; 2 L.J.C.P. 11; 131 E.R. 629; 19 Digest 50, 276.
- (14) *Thomas v. Owen*, (1887), 20 Q.B.D. 225; 57 L.J.Q.B. 198; 58 L.T. 162; 52 J.P. 516; 19 Digest 34, 166.
- (15) *Liddiard v. Waldron*, [1934] 1 K.B. 435; 103 L.J.K.B. 172; 150 L.T. 323; Digest Supp.

APPEAL by the tenant from a decision of DANCKWERTS, J., dated Oct. 5, 1950, and reported [1950] 2 All E.R. 828.

The tenant took out an originating summons for the determination of the question whether, on the true construction of a lease and in the events which had happened, the landlord was entitled to use without the consent of the tenant for the purpose of advertising the outer walls, or any and if so what portion or portions of the outer walls, of the property demised by the lease. The learned judge held that the outer walls were included in the demise, but in the circumstances there was to be implied in the lease an easement to display two advertisements which were in existence at the date of the lease, and to repair and generally to maintain them. The facts are fully stated in the judgment of SIR RAYMOND EVERSHED, M.R.

Mulligan for the tenant.

Richmount and Spears for the landlord.

Cur. adv. vult.

May 11. The following judgments were read.

SIR RAYMOND EVERSHED, M.R.: The question raised in the present appeal is that stated in the originating summons dated Mar. 27, 1950, issued by the tenant against the landlord, *viz.*:

"Whether, on the true construction of the lease dated Aug. 11, 1949, and made between the landlord of the one part and the tenant of the other part and in the events which have happened, the landlord is entitled, until the determination of the lease, to use for the purpose of advertising the

outer walls and if so what portions or portion of the outer walls of the property demised by the lease without consent of the tenant."

The emphasis in the language I have quoted is on the phrase "and in the events which have happened," for there is no question of the construction of the lease itself. The point is whether "in the events which have happened" there is an implied reservation in favour of the landlord of a right (stating it loosely at this stage) to maintain advertisements on the walls of the premises the subject of the demise in favour of the tenant. DANCKWERTS, J., came to a conclusion in favour of such a reservation. He said ([1950] 2 All E.R. 831):

"... it appears to me to be common sense to imply an intention on the part of the parties that [those advertisements] should remain."

B In the circumstances of the case the strength of the appeal to common sense is not negligible, but in the light of the authorities binding on this court I have found myself unable to agree with the learned judge and I think that this appeal must succeed. The landlord by his counsel in the course of the argument complained of the form of the proceedings as being inappropriate to the problem which we are called on to determine. Particularly he complained that in the proceedings

C there was no opportunity for him, as an alternative weapon of defence, to counter-claim for rectification. It is true that the evidence before us is of a very meagre character. It does not seem to me, however, that the landlord can fairly complain of that. He was the lessor under the relevant lease which he must be taken to have proffered, and admittedly the onus must be on him to establish any implied reservation in his favour. The application was supported by a brief affidavit

D on the tenant's part in which (*inter alia*) he swore that he had never granted to the landlord any right, or otherwise any easement or licence over, or for, or in respect of, the user of the outer walls of the demised premises. No application to cross-examine the tenant was made by the landlord who contented himself by filing a still briefer affidavit containing no evidence whatever relating to the circumstances in which the lease was granted and stating in the last paragraph

E that he contends and will contend that when the tenant took possession of the premises he

"was well aware of the presence of both advertisements complained of and in taking no exception to them then it is contended that he acquiesced and entered into a tenancy agreement with the landlord, accepting the landlord's rights to continue to have the benefit of both the advertisements."

F We have, therefore, to decide the case on the material before us. Our decision must necessarily be related to those facts and cannot be regarded as extending beyond them to cover other cases in which much fuller material might be before the court. Our decision, moreover, must be without prejudice to any claim the landlord may have to rectify the lease or to any point he may be able or entitled to raise on any application by the tenant for an accourt or an injunction or otherwise by way of enforcement of his rights. The facts as proved by the limited evidence to which I have referred are as follows. The landlord appears to be, and to have been, at all material times, the head-lessee of the premises known as 405, Footscray Road, New Eltham. The lease or leases have not been before the court, nor is there any evidence of their terms. The premises, in fact, consist

G of a site and building on the corner of Footscray Road and Avery Hill Road, and the landlord has at all material times carried on upon the ground floor of the premises his business as a shopkeeper, selling meat, grocery and provisions under his own name. The premises are in the shape, as it were, of half a hexagon, of which the centre and smallest side faces diagonally across the corner of the two roads. The entrance to the landlord's shop occupies the ground floor of this side. In 1939 the upper part of these premises was let to the tenant by the landlord. The terms of the tenancy (which was for a period of three years) are contained

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in a short agreement. I find it unnecessary to refer to this document except to say that it contained no provision for the repair or upkeep of the exterior of the premises demised, no reference to the head lease, and no reference to any means of access to the premises demised, such access, apparently, being obtained in fact through a door in the west side of the ground floor in Avery Hill Road. The tenant continued in occupation, presumably according to the terms of this contract, until the grant of the lease now in question on Aug. 11, 1949. In fact, during the whole of this ten-years period, and, indeed, ever since, the landlord has maintained two advertisements on the outside of the premises demised without (as is conceded) any complaint or claim on the part of the tenant. The first advertisement consists of an advertisement of the landlord's own business painted on the bricks of the middle and shortest side of the premises and occupying the whole of that side. The second is an advertisement of Brymay safety matches, apparently contained in a wooden frame, attached to part of the western wall of the premises. From the photograph with which we have been supplied, it appears that on the top side of the frame is printed the word "Boro." It is not in evidence and does not appear whether the area covered by the frame, which is considerable, is limited to the wall above the ground floor (or, as seems probable) starts below the level of the first floor. It extends nearly to the top or cornice of the first floor.

On Aug. 11, 1949, as already indicated, the relevant lease was entered into between the landlord and the tenant. The subject-matter was the same as that comprised in the earlier tenancy agreement, that is, "the first and second floors of the building situate in and being No. 405, Footscray Road, New Eltham." The term was twenty-one years from Mar. 25, 1949, and the amount of the rent was substantially increased by comparison with that previously payable. The lease is a somewhat elaborate document. There are covenants as regards upkeep, delivery up, against making alterations, etc., and (on the landlord's part) for quiet enjoyment. All these covenants, which are in common form, were inserted without, perhaps, too close a regard to the precise nature of the transaction. There was also inserted a covenant on the part of the tenant not to use or permit the demised premises to be used for any purpose other than as a hairdressing saloon without the consent in writing of the landlord first had and obtained. This last covenant constituted a new obligation on the tenant. The lease followed, however, the unhappy example of the preceding contract in omitting any reference to means of access and (more important for present purposes) any reference whatever to the exterior of the premises. Thus, there was no covenant by either the landlord or the tenant to maintain the outer walls, but in this instance (and this was again a new departure) there was a covenant by the landlord to perform and observe all the covenants, etc., affecting the demised premises

"which are contained in the superior lease of the premises of which the premises hereby demised form a part dated Mar. 25, 1949, and made between Cyril Frederick Keen of the one part and the lessor of the other part and on the part of the lessor to be performed and observed."

This reference is the only information available as regards the superior lease, and it is to be noted that its term also ran from Mar. 25, 1949. It may, therefore, no doubt be assumed that the grant of the lease under consideration was connected with the grant to the landlord of a new head lease. It seems also likely enough that the covenants in the head lease (which the landlord undertook to observe) included a covenant as regards maintenance of the exterior. Apart, however, from these surmises there is no evidence whatsoever of the circumstances in which the present lease was granted or of any negotiations leading up to it. It has been conceded by the landlord that, notwithstanding the silence of the lease in this respect, the demise covered the outer walls of the upper floors of the premises so that they passed to the tenant for the term of the lease. There is no other question of construction of the document. Neither by its

expressed terms, nor by necessary implication, can there possibly be extracted from the document itself any kind of reservation in the landlord's favour as regards the use of the walls. As I have said above, the tenant in his affidavit states that he never agreed to any grant of a right for the landlord to maintain advertisements. On the other hand, the landlord, by his answer, relies on his user in fact for the preceding ten years, although he has made no suggestion of any agreement or discussion in regard to the advertisements or of any mutual intention that he should be entitled to retain them.

Matters continued as before until the beginning of 1950 when the tenant (whose hairdressing business does not seem to have been entirely successful) appears to have woken up to the possibilities which the advertisements presented to him. On Jan. 23, 1950, his solicitors wrote to Bryant & May, Ltd., calling attention to the fact that ever since March, 1939, they had had an advertisement on the west wall of the premises, but that the tenant had received no payment therefor. The solicitors asked, accordingly, for particulars of any payments made and requested that all future payments should be made to the tenant. As a result, the tenant learnt from Bryant & May, Ltd., that, according to their understanding, the advertising site had been "leased" to the Borough Billposting Co., Holborn House, High Holborn, to whom Bryant & May, Ltd., had always paid their rental. The tenant's solicitors, accordingly, communicated with the Borough Billposting Co. and they, in turn, stated that they had been in occupation of the site for many years, having obtained a "licence" for such purpose from the landlord. No further information is before the court of the nature of the arrangement subsisting between the landlord and the Borough Billposting Co.

The question then is whether, having regard to the apparent and continuous user by the landlord (or those under contract with him) with the full knowledge of the tenant, there ought to be implied the reservation which the landlord seeks. Beyond the facts of user and of the tenant's acquiescence, there is no other relevant consideration. As I have already indicated, the authorities, in my judgment, compel me to hold that the landlord has failed to establish any sufficient ground for an implied reservation in his favour.

The first question is: What is the reservation sought to be implied? It is at this point that the landlord's difficulties appear to me to begin. As regards the use of the corner wall by the landlord for advertising his own business, the only claim made by him through his counsel is a right personal to himself to maintain on that wall the existing advertisement, or some other advertisement substantially identical. As regards the Brymay advertisement, the landlord has put his claim in more than one way. First, he says that he is entitled to a personal right to maintain that advertisement and no other. Secondly, and alternatively, he claims a personal right to continue to license or let to the Borough Billposting Co. the site of the present advertisement for any advertisements which the Borough Billposting Co. may in turn authorise. Thirdly, he suggested (but this claim has not been persisted in before us) that there was reserved a right to him and his assigns, persons entitled to the reversion expectant on the tenant's lease, to maintain on the site of the Brymay advertisement any advertisement or advertisements whatever. This is the landlord's first difficulty, for, if he is entitled to a implied reservation in his favour, it is essential that he should be able precisely to define its terms and character. Put alternatively, if the implication of a reservation is justified in order to give effect to what the parties must be presumed between them to have intended, the terms and nature of the reservation should be capable of certain statement. The landlord's case, however, presents a disconcerting ambiguity. There is, in the first place, a difference in quality between the right claimed by him in respect of the corner wall and that claimed in respect of the west wall. As regards the former, he claims a right personal to himself and limited by application to the business which he himself is now

carrying on. As regards the latter, the right asserted is to let the space in question to others for advertisements unrelated to the landlord's own trade, and it is uncertain whether and to what extent such right is further qualified.

If the court were satisfied that in order to make the transaction between landlord and tenant sensible and effective according to its terms they must have intended some particular right to be reserved to the landlord, it might be possible to imply an appropriate reservation. Such a result might be said to be implicit in the language of LORD PARKER OF WADDINGTON in *Pwllbach Colliery Co., Ltd. v. Woodman* (1) ([1915] A.C. 646):

"The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used: see *Jones v. Pritchard* (2) and *Lyttelton Times Co., Ltd. v. Warners, Ltd.* (3). But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use."

Whatever be the proper significance of the language I have quoted, the landlord's difficulty in the way of its application in the present case seems to me to be that the facts as proved in evidence, if they are consistent with such an implied reservation as the landlord claims, are equally consistent with a merely permissive privilege allowed by the tenant to the landlord and revocable by the tenant at any time. Such a reservation as the landlord claims is requisite, so far as I can see, for the effective enjoyment neither of the premises demised nor of the premises retained.

Ever since *Suffield v. Brown* (4) it has, in my judgment, been established that *prima facie* a grantor or lessor cannot assert against his grantee or lessee any right or privilege unless it has been expressly reserved to him by the grant. To this general rule there are, no doubt, exceptions, no less well established. Thus, a right of way to the grantor's premises will be impliedly reserved over the premises granted if it is necessary to enable access to the former to be had. Similarly, rights will be impliedly reserved which are in their nature reciprocal to rights which the grant must be taken to have conferred on the grantee. In *Aldridge v. Wright* (5) GREER, L.J., attempted an exhaustive classification of the rights which the courts will imply in favour of a grantor, none of which (as counsel concedes) can be said to cover the landlord's case here. Counsel for the landlord has argued, however, that there are further exceptions to the general rule. He says that a right in favour of a grantor will be implied either (a) whenever in all the circumstances it is equitable so to do, or (b) (and this may be a particular manifestation or example of his general exception) where there has been any failure on the part of the other party to perform such duty of disclosure as the circumstances of the case may have imposed on him. As regards the former alternative, the answer seems to me to be that such an alleged general equity would be inconsistent with the duty of express reservation which *prima facie* is imposed on the grantor, and, further, would render otiose and inappropriate the particular exceptions to the general rule which the court has made and precisely defined. For his second alternative counsel has particularly relied on the language of LORD BLACKBURN in his dissenting opinion in *Russell v. Watts* (6) (10 App. Cas. 613):

"LINDLEY, L.J., refers to *Dann v. Spurrier* (7) and *Cotching v. Bassett* (8), and he might have referred to *Freeman v. Cooke* (9) at law, as exemplifying the principle that where one man induces another to alter his position by active misleading, or by silence, where there is by contract, usage of trade, or otherwise, a duty to speak, or, in an equitable case, one may say, where

the circumstances are such as to make it against conscience to be silent, his rights must be regulated by what he has himself brought about."

A In the present case counsel for the landlord has pointed to the somewhat remarkable facts to which I have already alluded—the ten years of user by the landlord from 1939 to 1949 with the full knowledge of the tenant and without any complaint or claim on his part; the fact that the advertisement on the west wall was obviously (for the name "Boro" appeared on the frame) the subject of some letting or licence for reward, and the fact that such advertisement extended in part over the wall of the ground floor premises or at least was part of a larger advertisement which manifestly so extended; and the terms of the 1949 lease itself, including the obligation imposed on the tenant to use the premises demised solely for the purposes of a hairdressing saloon. From these facts counsel has submitted that, unless the tenant was intending to concede to the landlord the right which he claims, his failure to inform his lessor to the contrary when the lease was being negotiated and prepared was, in effect, an act of bad faith on his part. Whether silence on the part of a grantee at the time of or immediately prior to the grant to him would in the particular circumstances of any given case amount to bad faith, and whether, in such an event, the grantee would be treated as disabled in a court of equity from disputing the grantor's claim to an implied reservation, are matters on which it is unnecessary for me to express any opinion, for, in my judgment, those are not the circumstances relevant to the present case. In the absence, at any rate, of bad faith, it seems to me that such a duty as counsel says was imposed on the tenant is inconsistent with the general principles established by authority. For the existence of any such general duty, as counsel alleges, on the part of the grantee is, to my mind, inconsistent with the duty which, according to the cases, is imposed by the law on the grantor expressly to reserve any right which he desires to secure or maintain against the grantee. What, indeed, would be the character of the grantee's obligation? To draw the grantor's attention to his own duty? To warn him that in the absence of express reservation he will go without? Where (as seems likely enough in the present case) neither party ever had the matter in mind at all, is the grantee under a greater duty than the grantor to ascertain (and disclose) what might be the true legal position?

E I do not attempt for my part any exhaustive definition of the exceptions to the general rule. In my judgment, the general rule itself as formulated in the cases leaves no room for either of counsel's exceptions. I content myself by referring to the judgment of THESIGER, L.J., in this court in *Wheeldon v. Burrows* (10) (12 Ch.D. 49):

G "We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi* easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case. Both of the general rules which I have

mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense, *viz.*, that a grantor shall not derogate from his grant."

Again, after referring to *Suffield v. Brown* (4), THESIGER, L.J., quoted (*ibid.*, 56) the observation of LORD CHELMSFORD, L.C., in *Crossley & Sons, Ltd. v. Lightowler* (11) (2 Ch. App. 486):

"It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for *non constat* that the grantor does not intend to relinquish it unless he shows the contrary by expressly reserving it."

Finally, and in reference to what he had said in the course of the first passage from his judgment in *Wheeldon v. Burrows* (10), which I have quoted, THESIGER, L.J., reconciled certain other cases with the general propositions he had stated by adding as a second exception to his second proposition reciprocal easements of the kind already mentioned. He said (12 Ch.D. 59):

"It seems to me to be consistent with reason and common sense that these reciprocal easements should be implied . . ."

It remains only for me to say a word or two about *Simpson v. Weber* (12) which DANCKWERTS, J. ([1950] 2 All E.R. 830), regarded as being the "nearest case to the present" case and which he followed accordingly. The case (which was before the Divisional Court on appeal from a county court) is reported both at 41 T.L.R. 302 and 133 L.T. 46. Both reports are brief, and although the latter contains no report of the argument, it has seemed to me on the whole the better of the two. Nevertheless, the facts are, to my mind, in some degree obscure. The dispute was plainly of a most trivial character. The plaintiff and defendant were respectively successors in title of the grantee of a common owner and the common owner. There had been growing at all material times on the border of the defendant's tenement a Virginia creeper which had, according to its nature, attached itself to the plaintiff's easterly wall. At some time before action brought the growth of the creeper had obstructed a gutter of the plaintiff which the plaintiff had cleared, a matter to which the Divisional Court attributed the county court judge's award of 40s. damages. It is to be noted that the gutter in fact overhung the defendant's property although no point appears to have been made of this not unimportant fact. The other *casus belli* related to a gate-post of the defendant which was attached to the plaintiff's wall by nails or plugs, part of the length of which was inserted in the plaintiff's wall. I will not criticise the conclusion of the Divisional Court which reversed the judgment of the county court judge in the plaintiff's favour. There seems to me, however, all the difference in the world between a long-lived tree and a gate-post permanently attached to a wall, on the one hand, and temporary advertisements, on the other, and to the case of the tree the analogy of reciprocal easements might, perhaps, have been applied. In the course of his leading judgment SALTER, J., used the following language (133 L.T. 47):

"I have to ask, what was the intention of the parties in the present case as to whether the creeper was to remain and grow against the plaintiff's wall, and as to whether the gate-post was to remain fastened to it . . . I have come to the conclusion . . . that there was no evidence that it was not the intention of the parties that the creeper and gate-post should stay."

If by this language that learned judge intended to lay it down that in a case such as the present, while it is, or may be, reasonable for the court to assume that if the parties had applied their minds to the problem of the advertisements they would or should have made provision for securing to the landlord such right as he now claims, it is sufficient for the landlord to establish the absence of any evidence of a contrary intention, it seems to me that the proposition is in direct conflict with the principle which is not only well established but which also, in

my judgment, ought not to be lightly qualified—the principle that it is the duty of a grantor to reserve expressly any right he wishes to maintain against his grantee or, at least, to prove affirmatively that such a reservation was clearly intended by him and his grantee at the time of the grant.

A Failing, as I think the landlord does, to establish the necessary condition, the question raised in the summons must necessarily, in my judgment, be answered in the negative. As I have earlier stated, however, my conclusion on the particular question raised for our consideration leaves unjudged the results which properly flow if the tenant seeks by asking for an account or otherwise to enforce the rights which, by reason of this judgment, he has. In the hope that in some measure further litigation and dispute may be saved, I add this. The proper conclusion from the facts now before the court appears to me to be that the landlord's activities, until challenged, ought to be regarded as having been by the tacit permission or licence of the tenant. That permission or licence was terminated when the tenant called in question the landlord's rights in January, 1950. So far as concerns the landlord's own advertisement on the middle or diagonal wall, it is painted on the bricks which (as the landlord concedes) are included in the demise. *Prima facie* that is all that has to be said—save that the landlord cannot henceforth renew the advertisement. The position of the C Brymay advertisement is less easy. We know nothing of the terms of the contract between the landlord and the Borough Billposting Co. Counsel for the tenant concedes that his client cannot—or cannot without exposing himself to liability—terminate or interfere with that contract. Where part of premises granted or demised is subject to an existing and valid tenancy or other agreement, *prima facie*, no doubt, the grantee or lessee would take subject to and with the benefit of that contract. In the present case the tenant's rights, on the facts, may not be so simple. If the tenant should be taken to have granted to the landlord a permission or licence to use the relevant space for advertising purposes by means (inter alia) of letting it for reasonably short terms to advertising contractors, it may well be that he could not recall his permission or licence so as to attract to himself the profits of any pending contract entered into within the scope of the permission granted, although he could, presumably, require any such existing contract to be determined as soon as legitimately possible. In working out the rights, much may depend on the usual practice in regard to such lettings and on the actual terms of any contract with the Borough Billposting Co. It would, however, appear that in any case the tenant could not possibly require the landlord to account in respect of the period prior to the date of the lease Aug. 11, 1949, and (as I think at present) prior to the date of his challenge of the landlord's rights in January, 1950.

F The fortunes of war have favoured the tenant, and I venture to express the hope that he will prefer the claims of neighbourliness and reasonableness to the costs and hazards of further litigation, as he must also remember his covenant against user of the premises otherwise than as a hairdressing saloon. The hope is, perhaps, the less futile since in any further litigation he will, I gather, claim the privilege of suing at public expense.

G JENKINS, L.J.: I agree. The facts have been fully stated by SIR RAYMOND EVERSHERD, M.R., and I will, therefore, confine myself to a brief recapitulation of their essential features. The landlord is head-lessee of the whole of the premises, H No. 405, Footscray Road, New Eltham. He occupies the ground floor, where he carries on business as a butcher and provision merchant. The tenant holds the two upper floors of the premises under a lease from the landlord dated Aug. 11, 1949, for the period of twenty-one years from Mar. 25, 1949 (determinable by the tenant at the seventh or fourteenth year) at the weekly rent of £2. Prior to the grant of this lease the two upper floors had, since 1939, been occupied by the tenant at a yearly rent of £65 under a tenancy agreement with the landlord dated Feb. 10, 1939, originally for three years from Mar. 6, 1939, renewable

at the tenant's option for a further period of three years, but in fact continued on a yearly basis down to the granting of the lease of Aug. 11, 1949. The tenant is a hairdresser by trade and uses the two upper floors for the purposes of a ladies' hairdressing establishment. The tenant's covenants in the lease of Aug. 11, 1949, include covenants to paint and repair the interior of the demised premises, not to make any alteration or addition in or to such premises without licence, and not (save with consent not to be unreasonably withheld) to use the demised premises for any purpose other than as a hairdressing saloon. It is not disputed that the lease of Aug. 11, 1949, and the tenancy agreement which preceded it, both included the exterior surfaces of the outside walls of the two upper floors, and that neither document contained any provision reserving to the landlord any rights over such exterior surfaces, except in so far as there must be implied under the lease such rights of access, and so forth, as may be necessary to enable the landlord to comply with a covenant on his part in the lease to perform the lessee's covenants contained in the head lease, which, presumably, include full repairing covenants.

There are, and have at all times since a date prior to the commencement of the tenant's original tenancy been, the following advertisements painted on or affixed to the exterior surfaces of the outside walls of the two upper floors demised to the tenant, *viz.*: (i) Painted directly on the brickwork of the wall over the door into the landlord's shop in black letters on a white ground an advertisement of the landlord's own business in these terms: "Webb's for meat grocery & provisions. Phone ELT. 2047." (ii) Displayed on a billboard affixed to the upper part of one of the flank walls of the premises a poster advertising Brymay safety matches. This poster surmounts another similarly affixed to the lower part of the same wall advertising Oxydol, the upper poster apparently extending downwards to approximately the level of the first floor, although it is impossible to say exactly where its lower edge is placed in relation to the interior division between the ground and first floors. The tenant never raised any objection to the presence on the exterior of the outer walls comprised in his tenancy or lease of the advertisement and poster I have mentioned until January, 1950, when through his solicitors he opened a correspondence on the subject of the Brymay poster. Bryant & May, Ltd., who were first approached, referred the tenant's solicitors to the Borough Billposting Co., to whom they paid rent for the display of the poster, and reference to that company (with a demand for payment to the tenant of all further rent in respect of the Brymay poster) elicited information to the effect that they held a licence from the landlord under which they used the part of the wall occupied by the poster as an advertising site. The tenant's solicitors next wrote to the landlord's solicitors claiming that the landlord should account to the tenant for all sums received by him since Mar. 6, 1939, from the Borough Billposting Co. in respect of the Brymay poster, and also asking what payment the landlord was prepared to offer for his own advertisement. After further correspondence (including a letter dated Mar. 15, 1950, whereby the tenant's solicitors gave notice terminating "all licences if any" from the tenant to the landlord in respect of the display of advertisements on the outer walls of the two floors demised to the tenant) the present proceedings ensued.

As my Lord has already stated, the proceedings took the form of an application by the tenant by originating summons for the determination of the question whether, on the true construction of the lease of Aug. 11, 1949, and in the events which had happened, the landlord was entitled, until the determination of the lease, to use for the purposes of advertising the outer walls, and, if so, what portion or portions of the outer walls, of the property demised by the lease without the tenant's consent. I would say nothing to discourage the use of the relatively cheap and expeditious procedure by originating summons for the construction of a written instrument where the real issue between the parties is one of construction, but in the present case there is, in truth, no question of construction

at all. The lease of Aug. 11, 1949, contains no vestige of a provision reserving to the landlord any right to use any part of the outer walls of the demised premises for advertising purposes, and the real issue between the parties was whether the circumstances in which the lease was granted were such that some reservation of this character ought to be implied in favour of the landlord notwithstanding the total absence of any such provision from the expressed terms of the lease.

A An originating summons heard without oral evidence is not, in my view, a satisfactory form of procedure for the trial of an issue such as this. The result in the present case has been that the only evidence before the court consists of affidavits by the tenant and the landlord on which there was no cross-examination and which leave the matter to be determined simply by applying the relevant law to the bare facts above summarised.

B The matter, therefore, stands thus. The landlord did not include in the provisions of the lease, as executed, any reservation of advertising rights over any part of the outer walls. At the date of the lease the advertisements now in dispute were in their present positions on the walls and plainly to be seen. Moreover, they had existed in their present positions continuously since before the commencement of the tenant's original tenancy in 1939, and the tenant never objected to their presence at any time during his original tenancy or at the time of the granting of the lease of Aug. 11, 1949, or thereafter until January, 1950. There is no evidence that either party ever even mentioned the subject of the advertisements to the other during the whole of this period of more than ten years. This being in substance the whole of the available facts, the question is whether on those bare facts, without more, the court can and ought as a matter of law to imply in favour of the landlord a reservation during the term of twenty-one years granted by the lease of Aug. 11, 1949, of advertising rights over the outer walls demised, at all events, to the extent required to enable him to maintain the existing advertisements and to retain for his own benefit any periodical payments receivable from the Borough Billposting Co. in respect of the site of the Brymay poster.

E As to the law applicable to the case, it is not disputed that as a general rule a grantor, whether by way of conveyance or lease, or part of a hereditament in his ownership, cannot claim any easement over the part granted for the benefit of the part retained unless it is expressly reserved out of the grant: see, e.g., *Suffield v. Brown* (4), *Crossley & Sons, Ltd. v. Lightowler* (11) and *Wheeldon v. Burrows* (10). There are, however, certain exceptions to the general rule.

F Two well-established exceptions relate to easements of necessity and mutual easements such as rights of support between adjacent buildings. It is, however, recognised in the authorities that these two specific exceptions do not exhaust the list, which is, indeed, incapable of exhaustive statement as the circumstances of any particular case may be such as to raise a necessary inference that the common intention of the parties must have been to reserve some easement to the grantor or such as to preclude the grantee from denying the right consistently with good faith, and there appears to be no doubt that where circumstances such as these are clearly established the court will imply the appropriate reservation. For statements of the general rule and observations on the types of case which should be treated as exceptions to it, reference may usefully be made to the following authorities.

G H In *Wheeldon v. Burrows* (10) THESIGER, L.J. (12 Ch.D. 49), states two propositions as "the general rules governing cases of this kind." The first concerns easements passing to the grantee and is not relevant here. The second he states (*ibid.*) as being

"... that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known

exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case. Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense, *viz.*, that a grantor shall not derogate from his grant."

The learned lord justice deals further with the question of exceptions (*ibid.*, 59), but, apart from the case of easements of necessity, he does not appear to have been disposed to admit any further exceptions other than cases of mutual easements and cases in which the same vendor sells by auction different lots to different persons at the same time, where the purchaser of one lot may be entitled to an easement over another lot even though the latter was in fact actually conveyed before the former: see *Swansborough v. Coventry* (13). In *Russell v. Watts* (6) the EARL OF SELBORNE, L.C., after referring to the general rule that a man cannot be prevented from darkening his neighbour's windows by a lawful act done on his own land unless light has been enjoyed through those windows for twenty years and also to the second of the two propositions in *Wheeldon v. Burrows* (10), said (10 App. Cas. 596):

"It is manifest, however, that neither of those rules can be invoked in defence of any act contrary to the good faith of a particular contract."

In *Aldridge v. Wright* (5) SCRUTTON, L.J., said ([1929] 2 K.B. 124):

"There are exceptions to the doctrine of *Wheeldon v. Burrows* (10). I do not see my way to attempt an exhaustive statement of those exceptions, as facts would immediately present themselves to prove my absence of foresight, and I find some of the suggested exceptions difficult to understand—but I do not find any suggested exception which covers the facts of this case,"

and, after citing (*ibid.*, 125) the well-known statement of LORD PARKER OF WADDINGTON in *Puillback Colliery Co., Ltd. v. Woodman* (1) ([1915] A.C. 646) (to which I will return), he stated his conclusions thus ([1929] 2 K.B. 127):

"I think the grantee of No. 30, when his grantor claims to have impliedly reserved such a right from his grant, though it is not mentioned in his grant, is entitled to require the clearest evidence of an 'intention of the parties' that there should be reserved for the benefit of No. 28 an easement or quasi-easement to be used and enjoyed as of right. In my opinion the defendant has failed to show such a common intention or implied reservation in this case; the doctrine of *Wheeldon v. Burrows* (10) applies; the decision of the Divisional Court must be affirmed, and the appeal dismissed."

GREER, L.J. (*ibid.*, 129) quoted the general rule as enunciated by THESIGER, L.J., in *Wheeldon v. Burrows* (10) and stated five classes of exceptions which he thought to be the only ones warranted by the authorities and of which it is only necessary to mention the third, which is thus stated (*ibid.*, 130):

"3. If the owner of two adjoining properties. A and B, grants to the tenant of A a tenancy from year to year with a right of way during his tenancy over B, and subsequently leases B, the lease of B is subject to a reservation of the right of way which has *ex hypothesi* been granted to the tenant of A if it is shown that the lessee of B was aware of a long-continued exercise of the right by the tenant of A: *Thomas v. Owen* (14)."

SANKEY, L.J., said (*ibid.*, 134):

"I do not think it is possible, at any rate I propose to resist the dangerous ambition of trying, to lay down a rule which will cover all exceptions. It is impossible to foresee facts; all that can be said is that the onus is upon the grantor to establish the facts to prove that his case is an exception to the rule. In *Wheeldon v. Burrows* (10) he failed to do so."

In *Liddiard v. Waldron* (15), *Thomas v. Owen* (14) was distinguished and GREER, L.J., after referring to *Aldridge v. Wright* (5) and the rule in *Wheeldon v. Burrows* (10) said ([1934] 1 K.B. 447):

A "The courts have been faced with the question whether or not in some cases there are exceptional circumstances which justify departure from that rule. One of those exceptional cases was established in *Thomas v. Owen* (14), the effect of which I ventured to summarise in these words . . ."

GREER, L.J., then set out and re-affirmed his statement of the effect of that case in *Aldridge v. Wright* (5) and added (*ibid.*):

B " *Thomas v. Owen* (14) is only an illustration of the proposition that a man cannot grant to A what he has already given to B, and, therefore, in order to give effect to what he has already given to B, if the grantee knows the facts, there must be an implied reservation of that which would enable him to perform his obligation to his tenant under his existing lease."

C The most comprehensive statement of the area of potential exceptions is probably that contained in the speech of LORD PARKER OF WADDINGTON in *Pwllbach Colliery Co., Ltd. v. Woodman* (1), where his Lordship, after referring to the exception with respect to easements of necessity, said this ([1915] A.C. 646):

D " "The second class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used: see *Jones v. Pritchard* (2) and *Lyttelton Times Co., Ltd. v. Warners, Ltd.* (3). But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use."

E The illustrations given by LORD PARKER in support of this general proposition seem, however, to show that it is of less comprehensive import than would at first sight appear. He refers to *Jones v. Pritchard* (2), which was, in effect, a case of mutual easements; to *Lyttelton Times Co., Ltd. v. Warners, Ltd.* (3), where both parties contemplated at the time of the grant that the grantor should carry on his printing works on the part of the premises retained and it was held that the grantee could not in those circumstances complain of a nuisance to the premises granted due to noise and vibration unavoidably occasioned by the carrying on as contemplated of printing operations on the grantor's part of the premises; and to two other cases which appear to have proceeded on similar principles.

G The case which in point of actual decision goes furthest in the direction of implying reservations of easements in favour of a grantor is, undoubtedly, *Simpson v. Weber* (12). The question there was whether the grantor of one of two adjoining houses owned by him had by implication reserved the right to have a creeper growing in the garden of the house retained supported by a wall of the house granted over which its foliage had spread, and the right to continue the attachment of a gate forming part of the premises retained to a wall forming part of the premises granted, and the Divisional Court, reversing a county court judge, decided in favour of the grantor's successor in title on both points. Of this case I need only say that while the physical circumstances at the date of the severance may, perhaps, have sufficed to support an implication of an intention common to grantor and grantee that the easements in question should be reserved, I cannot agree that the decision is good law so far as it proceeds on the

ground, given in both the two not very satisfactory reports, that (133 L.T. 47; 41 T.L.R. 304),

"there was no evidence that it was not the intention of the parties that the creeper and gate-post should stay."

In his judgment in the present case DANCKWERTS, J., after citing at length from *Simpson v. Weber* (12), and also referring to *Liddiard v. Waldron* (15), *A Wheeldon v. Burrows* (10) and *Thomas v. Owen* (14), expressed his conclusion thus ([1950] 2 All E.R. 831):

"It does seem to me that there may be exceptional circumstances in which it is only common sense to imply some reservation, and that such an implication should be made in the circumstances of the present case. When I see from the photograph which is before me that when the parties entered into their transaction there was an enormous advertisement painted on the wall advertising Webb's for meat, grocery and provisions, and a very large advertisement advertising Brymay safety matches, which had been there at least since 1939, and when no evidence is given that anything was said by either of the parties about the removal of those advertisements, it appears to me to be common sense to imply an intention on the part of the parties that they should remain. Therefore, I am prepared to hold that there was in favour of the landlord implied in this lease an easement until the termination of the lease to keep those two advertisements in the position in which they were, and, by necessary implication, a right to repair them, paint them, and do whatever may be necessary from time to time to preserve them as effective advertisements."

I find myself unable to agree with the learned judge's conclusion. The question is whether the circumstances of the present case as proved in evidence are such as to raise a necessary inference that the common intention of the parties was to reserve to the landlord during the twenty-one years' term some, and, if so, what, rights in regard to the display of advertisements over the outer walls of the demised premises, or such as to preclude the tenant from denying the implied reservation to the landlord of some such rights consistently with good faith.

That question must be approached with the following principles in mind: (i) If the landlord intended to reserve any such rights over the demised premises it was his duty to reserve them expressly in the lease of Aug. 11, 1949: *Wheeldon v. Burrows* (10). (ii) The landlord having failed in this duty, the onus was on him to establish the facts to prove, and prove clearly, that his case was an exception to the rule: *Aldridge v. Wright* (5). (iii) The mere fact that the tenant knew at the date of the lease of Aug. 11, 1949, that the landlord was using the outer walls of the demised premises for the display of the advertisements in question did not suffice to absolve the landlord from his duty of expressly reserving any rights in respect of them he intended to claim, or to take the case out of the general rule: see *Suffield v. Brown* (4) (4 De G.J. & Sm. 199), *Crossley & Sons, Ltd. v. Lightowler* (11) (2 Ch. App. 486).

Applying these principles to the present case, I ask myself whether on the meagre facts proved the landlord has discharged the onus which lies on him of proving it an exception to the general rule. He can, so far as I can see, derive no assistance from the passage quoted from the speech of LORD PARKER OF WADDINGTON in the *Pullback Colliery* case (1). It might, I suppose, be said to have been in the contemplation of the parties that the landlord would continue to use the ground floor of the premises for the purposes of his business as a butcher and provision merchant, but it cannot, in my view, be contended that the maintenance during the term of the lease of his advertisement over the door was a necessary incident of the user so contemplated. This applies *a fortiori* to the Brymay advertisement, the display of which on the outer wall of the demised

A premises by the Borough Billposting Co. as licensees of the landlord was, so far as I can see, not related in any way to the use or occupation of the ground floor for the existing or any other purpose. The transaction with that company was simply a hiring out for reward of part of an outer wall of the demised premises for use as an advertising or billposting site or station. The mere fact that the tenant knew of the presence of the advertisements at the date when the lease of Aug. 11, 1949, was granted being beside the point, nothing is left beyond the bare circumstance that the advertisements were not only present at the date of the grant, but had been continuously present without objection by the tenant since the commencement of his original tenancy in 1939. Does this circumstance suffice to raise a necessary inference of an intention common to both parties at the date of the lease that the landlord should have reserved to him the right to maintain these advertisements throughout the twenty-one years' term thereby granted? I cannot see that it does. The most that can be said is that the facts are consistent with such a common intention. That will not do. The landlord must surely show at least that the facts are not reasonably consistent with any other explanation. Here he manifestly fails. It may be that neither party ever applied his mind at all to the question whether the outer walls were included in, or excluded from, the original tenancy or the lease ultimately granted, or what their respective rights as to the use of such walls for any purpose might be. It may be that the tenant, so far as he applied his mind to the matter at all, merely refrained from objecting to the presence of the advertisements because, whether the landlord was within his rights in maintaining them or not, he, the tenant, did not for the time being think it worth his while to object. As to the landlord, he may have been under the erroneous impression that, notwithstanding the tenancy and, subsequently, notwithstanding the lease, he was entitled to use the outer walls for advertising purposes. If so, his own mistake will not avail him, at all events in the absence of evidence that the tenant was aware of it. On the other hand, the landlord may have thought, when he came to grant the lease, that, as the tenant had never objected to the advertisements during all the ten years of his previous tenancy, it could be assumed that the tenant would not object in the future, and have preferred, accordingly, to let the matter rest at that rather than raise the question by claiming a reservation. In short, I can hold nothing more established by the facts proved than permissive user of the outer walls by the landlord for the display of the advertisements during the original tenancy and thereafter from the granting of the lease until the tenant's objection in January, 1950, with nothing approaching grounds for inferring, as a matter of necessary inference, an intention common to both parties that such permissive user should be converted by the lease into a reservation to the landlord of equivalent rights throughout the twenty-one years' term thereby granted. If the hypothetical officious stranger, sometimes used as a test of implied terms, had intervened in the course of the negotiation of the lease and had said: "What about Mr. Webb's advertisements?" would both parties have exclaimed with one voice: "Of course they are to stay"? I see no justification for this assumption. The landlord might well have said: "Of course I want them to stay," but, as likely as not, the tenant would have said: "At present I have no objection to the advertisements, but I cannot bind myself to allow them for twenty-one years. For all I know, I may at any time during that period for one reason or another want them removed. If the landlord insists on reserving rights in the matter, he must reduce the rent or find some other tenant." So far as the Brymay advertisement is concerned, the present case resembles *Thomas v. Owen* (14) in that the right in question was granted by the landlord to the Borough Billposting Co. before the date of the lease. This means only that *prima facie* the demise to the tenant took effect subject to the company's right, and cannot, so far as I can see, afford any ground for implying a reservation by the landlord

to himself of the proceeds accruing subsequently to the date of the lease from thus hiring out a part of the demised premises or any right to grant any further licence for a similar purpose.

For these reasons I am of opinion that the appeal should be allowed and that a negative answer should be returned to the question raised by the summons. The consequences of a decision to that effect are not strictly before us, but I should, perhaps, add (with a view so far as possible to curtailing the grounds for future controversy): (i) That, so far as the painted advertisement is concerned, the surface on which it appears, including the painted lettering and background themselves, in my view, passed under the demise, so that the mere continued presence of the painted background and lettering in their existing state cannot constitute a trespass. Re-painting would, however, be a different matter, and there is nothing to prevent the tenant using the same surface for any purpose not involving a breach of any of the covenants on his part contained in the lease notwithstanding that the effect of so doing may be to obscure the landlord's advertisement. (ii) Although there is no reservation to the landlord of any rights over the relevant area of wall in respect of the Brymay advertisement, the lease must, as I have said, *prima facie* have taken effect subject to the rights (whatever they may be) of the Borough Billposting Co. under the licence granted to them by the landlord, and, as between the tenant and the landlord, have passed to the tenant the benefit of the company's obligations under that licence so far as it affects the outer wall of the demised premises. It is obvious that, if the parties choose to litigate further, there may be ample room for controversy as to the apportionment of any rent paid by the company in respect of the two posters (the Brymay one being substantially, but perhaps not wholly, on the demised part of the outer wall and the Oxydol one being substantially, but perhaps not wholly, on the retained part of the outer wall), and as to the date from which the tenant can claim the benefit of any contract with the company or call on the landlord to account for his receipts under it, having regard to the fact that the tenant, as between himself and the landlord, must, I think, clearly be taken to have given his tacit consent to the presence of the Brymay poster down to January, 1950. It is to be hoped that common sense (to which DANCKWERTS, J., appealed in his judgment) will lead to a reasonable settlement of these outstanding matters.

MORRIS, L.J.: I agree. The landlord and the tenant expressed the terms of their agreement in a lease which appears to be both full and formal. The landlord becomes confronted, therefore, with one of the general rules referred to by THESIGER, L.J., in *Wheeldon v. Burrows* (10) (12 Ch.D. 49), *i.e.*, that, if a grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. That rule is but one application of the maxim that a grantor shall not derogate from his grant, a maxim which THESIGER, L.J., refers to (*ibid.*) as being as well established by authority as it is consonant to reason and common sense. The general rule is, however, subject to certain exceptions, and these are discussed by THESIGER, L.J., in *Wheeldon v. Burrows* (10). One of the most familiar examples of an exception is that which attaches to cases of what are called ways of necessity. Instances of other exceptions were recited by GREER, L.J., in his judgment in *Aldridge v. Wright* (5) ([1929] 2 K.B. 130).

In my judgment, the issue in the present case may be stated in the form of the question which SANKEY, L.J., posed in *Aldridge v. Wright* (5) (*ibid.*, 137), *i.e.*: "Has the defendant proved that the case is an exception to the general rule?" In my judgment, the landlord has not shown that he comes within any exception which is embraced by the principles laid down in the authorities. In his speech in *Pullbach Colliery Co., Ltd. v. Woodman* (1) LORD PARKER OF WADDINGTON said ([1915] A.C. 646) that, apart from implied grants by way of necessity or of what are called continuous and apparent easements, the cases in which easements can be granted by implication could be classified under two heads. LORD PARKER

stated the first of these as being where the implication arises because the right in question is necessary for the enjoyment of some other right expressly granted. He stated the second in the following words (*ibid.*):

A "The second class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used: see *Jones v. Pritchard* (2) and *Lyttelton Times Co., Ltd. v. Warners, Ltd.* (3). But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use."

B If these words are referred to as applying a test to the situation, the landlord would, in my judgment, fail to show on the facts of the present case that some reservation of a right ought to be implied. The implication of a reservation would have to be conclusively indicated and it would not suffice if the matter remained in the sphere of conjecture or ambiguity. The facts in the present case are not inconsistent with, and do not effectively negative, the view that the tenant may not have given thought to the question of having advertisements on the wall demised to him continuously during the period of the lease. Further, it may be D that the tenant lacked advice on legal matters. Neither is it shown, in my judgment, that any reflection on his good faith can validly be alleged, nor that he remained silent at a time when he should have been assertive. Further, it cannot be demonstrated that he has done anything to jeopardise his right to withdraw any permission previously tacitly given. On the particular and somewhat meagre facts which are before the court it is not, in my judgment, shown that it must E have been the common intention that the landlord was to reserve a right to retain advertisements on the wall demised. As that is not shown, the question propounded in the summons should, in my judgment, be answered in the negative. I would also add that I am in agreement with the observations made by SIR RAYMOND EVERSHED, M.R., in regard to any further assessment or adjustment of the position as between the tenant and the landlord.

F *Appeal allowed.*

Solicitors: *F. Duke & Sons* (for the tenant); *Neil Maclean & Co.* (for the landlord).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

BURTON AND ANOTHER v. HOLDSWORTH.

[KING'S BENCH DIVISION (Streatfeild, J.), May 4, 11, 1951.]

Legal Aid—Remittance of action in tort to county court unless security given by plaintiff for defendant's costs—Legal aid certificate issued to plaintiff—Jurisdiction to remit action—County Courts Act, 1934 (c. 53), s. 46 (2).

In an action for damages for negligence the defendant applied to the court, under the County Courts Act, 1934, s. 46 (1), to transfer the action to the county court in default of the plaintiffs giving security for his costs. His application was supported by an affidavit showing that the plaintiffs had no visible means of paying his costs should they be unsuccessful. The plaintiffs contended that the court had no jurisdiction to transfer the action under s. 46 (1) of the Act of 1934, as one of the plaintiffs had been granted a legal aid certificate under the Legal Aid and Advice Act, 1949.

HELD: the Act of 1949 contained no express provision affecting the discretion of the court to make an order under s. 46 (2) of the Act of 1934, and the regulations envisaged by s. 12 (2) (b) (ii) of the Act of 1949 could not affect a defendant's statutory right to a transfer of the action to a county court, as distinct from his right to security for costs, and, therefore, the exercise of the discretion of the court under s. 46 (2) of the Act of 1934 was not precluded by the fact that a legal aid certificate had been issued to one of the plaintiffs, but was to be exercised in accordance with the principles followed under the Poor Persons Rules before the Act of 1949 came into force.

Cook v. Imperial Tobacco Co. ([1922] 2 K.B. 158), applied.

Conway v. George Wimpey & Co., Ltd. ([1951] 1 All E.R. 56), distinguished.

FOR THE LEGAL AID AND ADVICE ACT, 1949, see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 532.

Cases referred to:

(1) *Conway v. George Wimpey & Co., Ltd.*, [1951] 1 All E.R. 56.

(2) *Willé v. St. John*, [1910] 1 Ch. 701; 79 L.J.Ch. 409; 102 L.T. 617; 16 Digest 185, 911.

(3) *Cook v. Imperial Tobacco Co.*, [1922] 2 K.B. 158; 127 L.T. 474; 13 Digest 485, 352.

(4) *Daley v. Diggers, Ltd.*, [1951] 1 All E.R. 116; [1951] 1 K.B. 661.

(5) *Olds v. Olds*, *Brittan v. Brittan*, [1948] 2 All E.R. 61; [1948] P. 282; [1948] L.J.R. 1385; 2nd Digest Supp.

(6) *Huntingford v. Huntingford*, [1950] 1 All E.R. 785.

(7) *Sykes v. Sykes*, (1869), L.R. 4 C.P. 645; 38 L.J.C.P. 281; 20 L.T. 663; 24 Digest 727, 7548.

APPEAL by the defendant in an action for damages for negligence from a decision of Master LAWRENCE, dated Apr. 16, 1951, whereby the learned master refused to make an order that, unless the plaintiffs gave security for the defendant's costs, the action should be transferred to the Ilford County Court, under the County Courts Act, 1934, s. 46. The learned master held that, as one of the plaintiffs had received a legal aid certificate under the Legal Aid and Advice Act, 1949, he was precluded by the decision of the Court of Appeal in *Conway v. George Wimpey & Co., Ltd.* ([1951] 1 All E.R. 56) from making an order under s. 46 of the Act of 1934. The appeal from his decision was heard by STREATFEILD, J., in chambers and was adjourned into court for judgment.

Craske for the plaintiffs.

N. Lawson for the defendant.

Cur. adv. vult.

May 11. STREATFEILD, J., read the following judgment. This is an appeal by the defendant from the refusal of Master LAWRENCE on Apr. 16, 1951, to order that, unless the plaintiffs give security for the defendant's costs,

this action be transferred to the Ilford County Court under the County Courts Act, 1934, s. 46. The case raises the question whether the powers of the High Court or a judge thereof under s. 46 of the County Courts Act, 1934, are affected by the provisions of the Legal Aid and Advice Act, 1949, and, having heard the arguments of counsel for the parties in chambers on May 4, I have at their request adjourned the case into court for the purpose of giving this judgment, so that, should either party desire to appeal further, there may be a shorthand transcript of the judgment available.

The material facts are as follows. On Aug. 17, 1950, a collision occurred between a motor cycle ridden by the plaintiff, William Burton, with the plaintiff, Leslie Burton, as pillion passenger, and the defendant's motor van. Both plaintiffs were injured, William the more seriously. He sustained a fracture of each bone of the left lower leg, involving part of the ankle joint, and it is said that there may be some permanent partial disability owing to the possibility of arthritis setting in. He claims £153 special damages. Leslie sustained cuts, bruises and shock, and he claims £19 10s. special damages. On Oct. 30, 1950, a writ was issued, and on Dec. 7 a statement of claim was delivered, claiming damages for the alleged negligence of the defendant's driver. Both plaintiffs were then ordinary, self-supporting litigants.

On Dec. 11, 1950, the defendant applied to the High Court under s. 46 (1) of the County Courts Act, 1934, to transfer the action to the county court in default of the plaintiffs giving security for his costs. In due course the application came before Master BAKER, supported by an affidavit by Mr. Arthur Gregory, an inquiry agent, and Mr. Rex Wyeth, the defendant's solicitor, sworn respectively on Dec. 18 and 15, 1950, in the following terms. First, Mr. Gregory states that,

having received instructions from the defendant's solicitors, he made inquiries as to the financial position of the two plaintiffs. Both plaintiffs are single men residing with their parents at 9, Chisenhale Road, Bethnal Green, E.2, and this address is situated in a working-class district. They pay £2 10s. per week each for board and lodging. The plaintiff, William, is an attendant at the electricity sub-station, Poplar, earning £7 10s. per week, and has no other means. The plaintiff,

Leslie, is employed as an electrician's mate by J. Lyons & Co., Ltd., of Cadby Hall, Kensington, earning £6 per week, and he also has no other means. The information contained in the first paragraph of the affidavit, which Mr. Gregory believes to be true, was, as to the premises being situated in a working-class district, derived from his own observation, and, as to the remainder, was obtained by him from the plaintiffs' mother in answer to his inquiries, and, having regard

to those matters, he submits that the plaintiffs have no visible means of paying the costs of the defendant should a verdict not be found for the plaintiffs in this action. Mr. Wyeth, a solicitor, for himself deposes that he is acting as solicitor in this matter and that the facts and matters out of which the proceedings have arisen are known to him, and, in his opinion, the defendant has a good defence to the action on the merits. After reading that evidence, Master BAKER

was informed that the plaintiff, William, was seeking legal aid under the Legal Aid and Advice Act, 1949, and thereupon he adjourned the application for further consideration after that plaintiff had become an "assisted person." On Feb. 19, 1951, William was granted a legal aid certificate, and the defendant's solicitor was notified thereof on Mar. 14. On Apr. 4, 1951, the summons under s. 46 of the Act of 1934 was restored. On Apr. 14, 1951, the defendant delivered his

defence, denying negligence and pleading that the accident was caused solely, or contributed to, by the negligence of the plaintiff, William Burton. On Apr. 16, 1951, the application came before Master LAWRENCE, who refused to transfer the action on the ground that, having regard to the decision of the Court of Appeal in *Conway v. George Wimpey & Co., Ltd.* (1), the jurisdiction to transfer an action under s. 46 (2) of the County Courts Act, 1934, is not exercisable after a legal aid certificate has been issued under the Act of 1949. Hence this appeal to the judge in chambers.

Counsel for the defendant submits, and counsel for the plaintiffs concedes, that *Conway v. George Wimpey & Co., Ltd.* (1) deals with a matter quite different from s. 46 of the Act of 1934 and does not conclude this case. I agree with them, but, since I am told that the learned master felt himself precluded by that decision from exercising his jurisdiction under s. 46 (2), I think that I should indicate why, in my view, that decision does not apply to this case. Section 46 of the Act of 1934 gives a defendant, in an action of tort in the High Court brought against him by a plaintiff who has no visible means of paying the defendant's costs if unsuccessful, a statutory right, not to an order for security for his costs, but to ask the court, if having regard to all the circumstances it thinks fit to do so, to transfer the action to the county court, unless the plaintiff does give security for the defendant's costs. This is a statutory protection to be given to a defendant in the court's discretion in a proper case, so that a successful defendant's costs, which he may be unable to recover from an impecunious plaintiff, may at least be minimised. It is open to the plaintiff to avoid the transfer by giving security for costs, if he can, but he is not ordered to do so, and in any case he is not barred from pursuing his legal remedy. He is still free to continue his action, though, in default of security for costs, in a court where lesser costs are incurred. By contrast, under R.S.C., Ord. 58, r. 15, an appellant to the Court of Appeal may, in special circumstances, e.g., poverty or insolvency, be ordered to give security for the respondent's costs, and the proceedings may be stayed pending security being given, and in default of security the appeal may stand dismissed. This is a rule of procedure in the Court of Appeal, and it was well settled that, where a poor person's certificate was granted under the old procedure (now superseded by the Legal Aid and Advice Act, 1949), the Court of Appeal would make no order for security for costs, and an order already made would lapse: see *Willé v. St. John* (2). *Conway v. George Wimpey & Co., Ltd.* (1) was a case of the latter variety. The plaintiff, who at the time was an ordinary litigant, was ordered to give security for costs of his appeal to the Court of Appeal. He was then granted an emergency certificate under the Legal Aid and Advice Act, 1949. The Court of Appeal held that, pending the making of regulations under s. 12 (2) (b) (ii) (which contemplates that in certain circumstances security for costs will be ordered), and in the absence of special circumstances, it was inappropriate that an order for security for costs against an assisted person should stand, thus following the old procedure. *Conway's* case (1), as it seems to me, is an authority on procedure only, and does not govern the case of a statutory right to the transfer of an action to the county court in default of security for costs, as distinct from a right to such security by itself, which, as I have stated, s. 46 of the Act of 1934 does not confer. I am, therefore, of opinion, with respect to the learned master, that his decision in the present case was based on an erroneous interpretation of *Conway v. George Wimpey & Co., Ltd.* (1).

Apart from submitting that *Conway v. George Wimpey & Co., Ltd.* (1) is inapplicable, the argument of counsel for the defendant may be stated under two main heads. He contends (i) that, under the old Poor Persons Rules (R.S.C., Ord. 16, r. 22 to r. 31H), the fact that a plaintiff was suing *in forma pauperis* did not preclude the exercise of the court's discretion under s. 46 of the Act of 1934 (or its predecessor, s. 2 of the County Courts Act, 1919) and, incidentally, that, if it could be equitably exercised under the old procedure, it can be even more equitably done now that an assisted person enjoys greater privileges under the Act of 1949; (ii) that the Act of 1949 and the regulations made thereunder contain, and hereafter can contain, nothing to invade a defendant's rights under s. 46 of the Act of 1934. For his first submission, counsel for the defendant relies on *Cook v. Imperial Tobacco Co.* (3), a case under s. 2 of the County Courts Act, 1919, which was in similar terms to those of s. 46 of the Act of 1934. It is only necessary to read the headnote, which is as follows:

A "A county court judge has no jurisdiction to admit a plaintiff to sue as a poor person in the county court. Where a plaintiff has been admitted to take proceedings in tort in the High Court as a poor person under Ord. 16, r. 22 to r. 31, a master or judge may nevertheless properly exercise his discretion under s. 2 of the County Courts Act, 1919, in remitting the action for trial in the county court, notwithstanding that the effect of such remittal, in cases in which the plaintiff has no means at all, will, owing to the absence of authority to admit him to sue in the county court as a poor person, be to deprive him of all power to continue the prosecution of the action. The master or judge however when exercising the discretion to remit ought to take that fact into consideration."

B That, indeed, is a strong authority, and it is to be emphasised that the court exercised the jurisdiction to transfer the action to the county court notwithstanding that under the rules in force at that time the plaintiff could not be admitted to sue in the county court as a poor person, thereby, in effect, depriving her of power to continue the action. Counsel for the defendant points out that that defect has now been remedied in a plaintiff's favour. For, although the Act of 1949 does not yet apply to actions initiated in the county court, as it eventually will, the Legal Aid and Advice Act, 1949 (Commencement) Order, 1950 (S.I., 1950, No. 1357), art. 1, has already brought into force, as from Oct. 2, 1950, the material provisions of the Act, whereby a person may be granted legal aid, not only in proceedings in the Supreme Court, but also in

C "... proceedings in any county court ... in or in connection with any action ... remitted or transferred thereto from the Supreme Court ..."

D This must include actions transferred to the county court under s. 46 of the Act of 1934. Thus, a plaintiff is no longer prejudiced by such a transfer, but can clearly continue his action as an assisted person in the county court. Counsel for the defendant, therefore, submits that this case should be regarded as *a fortiori* *Cook v. Imperial Tobacco Co.* (3).

E As to his second submission, he submits that in any case the statutory power of the Lord Chancellor to make regulations under s. 12 (2) (b) of the Act of 1949 is limited to regulating

"... the procedure of any court ... in relation to legal aid, and in particular [making] provision ... (ii) as to the cases in which and extent to which a person receiving legal aid may be required to give security for costs ..."

F —*e.g.*, cases under R.S.C., Ord. 65, r. 6 and r. 6A. He submits that the Lord Chancellor would have no power to make such regulations as would deprive a defendant of his statutory right to the transfer of an action in the court's discretion under s. 46 of the Act of 1934, particularly having regard to s. 1 (7) (b) of the Act of 1949 whereby, save as expressly provided by Part I of the Act or regulations made thereunder,

G "... the rights conferred ... on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings ..."

H The "liabilities" of other parties were dealt with by HILBERY, J., in *Daley v. Diggers, Ltd.* (4). This is the converse case of their "rights," which must be governed by the same principle. The Act itself contains no express provision affecting s. 46 of the Act of 1934, nor could the regulations envisaged by s. 12 (2) (b) (ii) affect a defendant's statutory right to a transfer of the action to a county court, as distinct from a right to security for costs.

In answer to this formidable argument, counsel for the plaintiffs puts forward a somewhat ingenious reply. First, he submits that, although nothing in the Act of 1949 supersedes s. 46 of the Act of 1934, yet the Act of 1949 and its regulations make it impossible in practice to carry out that section. Secondly, with regard to *Cook v. Imperial Tobacco Co.* (3), he submits that the principle

on which an assisted person may now be ordered to pay costs is different from that under the old Poor Persons Rules (R.S.C., Ord. 16, r. 22 to r. 31H), and that no case decided under those rules is now relevant. As to his first submission, his argument is as follows. Under s. 46 (1) of the Act of 1934, the governing requirement is that the plaintiff

“... has no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff...”

the important words being “the costs of the defendant.” By s. 2 (2) (e) of the Act of 1949 an assisted person’s liability to pay costs is limited, and “shall not exceed the amount (if any) which is a reasonable one for him to pay,” and the Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 17, lays down the principles which must guide the court in assessing his liability, and gives power to direct payment by instalments or to defer payment until a particular date, or to vary an order for costs on the ground of a change in his circumstances at any time within six years after the order. He thus becomes liable to pay only what, when and how the court thinks he can reasonably pay, and so, argues counsel for the plaintiffs, those restricted costs which he becomes liable to pay become “the costs of the defendant” within the meaning of s. 46 (1) of the Act of 1934. Therefore, says counsel, there cannot now in practice be a situation where the plaintiff has no visible means of paying the defendant’s costs under s. 46 of the Act of 1934, because either the plaintiff has some means, or, if he has none, he is not liable to pay any costs, and, therefore, there are no “costs of the defendant” within s. 46 (1).

I am quite unable to accept this argument. In my opinion, the words of s. 46 (1), enacted in 1934 before the Act of 1949 was thought of, must be given their natural meaning. The “costs of the defendant” clearly mean “the costs incurred by the defendant,” no doubt as allowed on taxation, and they are no less “the costs of the defendant” because a subsequent Act may have limited the unsuccessful plaintiff’s liability to pay them. I cannot interpret the words in s. 46 (1) as being the equivalent of “such of the defendant’s costs as the court may order the plaintiff to pay.” Moreover, it is to be noted that under s. 2 (2) (e) of the Act of 1949, in determining the amount of costs which is reasonable for the assisted person to pay, the court must have regard to all the circumstances, which include, not only his own means, but the means of the other parties and the conduct of all of them. It is, therefore, not impossible, even now, for the court to order the assisted person to pay the full taxed costs of the defendant. In that event, on the argument of counsel for the plaintiffs, the “costs of the defendant” would, in fact, be his full taxed costs. In my view, however, it is clearly wrong to interpret the defendant’s right under s. 46 of the Act of 1934, which he is given during the interlocutory stages of an action, according to the determination of a matter which does not take place until the very end of the actual hearing.

The second submission of counsel for the plaintiffs is that, formerly, under R.S.C., Ord. 16, r. 28 (1), the court had the same unfettered discretion in the matter of costs as in an ordinary action: see *Olds v. Olds*, *Brittan v. Brittan* (5), and *Huntingford v. Huntingford* (6). Although a litigant was a poor person, there was always a potential liability to pay costs. Now, under the Act of 1949, the court’s discretion is fettered and regulated by s. 2 (2) (e) and reg. 17 of the regulations of 1950. Although, however, the discretion is now fettered, in my opinion it still remains a discretion, and, as I have already pointed out, it may in a proper case be so exercised as to make the assisted person liable for full taxed costs. I am unable to follow why, even if the court’s discretion is now fettered, the principle underlying *Cook v. Imperial Tobacco Co.* (3) is affected, as counsel for the plaintiffs submits. As I read it, the only relevance of R.S.C., Ord. 16, r. 21 to r. 31, in that case was that the fact that a plaintiff could not then be admitted to sue in the county court as a poor person was a matter to be considered by the

master or judge in deciding whether to transfer an action to the county court under s. 2 of the County Courts Act, 1919. Now that legal aid is, under the Act of 1949, available in the case of actions transferred from the High Court to the county court, that factor has disappeared, and *Cook v. Imperial Tobacco Co.* (3) remains good law under the corresponding section, s. 46 of the Act of 1934, and unaffected by the fact that the court's discretion to award costs against an assisted person is now exercised on a different basis.

A In my judgment, therefore, the argument of counsel for the defendant is correct. I follow the decision in *Cook v. Imperial Tobacco Co.* (3) in deciding that there was nothing in the old Poor Persons Rules (R.S.C., Ord. 16, r. 22 to r. 31H) to preclude the exercise of the court's discretion under s. 46 of the Act of 1934 against a person suing *in forma pauperis*, and there is, and can be, nothing under the Act of 1949 to alter this position save for the better for the plaintiff who can continue the action as an assisted person in the county court. In my view, the discretion of the court under s. 46 is still to be exercised according to the old principles, as follows: (i) Where there is more than one plaintiff, unless there is ground for making the order against both, it cannot be made against either: see *Sykes v. Sykes* (7); (ii) I must be satisfied that the plaintiffs, and each of them, have no visible means of paying the defendant's costs. That does not, of course, signify merely "tangible" means, but it does require evidence of lack of capacity to pay the defendant's costs if the plaintiffs should be unsuccessful. Here, both plaintiffs are in much the same position, although only William Burton is an assisted person. They are brothers, living with their parents in a working-class district in Bethnal Green. According to Mr. Gregory's affidavit, based on information given by the plaintiffs' mother, William earns £7 10s. a week and Leslie £6 a week. Neither has any other means, and each pays his mother £2 10s. a week for his maintenance. That leaves Leslie with £3 10s. a week and William £5 a week for all other purposes, but I am informed that William has to pay £1 10s. a week towards his maximum contribution of £70 10s. as an assisted person. Thus, in effect, he, too, is left with £3 10s. a week. William's disposable income is for purposes of the Act of 1949 given as £297 a year, and disposable capital nil. In my view, in these days a plaintiff who, after paying his board and lodging, is left with only £3 10s. a week out of his wages for all other purposes cannot be said to have "visible means of paying" the defendant's costs of an action in the High Court if he (the plaintiff) should prove unsuccessful. In my judgment, therefore, the first ingredient of s. 46 is satisfied as regards these plaintiffs.

F Then I must be satisfied that in all the circumstances it is a fit case for trial in the county court, which includes consideration of the nature of the injuries and the nature of the action itself. Now, although William sustained a fractured leg and there may be a question of some permanent partial incapacity, I do not consider that there is anything about his injuries—and still less about those of Leslie—to make it more appropriate to retain the case in the High Court. The issues on the pleadings appear to be free from complication and do not involve any unusual or difficult points of law, and the defendant's solicitor, Mr. Wyeth, deposes in his affidavit that in his opinion the defendant has a good defence to the action. In my judgment, therefore, this is a case where, having regard to all of the circumstances, the discretion of the court under s. 46 (2) of the County Courts Act, 1934, should be exercised in the defendant's favour, and, accordingly, this appeal will be allowed, and I make the order prayed for in the notice of appeal, providing for security for the defendant's costs in the sum of £30.

Appeal allowed.

Solicitors: *Stocken, May, Sykes & Dearman* (for the plaintiffs); *A. E. Wyeth & Co.* (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

THE ABBEY, MALVERN WELLS, LTD. v. MINISTER OF TOWN AND COUNTRY PLANNING.

[CHANCERY DIVISION (Danckwerts, J.), May 2, 1951.]

Charity—Town and country planning—Land held on charitable trusts—Use of land for charitable purposes—Land owned by company and used for school—Shares of company held by trustees under provisions of trust deed—School conducted on non-profit-making basis under deed—Payment by pupils of full fees—Town and Country Planning Act, 1947 (c. 51), s. 85 (1). A

A private company was incorporated in 1926 for the purpose of acquiring and carrying on a girls' school. On Nov. 23, 1933, the shares of the company, which were originally held by the founders of the school, were transferred by them to the trustees of a trust deed, executed on that date, to be held on the trusts of the deed, the object of which was "to secure that the . . . school shall henceforth be carried on under the guidance of a body of persons interested in the education of girls and with a view to promoting solely the educational work and efficiency of the school . . ." On the same day some of the company's articles were altered in certain respects. By its articles, as amended, the company was to be managed by a council consisting of the trustees of the trust deed, who were prohibited from receiving remuneration for their services, and no share qualification was necessary for a member of the council. The fees to be charged for the tuition, boarding and maintenance of pupils were to be fixed by the council, who had power to suspend any pupil whose fees had not been paid. Under its memorandum and articles the company had the power to make profits and distribute dividends, but by cl. 2 of the trust deed the shares were to be held by the trustees on trust "for the benefit of the school and all dividends and other moneys derived therefrom shall be dealt with in such manner as the trustees in their discretion shall think advisable with a view to promoting the educational work and efficiency of the school." Clause 11 of the trust deed provided that, if the school should cease to be carried on, the trusts declared by the trust deed should thereupon determine and the trustees should hold the shares and any money or property representing or derived from the shares on trust "to deal with the same in such manner for the advancement of the education of girls as the trustees in their absolute discretion shall determine." The company contended that the land owned and leased by it and used for the purposes of the school was land to which the Town and Country Planning Act, 1947, s. 85 applied, as it was land an interest in which was held on charitable trusts or for charitable purposes and which was used at all material times for or in connection with the purposes for which the interest was held, within s. 85 (1) of the Act. B C D E F

HELD: (i) as the trust deed of Nov. 23, 1933, directed the manner in which the trustees were to operate the powers which they possessed as the holders of the shares of the company, in determining whether the requirements of s. 85 (1) of the Act of 1947 were satisfied it was necessary to look, not only at the company's memorandum and articles, but also at the trust deed; the whole purpose of the trust deed was to secure the education of the girls at the school on a non-profit-making basis, and it was merely the manner in which the dividends and other moneys derived from the shares should be applied in promoting the educational work and efficiency of the school that was left to the discretion of the trustees under cl. 2 of the deed; and, therefore, the trusts of the deed were of a charitable nature and the school was a charitable educational establishment, it being immaterial that the pupils might be required to pay the full value of the services which they received, and, as the land was used for and in connection with the purposes of the school, the condition contained in the second limb of s. 85 (1), *viz.*, the provision in respect of the use of the land, was satisfied. G H

Oxford Group v. Inland Revenue Comrs. ([1949] 2 All E.R. 537), distinguished.

Dictum of SIR JOHN LEACH, V.-C., in *A.-G. v. Lonsdale (Earl)* (1827) (1 Sim. 105), applied.

(ii) although the land in question was vested technically in the company and not in the trustees of the trust deed, which related to the trusts of the shares and not to the trusts of the land, the company, being an artificial person, could act only through its council, who were the trustees of the trust deed and, being strictly bound thereby, could use the property of the company only under its terms; while the property of the company was held nominally under the provisions of the memorandum and articles, it was, in fact, subject also to the provisions of the trust deed, and the company could apply its property and assets only for the charitable purposes mentioned in the deed; and, therefore, the interest in the land in question was held on charitable trusts or for charitable purposes, and s. 85 applied to it.

AS TO EDUCATIONAL PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, p. 116, para. 153; and FOR CASES, see DIGEST, Vol. 8, pp. 245, 246, Nos. 51-57.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, see HALSBURY'S STATUTES, Vol. 40, p. 825.

Cases referred to:

(1) *Oxford Group v. Inland Revenue Comrs.*, [1949] 2 All E.R. 537; 2nd Digest Supp.

(2) *A.-G. v. Lonsdale (Earl)*, (1827), 1 Sim. 105; 5 L.J.O.S. Ch. 99; 57 E.R. 518; 8 Digest 312, 932.

(3) *Re French Protestant Hospital*, [1951] 1 All E.R. 938.

(4) *Re Girls' Public Day School Trust, Ltd.*, [1951] 1 Ch. 400.

ADJOURNED SUMMONS for (*inter alia*) a declaration that land belonging to the plaintiffs and used by them on and since July 1, 1948 (the "appointed day" under the Town and Country Planning Act, 1947), for the purposes of their school was land to which s. 85 of the Act applied, being land an interest in which was held on charitable trusts or for charitable purposes and which was used at all material times for or in connection with the purposes for which the interest was held, within s. 85 (1).

On May 10, 1949, the plaintiffs' chartered surveyor applied to the Minister of Town and Country Planning for a determination under s. 92 (1) of the Act in respect of the land. By a letter, dated Apr. 5, 1950, the Minister informed the plaintiffs of his determination that the land was not land to which s. 85 of the Act applied. The plaintiffs thereupon appealed to the High Court, under s. 92 (2), by originating summons.

Under the Transfer of Functions (Minister of Health and Minister of Local Government and Planning) (No. 1) Order, 1951 (S.I., 1951, No. 142), art. 2, the title of the Minister of Town and Country Planning was changed to that of Minister of Local Government and Planning.

Upjohn, K.C., and *Sir Norman Touche* for the plaintiffs.

Denys B. Buckley for the Minister.

DANCKWERTS, J.: This is an originating summons issued at the instance of a limited company by way of appeal, under the Town and Country Planning Act, 1947, s. 92 (2), from a decision under s. 92 (1) of the Minister who was charged with the administration of the Act. The question which is in issue depends on the provisions of s. 85, which provides certain exemptions from charge in respect of the Act for property which is subject to charitable purposes. Section 85 (1) provides:

"This section applies to land an interest in which is held on charitable trusts or for ecclesiastical or other charitable purposes of any description if the land, as distinct from the rents and profits thereof, is used in any

manner (including use in a manner involving the beneficial occupation of the land by any person) for or in connection with the purposes for which the said interest is held, and not otherwise . . . ”

The effect of that appears to be that two conditions must be fulfilled: (i) the interest in the land must be held on charitable trusts or for charitable purposes of some description, and (ii) the use of the land must be for or in connection with the purposes for which the said interest is held, *i.e.*, charitable trusts or purposes.

The plaintiff company was formed in connection with a girls' school which had been carried on for a number of years by the Misses Florence, Margaret and Alice Judson, and it was incorporated on Dec. 31, 1926, under the Companies Acts, 1908 to 1917, with a share capital of £30,000 divided into 30,000 ordinary shares of £1 each. The number of shares which have been issued is 13,152. Originally 8,701 of those shares were held by Miss Florence Judson, 4,351 by Miss Alice Judson, and a hundred by a brother, Mr. William Judson. On Nov. 23, 1933, a deed of trust was executed and the shares were transferred to the trustees of that trust deed. On the same date the articles of association of the company were altered in certain respects, and it is only necessary for me to deal with the articles as amended on that day. The objects for which the company was established are stated in cl. 3 of its memorandum as follows:

“(a) To acquire, develop, extend, and carry on the school at Malvern Wells, in the county of Worcester, hitherto conducted by Florence Judson, Margaret Judson and Alice Judson, and known as the Abbey, Malvern Wells, and all boarding-houses, hostels, schools and other enterprises carried on in connection therewith either at Malvern Wells or elsewhere in the United Kingdom or abroad, and for that purpose to enter into the agreements referred to in art. 5 of the accompanying articles of association, and carry the same into effect, with or without modification. (b) Generally to establish and carry on schools, boarding-houses, hostels and institutions with the object of providing a liberal education for girls and sound religious training. (c) To purchase, take on lease, or agreement of tenancy or otherwise acquire school buildings, boarding-houses, dwellings for teachers or other persons employed in the business of the company, recreation grounds and other buildings or lands and such copyrights, books, stationery, fittings, furniture and other things as may be necessary and convenient for the educational business of the company.”

There follow a number of powers which are commonly conferred by the memorandum of a limited company. Paragraphs (n) and (p) are:

“(n) To accept and hold as trustee or otherwise and deal with any funds, grants, pensions, legacies and endowments and to undertake any trusts which it may seem expedient to the company to undertake for assisting or furthering the general objects of the company. (p) To do all such other lawful things as the company may deem incidental or conducive to the attainment of the above objects or any of them.”

By art. 3 of the company's articles of association: “The affairs of the company shall be managed by a council.” By art. 4 the company is to be a private company, and art. 5 records that the company is formed for the purpose of acquiring from the Misses Judson the school heretofore carried on by them and known as the Abbey, Malvern Wells, on the terms of an agreement which is therein referred to. Articles 64 to 68 contain the provisions dealing with the council. Article 64, which was altered on Nov. 23, 1933, now reads as follows:

“The council shall consist of the persons who are for the time being the trustees of a trust deed dated Nov. 23, 1933, and made between Florence Judson and Alice Judson of the first part, the several persons whose names are set out in the schedule thereto as parties of the second part, and the company of the third part. Accordingly the present trustees of the said trust

deed are the present members of the council, and every person who hereafter becomes a trustee of the said trust deed shall *ipso facto* become a member of the council."

Article 65 provides that no share qualification is necessary for a member of the council. Article 66 prohibits the members of the council receiving remuneration for their services, except that they may receive the sum of five guineas as expenses. Article 67 provides:

A "The council may in the management of the affairs of the company exercise all such powers of the company as are not by law or by these articles required to be exercised by the company in general meeting, subject, nevertheless, to any regulations of these articles or any special provisions as to the management and regulation of the school therein contained and to the provisions of any statute and to such directions, not being inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting."

B Article 68, headed "Disqualification of members of the council," provides:

C "The office of a member of the council shall be vacated: (a) If he for any reason ceases to be a trustee of the said trust deed . . ."

Article 74 provides:

"The company in general meeting may declare dividends to be paid to members in proportion to the amounts paid up on their shares. No dividend shall be payable except out of the profits of the company, and no dividend shall carry interest against the company."

D Article 77 contains a provision in regard to equalising dividends. Articles 84 to 89 deal with regulations of the school, and provide *inter alia* that the appointment of the head mistress shall rest with the council. Article 88 provides that the internal regulation of the school shall be under the sole management of the head mistress as regards certain things which are mentioned therein. Article 89 provides:

E "The annual sums and other fees to be paid for the tuition of each pupil by her parent or guardian or for the boarding and maintenance of such pupil during the continuance of such pupil at any school or hostel shall be fixed by the council and shall be paid to the treasurer or other proper officer in advance or otherwise by such periodical payments as the council may direct. In case of any default in payment in advance or otherwise, the entrance or return to school of any pupil in respect of whose account such default has been made may be suspended by the council until payment either by means of general regulations or in any particular case."

F It is clear from the memorandum and articles that the company has the power to make profits and to distribute dividends.

G The trust deed of Nov. 23, 1933, which was referred to in the articles, was made between Florence Judson and Alice Judson (described as "the founders"), of the first part, a number of persons whose names are set out in the schedule and who are described as "the present trustees," of the second part, and the Abbey, Malvern Wells, Ltd., *i.e.*, the company, of the third part. All the persons whose names are set out in the schedule appear to be of a respected character, and some of them are connected with education. The recitals refer first to the carrying on of the school prior to the incorporation of the company, to the incorporation of the company in 1926, and to the facts as to the issue of the capital. Then recital (d) says:

H "The founders being desirous of establishing an educational trust in order to secure that the said school shall henceforth be carried on under the guidance of a body of persons interested in the education of girls and with a view to promoting solely the educational work and efficiency of the said

school intend forthwith to transfer or cause to be transferred the said 13,152 ordinary shares in the company into the names of the present trustees or of some of them (not being less than three in number) to the intent that the said shares shall be held upon the trusts and with and subject to the powers and provisions hereinafter contained."

Clause 1 contains definitions referring to the school, the trustees and the council, which is defined as meaning "the council referred to in the articles of association of the company." Clause 2 provides:

"The said shares when transferred as aforesaid shall be held upon trust for the benefit of the school and all dividends and other moneys derived therefrom shall be dealt with in such manner as the trustees in their discretion shall think advisable with a view to promoting the educational work and efficiency of the school."

Clause 3 and cl. 4 provide:

"3. The said shares shall be held in the names of the trustees or of such of their number (not being less than three) as the trustees shall from time to time appoint. All voting rights attached to the said shares shall be exercised in such manner as the trustees in their discretion shall from time to time consider advisable for the purpose of promoting the educational work and efficiency of the school; and without derogating from the generality of the foregoing provision it is hereby declared that if the trustees shall think it desirable for the purpose aforesaid the said voting rights may from time to time be exercised with a view to effecting such alterations in the memorandum and articles of association of the company as the trustees shall think advisable (including if the trustees consider it desirable the insertion of provisions to the effect that no dividends shall be paid on any of the shares in the company and that in the event of a winding-up of the company no part of the assets of the company remaining after payment of the debts and liabilities of the company and the costs of liquidation shall be applied otherwise than for the advancement of the education of girls). 4. Provided that the said voting rights shall be exercised so as to procure (a) that the council shall as soon as practicable consist of the present trustees, (b) that the council shall thereafter consist of the trustees, and (c) that it shall not be necessary for a member of the council to hold any share qualification."

Those provisions of cl. 4 have been carried out.

By cl. 5:

"Provided also that the trustees shall secure either that no shares in the capital of the company are hereafter issued or that if any shares in the capital of the company are hereafter issued no dividends or other moneys derived therefrom shall be applied in any manner other than for the purpose of promoting the educational work and efficiency of the school."

Then there are certain administrative provisions about the proceedings of the trustees, a disqualification clause, and the provision for the appointment of new trustees, and a clause prohibiting remuneration for acting as a trustee, on similar lines to the clause in the articles of the company in regard to the members of the council. By cl. 11:

"If the school shall for any reason cease to be carried on the trusts hereinbefore declared shall thereupon determine and upon the determination of the said trusts the trustees shall thenceforth hold the said shares and any property and moneys representing such shares or derived therefrom upon trust to deal with the same in such manner for the advancement of the education of girls as the trustees in their absolute discretion shall determine."

The result of that trust deed is that the trustees are to operate the powers which they possess as the holders of the shares in the company so as to prevent the

company being used for a profit-making concern, and so that the profit, if any, may be re-applied for the advancement of the educational work of the school.

The material date for the purposes of s. 85 of the Act of 1947 is July 1, 1948, the "appointed day" under the Act, and it is necessary, therefore, to consider what was the situation at that particular time. The land in question, which is partly freehold and partly leasehold, was used for the purpose of the building and grounds of the school, and, therefore, if the school be a charitable educational institution, there seems to be no doubt that the condition contained in the second limb of s. 85 (1), *viz.*, the provision in respect of the use of the land, is satisfied, because it is used for and in connection with the purposes of the school, and not otherwise. The other condition which has to be satisfied is that the interests in question, freehold or leasehold, are held on charitable trusts or for charitable purposes. It is admitted by counsel for the plaintiffs that the conditions of s. 85 (1) could not be satisfied by a perusal of the memorandum and articles of association alone, as they permit a profit-making enterprise, but he relies on the combination of the memorandum and articles and the trust deed. I propose, therefore, to deal first with the provisions of the trust deed, because, unless it appears on the provisions of the trust deed that one is concerned with a purely charitable body with a charitable trust or purpose, the contentions made on behalf of the plaintiffs must fail.

The provisions of the trust deed are attacked by counsel for the Minister in two ways. He first referred to the provision in cl. 2 of the deed that the dividends and other moneys received from the shares

"... shall be dealt with in such manner as the trustees in their discretion shall think advisable with a view to promoting the educational work and efficiency of the school."

He says that that is a provision which takes the matter outside the ambit of a charitable trust, because the decision depends, not on the purposes laid down by the trust deed, but on the discretion of the trustees, and, therefore, it is something which the court could not regulate, and, accordingly, it is not a matter which satisfies the definition of a binding charitable trust. In support of his contention, he relied on *Oxford Group v. Inland Revenue Comrs.* (1). In that case one of the grounds on which the Court of Appeal refused to declare that the Oxford Group, a company limited by guarantee, was a purely charitable body was that one of the powers given to the company by its memorandum was in terms, as counsel for the Minister alleges, similar to the provision in cl. 2 of the trust deed in the present case. The provision in question was:

"To do all such other things as are incidental, or the association may think conducive, to the attainment of the above objects or any of them."

It seems to me that the *Oxford Group* case (1) is distinguishable in two ways. First, as counsel for the plaintiffs points out, in the *Oxford Group* case (1) there was no trust deed limiting the powers of the directors or governing body, and, therefore, they had an unfettered discretion to exercise the powers conferred by the memorandum. Therefore, it was plain that matters which were in the discretion of the company could not be regulated by the court. In the present case the power of dealing with the dividends under cl. 2 of the trust deed is a power of trustees, and, as the court has power to regulate trustees and the manner in which they exercise their power, it seems to me that for that reason the present case is distinguishable from the *Oxford Group* case (1). Secondly, there is also a distinction, in my opinion, in the language of the provisions in the two cases, as cl. 2 of the trust deed, in the present case, provides for the application of the dividends and other moneys with a view to promoting the educational work and efficiency of the school, and it is merely the manner which is left to the discretion of the trustees. In other words, they may choose one or another manner of applying the money, but the application must be for promoting the educational

work and efficiency of the school. Therefore, it seems to me that the *Oxford Group* case (1) really does not assist the question which I have to decide.

The other attack which is made by counsel for the Minister on the charitable nature of the trust deed is of a more general nature, and, as it seems to me, it is rather a startling proposition. He contends that an educational trust or an educational purpose is not charitable unless it be for the promotion of education for persons who pay less than the full value of the services which they receive. That seems to me a proposition which might at one time have been acceptable to the courts, but it is several centuries out of date. While the preamble to the statute of Elizabeth (43 Eliz. c. 4), which is regarded as the foundation of most charitable principles which we consider, refers to the "maintenance of . . . schools of learning, free schools, and scholars in universities," and also to the "education . . . of orphans," and at the beginning of the eighteenth century it was held that a school must be a free school if it was to be within the statute of Elizabeth, that view had been definitely abandoned by the nineteenth century. That that is so appears clearly from the observation of SIR JOHN LEACH, V.-C., in *A.-G. v. Earl of Lonsdale* (2), where he said (1 Sim. 109):

"The institution of a school for the sons of gentlemen is not, in popular language, a charity; but in view of the statute of Elizabeth, all schools for learning are so to be considered . . ."

Thus, all schools of learning, except those which exist purely as a profit-making venture (*e.g.*, certain preparatory schools and what are known sometimes as "cramming establishments"), are to be considered charities. Therefore, the whole purpose of the trust deed of Nov. 23, 1933, being to secure the education of girls at the Abbey School on a non-profit-making basis, it is plain, in my opinion, that the trusts of the trust deed are of a charitable nature.

The next question is: Can it be said that the land in question, which is vested technically in the company, is held on charitable trusts and for charitable purposes? The strength of the Minister's case in this respect rests on the fact that the trustees do not own or hold the land, but only hold the shares. Counsel for the Minister contends that, accepting, for the sake of argument, that the trusts of the trust deed are charitable, they are trusts, not of the land, but only of the shares, and, for the purpose of s. 85 (1) of the Act of 1947, it is the trusts of the land which are material. I think that counsel for the plaintiffs is right when he says that the memorandum and articles of association and the trust deed cannot be treated as if they were entirely divorced from each other, and that one must look at the facts of the case. The first fact that I find is, of course, that the company is an artificial person. Although it is formed under the Companies Acts, it is just as much an artificial person as a corporation formed by statute or by royal charter, and, although it is a legal person, it is not a physical entity and it can only operate by means of human beings. Therefore, one has to see who operates the company and what their position is, as in *Re French Protestant Hospital* (3), which came before me recently. In that case a corporation formed by royal charter was technically the trustee, but I found that the corporation was controlled by a body of persons called the governor and directors. As the question was whether the governor and directors should receive remuneration, it seemed to me that I should look at the substance of the matter to see who really controlled the situation. I found that the governor and directors were just as much in the position of trustees as the corporation itself.

In the present case, it seems to me that one is entitled, and, indeed, bound, to look at the constitution of the company to see who, in fact, is in control. I find that, by art. 3 of the company's articles, the company is controlled entirely by a body called a council, a body of persons, and, by art. 64, that body of persons must be the trustees of the trust deed. Therefore, while the company, theoretically, has the power to apply its property and assets for the purpose of making profits and devoting the resulting profit to the distribution of dividends

among the members, I find that the persons who regulate the operations of the company are not free persons unrestricted in their operations, but are the trustees of the trust deed, and, under the terms of the trust deed, they may use the property of the company only in a particular way and must not make use of the assets of the company for the purpose of a profit-making concern. I find that they are strictly bound by the trusts of the trust deed, and that those trusts are charitable trusts. It seems to me, therefore, that, while nominally the property of the company is held under the provisions of the memorandum and articles of association, in actual fact the property of the company is regulated by the terms of the memorandum and articles of association plus the provisions of the trust deed, and, therefore, the company is restricted in fact in the application of its property and assets and may apply them only for the charitable purposes which are mentioned in the trust deed.

That fact, in my view, distinguishes this case from *Re Girls' Public Day School Trust, Ltd.* (4), a decision of ROXBURGH, J. In that case, which was also under the Act of 1947 and depended on the provisions of s. 85, there were certain preferential shareholders who could obtain substantial benefits under the terms of the memorandum and articles of the company in question, but, by exercising some self-denial, which appears to have been entirely voluntary on their part, they did not exercise their rights for their own profit, but merely carried on the concern as an educational establishment. It does not appear clearly from the report, but I am told that there was nothing to prevent the shares in question being acquired by any person, so that some avaricious person might, if he had been so disposed, have acquired shares and exercised his rights to carry on the school and the company as a profit-making concern. That is not so in the present case. The trustees are prohibited by the trust deed from doing any such thing. They hold the shares and control the company merely as trustees. I am not prepared to consider that they might be capable of committing a breach of trust, as counsel for the Minister invited me to do. I must consider them in their situation as regulated by the trust deed and on the footing that they carry out their duties as required by the trust deed. It seems to me that those duties confine them to charitable purposes, and, therefore, as the company is controlled in that way, the property of the company is held on charitable trusts or for charitable purposes, and, accordingly, s. 85 of the Act of 1947 applies to the land in question.

Declaration accordingly.

Solicitors: *Preston, Lane-Claypon & O'Kelly* (for the plaintiffs); *Treasury Solicitor* (for the Minister).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

MEHMET DOGAN BEY v. G. G. ABDENI & CO., LTD.

[KING'S BENCH DIVISION (McNair, J.), April 9, 10, 20, 1951.]

Damage—Remoteness—Breach of contract—Functions of judge and jury—Direction by judge—Finding by jury—Duty of arbitrator—De-valuation of pound sterling—Delay in payment of freight—Loss on conversion into foreign currency.

By a charterparty, dated July 8, 1949, a shipowner, who carried on business in Turkey, chartered a vessel to carry a cargo of barley from Syria to the United Kingdom. The charterparty provided that the freight should be paid in advance to the shipowner's agents in London who were instructed to remit it to the shipowner in Turkey. On Sept. 6, 1949, freight became payable, but it was not received by the agents from the charterers until Sept. 14. On Sept. 18 the British government de-valued the pound sterling and the rate of exchange of the Turkish pound to the pound sterling fell from 11·284 to 7·84. On Oct. 5 the agents obtained permission from the exchange control authorities to remit the money to Turkey, but, owing to the late payment of the freight and the de-valuation, the shipowner sustained a loss of £3,953. The shipowner having claimed this sum from the charterers on the ground that his loss arose through their failure to pay the freight in due time, the matter was referred to arbitration, and the arbitrator found that (i) the loss was not reasonably foreseeable by either party as liable to result from the freight not being paid on the due date; (ii) the charterers would not as reasonable persons have concluded that the loss was liable to result from the late payment, and (iii) the loss did not naturally and directly flow from the failure to pay on the due date, and, therefore, that the charterers were not liable.

HELD: on a question of remoteness of damage it was the function of the judge to direct the jury on the meaning of "natural and direct" or "reasonably foreseeable" consequences, on whether a particular head of damages was capable in law of falling within those phrases, and on whether there was evidence that a particular consequence was one to which those phrases applied; it was then for the jury to find as a fact whether certain damage was such a consequence, their conclusion, subject to there being evidence to support it, being final; in the present case, the arbitrator, being the tribunal of fact, had not misdirected himself on the law, and findings (i) (ii) and (iii) were findings of fact against which there was no appeal.

AS TO REMOTENESS OF DAMAGE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 103-109, paras. 130-136; and FOR CASES, see DIGEST, Vol. 17, pp. 117-120, Nos. 267-289.

Cases referred to:

- (1) *Hobbs v. London & South Western Ry. Co.*, (1875), L.R. 10 Q.B. 111; 44 L.J.Q.B. 49; 32 L.T. 252; 39 J.P. 693; 17 Digest 95, 106.
- (2) *Hammond & Co. v. Bussey*, (1887), 20 Q.B.D. 79; 57 L.J.Q.B. 58; 17 Digest 110, 214.
- (3) *Chaplin v. Hicks*, [1911] 2 K.B. 786; 80 L.J.K.B. 1292; 105 L.T. 285; 17 Digest 92, 98.
- (4) *McMahon v. Field*, (1881), 7 Q.B.D. 591; 50 L.J.Q.B. 552; 45 L.T. 381; 46 J.P. 245; 17 Digest 98, 134.
- (5) *Monarch S.S. Co., Ltd. v. Karlshamns Oljefabriker (A.B.)*, [1949] 1 All E.R. 1; [1949] A.C. 196; [1949] L.J.R. 772; 2nd Digest Supp.
- (6) *The Malcolm Baxter, Jr.*, (1928), 31 Ll.L. Rep. 200.
- (7) *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Ry. Co. of London, Ltd.*, [1912] A.C. 673; 81 L.J.K.B. 1132; 107 L.T. 325; 17 Digest 126, 343.
- (8) *Hadley v. Baxendale*, (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 156 E.R. 145; 17 Digest 93, 101.

- (9) *Weld-Blundell v. Stephens*, [1920] A.C. 956; 89 L.J.K.B. 705; 123 L.T. 593; 17 Digest 114, 237.
- (10) *Scotts' Trustees v. Moss*, (1889), 17 R. (Ct. of Sess.) 32; 27 Sc.L.R. 30; 36 Digest 123, 814, *xiv*.
- (11) *Royal Greek Government v. Minister of Transport*, (1950), 83 Ll.L. Rep. 228.
- (12) *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*, [1949] 1 All E.R. 997; [1949] 2 K.B. 528; 2nd Digest Supp.
- (13) *Di Ferdinando v. Simon, Smits & Co.*, [1920] 3 K.B. 409; 89 L.J.K.B. 1039; 124 L.T. 117; 17 Digest 159, 604.
- (14) *S.S. Celia v. S.S. Voltorno*, [1921] 2 A.C. 544; 90 L.J.P. 385; 126 L.T. 1; 17 Digest 159, 602.
- (15) *Fletcher v. Tayleur*, (1855), 17 C.B. 21; 25 L.J.C.P. 65; 26 L.T.O.S. 60; 139 E.R. 973; 17 Digest 132, 393.

B SPECIAL CASE stated by an arbitrator.

The shipowner, Mehmet Dogan Bey, claimed damages from the charterers, G. G. Abdeni & Co., Ltd., for breach of the charterparty, alleging that the charterers' failure to pay freight at the time specified in the charterparty had resulted in a loss by him of £3,953. The charterers contended that the damage was too remote and this contention was upheld by the arbitrator.

C *Mocatta, K.C.*, for the shipowner.

Megaw for the charterers.

Cur. adv. vult.

D Apr. 20. McNAIR, J., read the following judgment. This award stated in the form of a Special Case under s. 9 (1) (b) of the Arbitration Act, 1934, raises certain interesting questions as to the respective functions of the judge and jury in determining what damages are recoverable in the case of breach of contract, and, in particular, as to the recoverability of damages resulting from the de-valuation of the pound sterling.

E By a charterparty dated July 8, 1949, in the general form of the Uniform General Charter (Gencon), as revised in 1922 but modified in important respects to meet the needs of the parties, the owner of the steamship Tanar flying the Turkish flag chartered the vessel to G. G. Abdeni & Co., Ltd., of Beyrouth, to carry a full and complete cargo of barley in bulk from Lattakya, Syria, to the United Kingdom for a freight of 32s. 6d. per ton. Clause 4 of the charterparty provided that the freight should be

F "paid in London in advance, discountless on signing bills of lading, in sterling area funds to Messrs. S. Catsell & Co., Ltd., London, less loading disbursements, if any . . . cash for ordinary disbursements at port of loading should be advanced by charterers if required at highest rate of exchange subject to two per cent. to cover insurance and other expenses."

G The shipowner, Mehmet Dogan Bey, carries on business in Turkey, and S. Catsell & Co., Ltd. (to whom I shall refer as Catsell) were at all material times his brokers and agents in London and had so acted for him on previous occasions. The position as regards the remittance to the shipowner in Turkey was that the owner did not always instruct Catsell to remit freights to him in Turkey. Sometimes the freights recovered were retained by Catsell for payment of the owner's obligations in London or for repairs, so that there was no certainty that the shipowner would, in fact, require any particular freight to be remitted to him in Turkey either in whole or in part. Shortly after July 8, 1949, the date of the charterparty, Catsell received instructions from the owner to remit the charter freight to him in Turkey when received. The existence of these instructions was unknown to the charterers and they might at any time have been modified, though, in fact, they were not.

H On Sept. 3, 1949, the loading was completed at Lattakya, and, apparently, bills of lading were signed that day. The freight ought, accordingly, to have been

paid in London either on Sept. 3, or at latest by Sept. 6, if a reasonable time after signing bills of lading is to be allowed. For the purpose of the argument before me it was agreed that freight should have been paid at latest by Sept. 6. It was not, however, until Sept. 7 that the charterers telegraphed to their London agents, Cargo Superintendents (London), Ltd., that they were remitting the sum of £10,512, representing the freight less loading port disbursements. Owing to some unexplained delay this sum did not reach Cargo Superintendents' bank in London until Sept. 13, with the result that it was not until Sept. 14 that Cargo Superintendents were able to hand their cheque to Catsell. On Thursday, Sept. 15, Catsell paid the cheque into their account with their bankers and it was cleared the same day. They did not, however, take any immediate steps to apply either through their bankers or at all for permission under the Exchange Control Act, 1947, to remit the whole or any part of the money received to the owner in Turkey. On Sunday, Sept. 18, 1949, the Chancellor of the Exchequer announced that His Majesty's government in the United Kingdom proposed forthwith to de-value the pound sterling in terms of United States dollars. The pound sterling/U.S. dollar official rate of exchange which prior to that date had stood at \$4.0325 to the pound sterling thereafter became \$2.80 to the pound sterling. The Turkish pound was not de-valued on Sept. 18 or at any material time thereafter, and, accordingly, whereas before Sept. 18, 1949, the official Turkish pound/pound sterling rate of exchange had been 11.284 Turkish pounds to the pound sterling, after Sept. 18, 1949, the official Turkish pound/pound sterling rate of exchange became 7.84 Turkish pounds to the pound sterling. Monday, Sept. 19, was a bank holiday, and on Tuesday, Sept. 20, Catsell applied to the Bank of England for permission to transmit £9,000, part of the £10,512 received, but, owing to pressure of business on the exchange control authorities, permission was not granted until Oct. 5, 1949, when immediate remittance was made. If remittance of £9,000 had been made at any time before Sept. 18, 1949, the shipowner would have received 101,556 Turkish pounds, but, in fact, he received only 70,560 Turkish pounds as the result of the remittance of £9,000 on Oct. 5. The difference between these two sums amounts to 30,996 Turkish pounds, which, converted into pounds sterling at the rate of 7.84 Turkish pounds to the pound sterling, equals £3,953 11s. 2d. Accordingly, it can be stated that but for the late payment of the freight and the de-valuation on Sept. 18, the shipowner would not have suffered this particular loss, namely, £3,953 which he claimed before me. The arbitrator found: (a) that the possibility that the pound sterling could be de-valued in terms of United States dollars during 1949 had been the subject of frequent discussions in the British, United States, and European Press both before and after July 8, 1949, but that, on the other hand, any intention on the part of H.M. government in the United Kingdom to de-value the pound sterling in terms of United States dollars had been repeatedly denied by the Chancellor of the Exchequer both before and after that date, and (b) that the charterers, their servants or agents possessed no actual knowledge either on July 8, 1949, or at any material time thereafter that, if the freight was not paid on the signing of the bills of lading or within a reasonable time thereafter, the shipowner would suffer the loss claimed.

The crucial paragraph of the award is in these terms:

" 22. In so far as the following matters are questions of fact I further find and in so far as they are questions of law I hold that: (i) The [charterers] paid the freight due under the charterparty to Catsell on behalf of the [shipowner] at a date later than that upon which the freight became due and payable and thereby committed a breach of the charterparty. (ii) If the [charterers] had not committed this breach of the charterparty, the [shipowner] would not have suffered the loss of £3,953 11s. 2d. claimed by him in this arbitration. (iii) The loss claimed by the [shipowner] was not reasonably foreseeable on July 8, 1949, or at any material time thereafter

by either the [shipowner] or the [charterers] as liable to result from the freight not being paid by the [charterers] in accordance with the [charterers'] obligations under the charterparty. (iv) The [charterers] would not, if they had considered the matter on July 8, 1949, or at any material time thereafter, as reasonable persons have concluded that the loss claimed by the [shipowner] was liable to result from the freight not being paid by the [charterers] in accordance with the [charterers'] obligations under the charterparty. (v) The loss claimed by the [shipowner] did not naturally and directly flow from the freight not having been paid by the [charterers] in accordance with the [charterers'] obligations under the charterparty."

Neither of the two findings or holdings set out in sub-paras. (i) and (ii) was challenged before me. The question of law left for the decision of the court, by the Case was, in effect, whether, on the arbitrator's findings of fact, the shipowner was entitled to the sum of £3,953 11s. 2d. as damages for breach of the charterers' obligations to pay the freight in London not later than Sept. 6, 1949. Subject to the decision of the court on this question the arbitrator awarded and adjudged that the claim failed.

Counsel for the shipowner conceded that, if the issues raised in paras. (iii), (iv) and (v) were issues of fact and not of law, the shipowner's claim must fail. He argued, however, that in contract at least the question of remoteness of damage is always a question of law, or, at least, a question of mixed law and fact for the judge and not for the jury, and he relied in particular on the statement of BLACKBURN, J. (L.R. 10 Q.B. 122), in *Hobbs v. London & South Western Ry. Co.* (1) that the question of remoteness ought never to be left to a jury, the statement by LORD ESHER, M.R. (20 Q.B.D. 89) in *Hammond & Co. v. Bussey* (2) that the question of what may be reasonably supposed to have been in the contemplation of the parties as the result of a breach of contract is not one for the jury, and the statement by FARWELL, L.J. ([1911] 2 K.B. 797) in *Chaplin v. Hicks* (3) that the question of remoteness is for the judge and the question of assessment is for the jury. Reference was also made to the judgment of BRETT, L.J., in *McMahon v. Field* (4). This is, no doubt, a formidable body of judicial opinion. On the other hand, there are, in my view, equally strong indications to the contrary in the speeches in the House of Lords in *Monarch S.S. Co., Ltd. v. Karlshamns Oljefabriker (A.B.)* (5). In that case LORD PORTER ([1949] 1 All E.R. 6, 7), in distinguishing *The Malcolm Baxter, Jr.* (6), relies on the statement by STONE, J., delivering the judgment of the United States Supreme Court, that "there is no finding, nor is it suggested, that at the time when the contract of affreightment was entered into . . . the embargo could reasonably have been foreseen . . ." I think that STONE, J., in this passage is clearly referring to a finding of fact, or rather the absence of a finding of fact, by the trial judge. LORD WRIGHT (*ibid.*, 13) states that remoteness of damage is in truth a question of fact and supports this by a reference to the speech of VISCOUNT HALDANE, L.C., in *British Westinghouse Electric and Manufacturing Co., Ltd. v. Underground Electric Rys. Co. of London, Ltd.* (7) where LORD HALDANE had said ([1912] A.C. 688) that

"The quantum of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases."

I do not read the language used by LORD HALDANE as referring only to the numerical assessment of the damages in terms of money. I think that LORD HALDANE must have had in mind the function of the jury under proper direction of selecting the heads of damages in respect of which a monetary assessment has to be made. Finally in the *Monarch Steamship* case (5) LORD DU PARCQ says ([1949] 1 All E.R. 19):

"I do not doubt the wisdom of the judges who, in *Hadley v. Baxendale* (8) and the many later cases which interpreted or explained that classic

decision, have laid down rules or principles for the guidance of those whose duty it is, as judges or jurymen, to assess damages. When those rules or principles are applied, however, it is essential to remember what my noble and learned friend, LORD WRIGHT, and LORD HALDANE in the passage cited by him, have emphasised—that in the end what has to be decided is a question of fact, and, therefore, a question proper for a jury. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and not too rigidly applied. It was necessary to lay down principles lest juries should be persuaded to do injustice by imposing an undue, or, perhaps, an inadequate, liability on a defendant.”

Later the same learned Lord says (*ibid.*):

“I may express my own opinion by saying that, if a jury, directed in the terms in which the Lord President’s opinion shows us that he would have directed them, had awarded the respondent the sum of £21,634 as damages, there would have been no ground for setting aside or varying the verdict.”

The apparent inconsistency between the expressions of opinion in the four cases referred to above as being relied on by counsel for the shipowner and the speeches in the *Monarch Steamship* case (5) can, in my judgment, be resolved if it is accepted, as I think it must be, that it is the function of the judge to direct the jury as to the meaning of the terms “natural and direct consequences” or “reasonably foreseeable consequences”, whether a particular head of damage is capable in law of being a consequence falling within these phrases, and whether there is any evidence that a particular consequence is a consequence falling within these phrases, and that it is then for the jury to find as a fact whether a particular head of damage is such a consequence, their conclusion on that point (subject to there being evidence to support it) being final. The matter was, in my opinion, so treated in *Weld-Blundell v. Stephens* (9). In that case the third question left to the jury, to which they returned an affirmative answer, was whether the actions for libel brought by Lowe and Comins against the plaintiff and the damages recovered by them were “the natural and probable consequences of the proved negligence of the [defendant].” The jury answered the question in the affirmative and they then assessed the monetary figure of damages. LORD DUNEDIN, after referring with approval to *Scotts’ Trustees v. Moss* (10) in which the Inner House had granted an issue to the jury which asked the question whether what had happened was the natural and probable result of what the defendant had done, stated ([1920] A.C. 975) that in the case then before the House he had come to the conclusion that there was no evidence which entitled the jury to give the affirmative answer they did to the question put to them: see also the speech of LORD SUMNER (*ibid.*, 988). It is significant that neither of these masters of the common law suggested that the issue of remoteness was never one for the jury under a proper direction. The judgment of DEVLIN, J., in *Royal Greek Government v. Minister of Transport* (11) (83 Ll.L. Rep. 236) is, as I read it, to the same effect.

If this conclusion as to the effect of the authorities is correct, then, in my judgment, the findings of the learned arbitrator in paras. (iii), (iv) and (v) are findings of fact conclusively determining the issue in this case against the shipowner, the form of the findings and the citation of authorities in the case negating any misdirection in law. I may add that, if this dispute had been tried in the Commercial Court, as it might have been, with the assistance of a City of London special jury, I can imagine no question more proper to be put to such a jury than the question whether this particular form of loss, namely, damages resulting from the de-valuation of the pound sterling, was reasonably foreseeable by commercial men on July 8, 1949, and if the jury, properly directed, had answered the question in the negative, as the learned arbitrator did here, then their verdict would not, in my judgment, be open to challenge. Had I,

however, felt able to accept the submission of counsel for the shipowner that the question of recoverability of the particular form of damages claimed was a pure question of law or a mixed question of law and of fact to be determined solely by the judge as is the question of frustration or the question of the implication of terms into a contract, I should on the facts found by the arbitrator in the other paragraphs of his award have reached the same conclusion as the arbitrator. Accepting the principles stated by ASQUITH, L.J., in delivering the judgment of the Court of Appeal in *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.* (12) it would, in my judgment, be to require a wholly unreasonable standard of prevision in the Syrian charterers in the present case to hold that on July 8, 1949, when they entered into the charterparty they ought reasonably to have foreseen that there was a serious possibility or real danger that if they did not pay the freight on the due date the loss claimed would result. The incurring of the loss depended on a series of future contingencies including the contingencies that the shipowner would require immediate remission of the money to Turkey, that de-valuation of the pound sterling should take place at or about the due date of payment, and that such de-valuation would not be accompanied by a corresponding de-valuation of the Turkish pound. It appears from the award that even early in September there was no reason to suppose that de-valuation was imminent since the arbitrator finds that Catsell did not act unreasonably in not seeking permission from the Bank of England in advance to remit the whole or part of the freight as soon as it might be received by them, though this course was open to them.

The conclusions stated above make it unnecessary for me to deal with a number of other submissions advanced by counsel for the charterers, namely (i) that, even if foreseeability of consequences is the test of recoverability of damages, there must, for the shipowner to succeed, also be an affirmative finding by the arbitrator on the question of causation; (ii) that as a matter of law any change in the rate of exchange during the contractual period and, *a fortiori*, if subsequent to the date of breach, is too remote to give rise to a claim in damages unless there is a specific term in the contract dealing with such a contingency or the risk has been brought to the attention of the party in default at the time of the contract and he has contracted to accept that risk; (iii) that, where there is a breach of contract involving in the assessment of damages a reference to foreign currency, the rate of conversion for sterling is the rate ruling at the date of the breach. In my judgment, the cases of *Di Ferdinando v. Simon, Smits & Co.* (13), and, in particular, the judgment of SCRUTTON, L.J. ([1920] 3 K.B. 415) and *S.S. Celia v. S.S. Volturno* (14), go a long way towards supporting these propositions. Nor is it necessary for me to decide whether there are any exceptions, and, if so, whether the present case falls within the exceptions, to the general principle stated by WILLES, J., in *Fletcher v. Tayleur* (15) that, "... in the case of non-payment of money the measure of damages is, the interest of the money only."

For the reasons given above I answer the question of law stated in the Special Case in the negative with the result that the arbitrator's award stands.

Award of the arbitrator upheld.

Solicitors: *Holman, Fenwick & Willan* (for the shipowner); *Constant & Constant* (for the charterers).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re MEADE (A DEBTOR). *Ex parte* HUMBER *v.* PALMER
(THE TRUSTEE).

[CHANCERY DIVISION (Romer and Harman, JJ.), April 16, 30, May 28, 1951.]

Bankruptcy—Proof—Money employed in setting up business—Creditor interested in business and benefitting thereby, but not a partner or receiving share of profits.

Between June 20, 1949, and Oct. 7, 1950, the appellant advanced to the bankrupt sums, amounting to £7,218 15s. 8d., which were used by the bankrupt in setting up a residential riding academy. There was no agreement between the parties for the repayment of the moneys, the payment of any interest thereon, or the giving of any security in respect thereof. Although not married to the bankrupt, the appellant lived with him and looked after the domestic side of the academy, and in the brochure advertising the academy the bankrupt and she were referred to as Mr. and Mrs. M., she being described as one of the "principals." There was no arrangement for her to receive any defined share of the profits and she was not a partner, but the enterprise was intended to provide her, as well as the bankrupt, with a home and a living. On Oct. 5, 1950, a receiving order was made against the bankrupt on his own petition, and the adjudication order was made on Oct. 11. On Nov. 11, 1950, the appellant lodged a proof for the sum of £7,218 15s. 8d. paid by her to the bankrupt, claiming that it was a loan to him at his request and alleging that she had no control over the manner in which he used it.

HELD: the sums paid by the appellant to the bankrupt did not constitute, and were never intended to constitute, a loan, but represented her contribution to the capital of a business enterprise in which she had an interest and which was carried on for their joint benefit; it was immaterial that she was not a partner and received no share of the profits of the business; therefore, she was not a creditor of the bankrupt, as the person carrying on the business, in respect of those sums, and was not entitled to prove in the bankruptcy in competition with the creditors of the business.

Re Beale, Ex p. Corbridge (1876) (4 Ch.D. 246; 46 L.J.Bey. 17), explained and *dictum* of BACON, C.J. (46 L.J.Bey. 18), applied.

AS TO LOANS FOR BUSINESS PURPOSES, see HALSBURY, Hailsham Edn., Vol. 2, p. 297, para. 392; and FOR CASES, see DIGEST, Vol. 4, pp. 483, 484, Nos. 4343-4357.

Cases referred to:

- (1) *Re Beale. Ex p. Corbridge*, (1876), 4 Ch.D. 246; 46 L.J.Bey. 17; 35 L.T. 768; 4 Digest 481, 4335.
- (2) *Ex p. Garland*, (1804), 10 Ves. 110; 32 E.R. 786; 43 Digest 735, 1709.
- (3) *Ex p. Butterfield. Re Butterfield*, (1847), De G. 570; 17 L.J.Bey. 10; 10 L.T.O.S. 241; 4 Digest 464, 4189.
- (4) *Re Childs. Ex p. New*, (1874), 9 Ch. App. 508; 43 L.J.Bey. 89; 30 L.T. 447; 4 Digest 422, 3806.
- (5) *Scott v. Izon*, (1865), 34 Beav. 434; 55 E.R. 703; 4 Digest 465, 4194.

APPEAL from an order of His Honour JUDGE HAMILTON, made at Northampton County Court on Feb. 13, 1951, whereby he dismissed the appellant's appeal from a decision of the bankrupt's trustee in bankruptcy rejecting the appellant's claim to prove as a creditor in the bankruptcy on the ground that she had allowed the money advanced by her to the bankrupt to be employed in the bankrupt's business. The trustee's decision was upheld by the county court judge on the authority of *Re Beale. Ex p. Corbridge*, (1876) (4 Ch.D. 246; 46 L.J.Bey. 17). On an appeal to the Divisional Court in Bankruptcy, the appellant contended *inter alia* that *Re Beale (supra)* was distinguishable on the facts and that the learned county court judge was wrong in law and misdirected himself in his

conclusion that he was bound by *Re Beale* (*supra*). The facts appear in the judgment of ROMER, J.

A. W. M. Davies for the appellant.

Vaughan, K.C., and J. G. Le Quesne for the trustee.

Cur. adv. vult.

May 28. The following judgments were read.

A

ROMER, J.: This is an appeal from an order of His Honour JUDGE HAMILTON, dated Feb. 13, 1951, whereby he dismissed the appeal of the appellant, Florence Annie Humber, against the decision of the trustee in bankruptcy of Mr. A. G. W. Meade rejecting the proof of the debt of the appellant for the sum of £7,314 8s. 8d. A receiving order was made against the bankrupt on his own petition on Oct. 5, 1950, and the order of adjudication was dated Oct. 11. B On Nov. 11, 1950, the appellant swore a proof in the bankruptcy for the above mentioned sum which she described as "the balance of money advanced and payments made for and on behalf of the bankrupt at his request." This claim was rejected by the trustee on the ground that the appellant allowed her money to be used in the bankrupt's business. On Jan. 11, 1951, the trustee wrote to the C appellant intimating that, in the event of the court reversing his decision and in view of a certain deduction from the appellant's claim to which he referred, such claim would be allowed in the sum of £7,218 15s. 8d. This deduction and consequential net claim have been accepted by the appellant.

In support of her claim the appellant submitted two not very easily intelligible statements of payments which she had made to a firm of solicitors who were acting for her and for the bankrupt and of the manner in which that firm, Messrs. Cecil Godfrey and Sons, had expended those and other moneys on behalf of the bankrupt. On her appeal to the Northampton County Court from the trustee's rejection of her proof the appellant swore an affidavit in which she said:

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"I say that in respect of each of the various sums of money in the aggregate making up my said proof of debt, that the same were advanced by me or by my solicitors to the said bankrupt by way of loan without control on my part as to the manner in which the said sums were to be or were in fact used, although I was well aware that at the material time the said bankrupt purchased Murcott House, Long Buckby, in the county of Northampton, for use as a dwelling-house, and also for the purpose of carrying on his business as a riding school proprietor, and that he was there carrying on the said business. I am not and I have at no time been a partner in the said or any other business of the said bankrupt, and no arrangement was ever made between myself and the said bankrupt for the said sums of money to be repaid to me by way of a share in the profits of the said business, or for me in any other manner to receive a fixed or any share of the said profits."

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Then she exhibits to that affidavit a copy of the account of the sums of money which she had advanced. She then goes on:

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"I respectfully submit that if and in so far as the said sums of money have been used in the said business of the said bankrupt, and even if I allowed the same to be so used, which I deny, as I had no control over the use of the same, as set out above, that such use of the said money is not a good and valid ground for the rejection of my said proof of debt."

In answer to this affidavit the trustee filed an affidavit in which he said:

"... I am informed by the said bankrupt, and verily believe, that the said bankrupt bought Murcott House, Long Buckby, Northamptonshire, at some date between October, 1949, and February, 1950, and opened a residential riding academy at the said house in February, 1950. I am further informed by the said bankrupt, and verily believe, that, excepting

the sum of £3,250 lent by a building society on a mortgage all the money needed for the purchase of the said house and the setting up of the said riding academy was provided by the [appellant]. 4. It appears from the vouchers submitted to me by the [appellant] in support of her proof that the whole of the sum of £7,218 15s. 8d. claimed by the [appellant] was spent on the purchase of the said house and of horses, equipment, furniture, and sundry other items necessary for the carrying on of the business of the said riding academy. It further appears from the statements of Messrs. Cecil Godfrey and Sons, exhibited to the said affidavit of the [appellant], that the moneys making up the said sum of £7,218 15s. 8d. were paid over between June 20, 1949, and Oct. 7, 1950, to meet the requirements of the said business from time to time. 5. No evidence has been submitted to me of any agreement between the [appellant] and the said bankrupt for the repayment of the said moneys or the payment of interest thereon, or of the giving of any security in respect of the said moneys. 6. I respectfully submit that the [appellant] allowed her money to be employed in the business of the said bankrupt and to be exposed to all the hazards of the said business, with the consequence that she is not now entitled to claim repayment in competition with the creditors of the said bankrupt."

The trustee exhibited to his affidavit a brochure advertising "Murcott House. Residential Riding Academy." The appellant, although not married to the bankrupt, had been living with him for some time prior to his bankruptcy and on p. 5 of the exhibited brochure the "principals" of the academy are stated to be "Major and Mrs. G. Meade." On p. 6 of the brochure there appears the statement that: "Students enjoy a family life under the personal supervision of Mrs. G. Meade", and on p. 10 it is stated:

"The physical and social life of junior students is under the careful supervision of Mrs. G. Meade. The principals will be pleased to arrange terms for parents of students wishing to spend holidays with their children while undergoing instruction."

It is admitted that the "Mrs. G. Meade" here referred to is the appellant. The trustee also exhibited to his affidavit a copy of the letter heading used at the academy in which the principals thereof are described as "Mr. and Mrs. G. Meade."

At the hearing before the county court judge oral evidence was given. The appellant said that the bankrupt decided what the moneys which she advanced should be spent on and that she herself had no control over the expenditure. Her explanation of the presence of her name in the brochure was that she was looking after the domestic side of Murcott House and would have looked after the children under sixteen (had there been any) and interviewed their parents. She said that she never made any arrangement to receive any share of the profits of the academy and was not going to become a partner in the enterprise, though she did think of introducing her daughter into it if it was successful. She explained this in cross-examination by saying that her daughter understood about and was interested in horses and she (the appellant) was not. In further cross-examination she said that she first knew the bankrupt about three years previously and discussed with him the starting of the riding school, and that she knew that he had no money, that the house was in part to be bought and the venture started with her money, and that the money which she caused to be paid to him or by his direction was being used for this venture. She admitted further that the whole of the sum for which she was proving in the bankruptcy was spent for the purposes of the business, that the hope was that the riding school would produce profits and that the household would be supported by means of them, and that she was content that her money should be used in the business and exposed to the risks of the business. She also said that she herself lived in Murcott House with the bankrupt and that nothing was ever mentioned

as to repayment of any of the moneys which she advanced for the purchase of the house and the purposes of the business.

A In the course of his judgment the learned judge said that it was obvious that the appellant was advancing moneys to the bankrupt for all kinds of purposes, including the purchase of horses for the academy as well as for the purchase of the house itself, grooms' wages, housekeeper's wages, telephone calls and rental, rates and so on. The judge said that there could be no doubt in his view that the appellant did lend or entrust her money to the bankrupt for the purpose of the business and that

B "... the object of putting her money into [the bankrupt's] hands was so that he could buy the house, set up and run the business and furnish and equip the house and run it with the assistance of [the appellant], who did take a part [by running the domestic side of the business]."

In view of these conclusions the learned judge upheld the trustee's decision and dismissed the appeal on the authority of *Re Beale*. *Ex p. Corbridge* (1).

C This decision was much canvassed in argument before this court and counsel for the respondent trustee contended that that case and certain authorities which preceded it establish a proposition which is stated in *WACE ON BANKRUPTCY* (1904 ed.), p. 150, in the following terms:

"Where a person has authorised the employment of his assets in a business he cannot prove in competition with the creditors of the business in respect of the assets so authorised to be employed."

D Before considering *Re Beale* (1) and the other cases, it would be convenient to summarise the argument on this point of counsel for the appellant. He argued that the moneys advanced by her were a loan to the bankrupt, and that, having regard to the provisions of s. 30 and s. 33 (7) of the Bankruptcy Act, 1914, these moneys constitute a provable debt ranking *pari passu* with the debts to the other creditors, and that the only provision in the Act relating to postponement which might be regarded as relevant is s. 36, but that section is not, in fact, relevant inasmuch as the appellant was not the bankrupt's wife. Indeed, counsel used s. 36 (2) to found an argument in favour of the appellant by saying that the fact that the section specifically postpones a wife who lends money to her husband for the purposes of his business indicates that a woman who lends money for business purposes to anyone who is not her husband is not similarly postponed, for otherwise there would be no point in s. 36 (2) at all. From these considerations counsel for the appellant proceeded to the conclusion that the learned county court judge was wrong in acceding to the view that the bankrupt's other creditors have priority over the claim of the appellant.

F We will now consider the effect on this argument of *Re Beale* (1) and the earlier authorities to which BACON, C.J., made reference in that case. The facts in *Re Beale* (1), as taken from the report in the *LAW REPORTS*, were as follows:

G "John Beale, a wine merchant at Sheffield, filed a liquidation petition in 1876, under which Cooper Corbridge was appointed trustee. In July, 1857, Beale had gone through the ceremony of marriage with Mary Walker, a sister of his then deceased wife, and had after that lived with her as his wife. On Aug. 1, 1876, Mary Walker tendered to the trustee a proof for £3,000 'for money lent, advanced, and paid' by her to Beale, at his request, in the year 1858. The trustee rejected the proof, and Mary Walker applied to the county court for an order to admit it. In support of her application she filed an affidavit, in which she stated that in August, 1858, a legacy of £3,000, to which she was entitled under the will of her father, who had died in March, 1858, was paid by her direction to Beale. The payment was made to him in pursuance of and in reliance upon an agreement made between Beale and herself, after her father's death and prior to the payment to Beale, that the legacy should be advanced to and used by Beale in the business of

a wine and spirit merchant which he then carried on; but that as to £2,000, part thereof, he should be a trustee of it for Mary Walker, and that a settlement to carry out the agreement should be executed by him after the receipt of the £3,000. In fact, no settlement was ever executed. Beale made an affidavit to the same effect. The story was also confirmed by the evidence of Henry Walker, a brother of Mary Walker. The only evidence in opposition was that of the trustee, who said that, though he was appointed receiver and manager of the business of Beale immediately after he filed his petition, and assisted him in preparing his accounts for presentation to the first meeting of the creditors, yet nothing was said to him about the claim of Mary Walker until after the first meeting. The judge admitted the proof to the extent of £2,000. The trustee appealed."

The judgment of BACON, C.J., was as follows (4 Ch.D. 248):

"It cannot be denied that this is a very singular case, but the circumstances furnish an explanation of the origin of the transaction. The respondent and the debtor were, to all intents and purposes, married, except for the provisions of the law of England. He being engaged in business, she, as any good wife would have done, allowed him to have her money to employ in his business. Stopping there, what was there wrong in the transaction? Was not the money exposed to all the hazards of the business? Had not the creditors of the business a right to say that they were entitled to be paid out of the assets in priority to the lender of the money which had been employed in the business? That is the principle of the decisions in *Ex p. Garland* (2), *Ex p. Butterfield* (3), and *Re Childs* (4). The trader goes into the world and deals with the money as part of his assets. It is said that a trust of it was created on behalf of the lender, but that is a trust repugnant to the first destination of the money. If there is a surplus after paying the creditors in full, Mary Walker may have a good equity against it, but that is her only right. In *Ex p. Butterfield* (3) the proof was attempted to be made on behalf of the estate of a dead man; in the present case it is on behalf of a living woman: that is the only distinction. The trust set up is wholly repugnant to the original stipulation for the loan. [Counsel for the respondent] says that the case of *Re Childs* (4) has no application to the present case. I agree that it has no direct application, but it recognises the principle of *Ex p. Butterfield* (3) and *Ex p. Garland* (2). There a man had carried on two separate businesses, a share in one of which had belonged to his wife before he married her, and he had entered into a covenant that the profits of her share of that business should be for her separate use. The lords justices held that on his bankruptcy there must be a separate administration of the assets of the two businesses, and that if there was any surplus of the husband's share of that estate in which the wife was interested, it must go over to the other estate. The judgment of JAMES, L.J., is distinct. In my opinion the principle is plain. It is not said that Mary Walker participated directly in the profits of the business, but that the business was in a certain sense carried on for the joint benefit of herself and the debtor no one can doubt. The Partnership Act of 1868 is imperative that a person who lends money to a partnership, on an agreement that he is to receive a share of the profits, cannot call for payment of his money until after the creditors of the partnership have been paid in full. If that statute has any application to this case the result is plain. Mary Walker knew that the money was to be employed in the business, and if she had sued the debtor while he was solvent it would have been a sufficient answer for him to say, I have employed the money in my business, and I have lost it all; there is none of the £2,000 left. The true principle is pointed out by *Ex p. Garland* (2) and *Ex p. Butterfield* (3); no proof can be admitted in respect of a trust which is inconsistent with the application of the money which the lender

has pointed out. The order of the county court judge must be discharged, but I think that, having regard to all the circumstances of the case, I ought not to give the appellant any costs."

The judgment as reported in the LAW JOURNAL REPORTS differs in some respects from the report in the LAW REPORTS. In the LAW JOURNAL REPORTS, BACON, C.J., is reported to have said (46 L.J.Bcy. 17):

A "These two persons were married, and though the marriage was not legal in this country they lived to all intents as husband and wife . . . There is no doubt that the money must be exposed to all the hazards of the business, and subject to the claims of its creditors. That is the principle of *Ex p. Garland* (2), of the case before LORD COTTENHAM, and of *Re Childs* (4). Then it is said there was a trust for the wife. But the money had been
B previously advanced and subjected to the contingencies of the business; the trust alleged is something repugnant to the destination originally given to the fund. If any part of the fund remained from the business there might be a trust between the husband and wife; but that is not what is set up."

C After referring to the judgment of JAMES, L.J., in *Re Childs* (4), the learned judge proceeded (*ibid.*, 18):

"That shows plainly that he who provides part of the capital of a business cannot call for payment till the creditors of the business are paid."

The judgment in *Re Beale* (1) is somewhat obscured (i) by the fact that the learned judge, although recognising the invalidity in this country of the marriage
D between Mr. and Mrs. Beale, does seem to have treated them for some purposes as husband and wife—indeed, in one passage in the report in the LAW JOURNAL REPORTS he refers to them under that description, and (ii) by his reference, in the report in the LAW REPORTS, to the Partnership Act, 1868. Having regard, however, to the issue involved and to the arguments of counsel, we think that the true *ratio decidendi* of the case lies in the passage in the report in the LAW
E JOURNAL REPORTS that

"... he who provides part of the capital of a business cannot call for payment till the creditors of the business are paid."

The learned judge was clearly applying that principle to the £2,000 which was in question and rejecting the contention that the principle was displaced by the
F operation of the trust to which the fund had been subjected.

Ex p. Garland (2) and *Ex p. Butterfield* (3) were both cases in which a testator authorised the use in a business of a part of his general estate. In each case the authority so conferred was exercised, and, on the subsequent failure of the person to whom the business was given, the trustees, as representing the persons beneficially interested in the general estate, sought to prove in respect of the moneys
G so used in competition with the other creditors of the business. In each case the claim was rejected, LORD ELDON, L.C., according to the report of *Ex p. Garland* (2), immediately expressing a clear opinion against it. In *Scott v. Izon* (5) SIR JOHN ROMILLY, M.R., expressed his view as to this class of case as follows (34 Beav. 438):

H "Many cases were cited to me to prove that when a testator has authorised the employment of his estate in trade, though the firm in which it was so employed becomes bankrupt, no proof can be made against the estate of the bankrupts in respect of such money of the testator so employed. This, no doubt, is correct, but it only proves that, as the testator's money was employed properly in this trade and without any breach of trust, the amount so employed could not be proved against the estate of the partners, if they had become bankrupts, as it was not a debt of the firm, but merely capital brought into it."

Re Childs (4) lends, perhaps, some support to the decision of BACON, C.J., in *Re Beale* (1), although the point in issue and decided in *Re Childs* (4) was a distinct one, viz., that, if a man carried on two businesses in different capacities (e.g., one as beneficial owner and one as executor) and became bankrupt, the assets of each business would be separate from the other, as also would the creditors.

In my judgment, the principles regulating cases where testators authorise the use of the whole or a part of the general estate in a business which is the subject of a specific disposition were rightly applied by BACON, C.J., to the circumstances which existed in *Re Beale* (1) and should be applied to the circumstances of the present case. It seems to me impossible to regard the appellant as a creditor of the bankrupt, as the person carrying on the business, in respect of the moneys which she advanced for the purpose of the riding academy, and, unless she was such a creditor, she cannot prove in competition with people who are. If she was, in fact, such a creditor, she could have sued the bankrupt for the return of her moneys at any time prior to his bankruptcy. Her evidence, however, shows how remote from reality any conception such as this would be. It shows that the enterprise into which her money went was intended to provide both him and her with a home and with a living and also, if it proved successful, possibly with an occupation for her daughter, and she admitted that no word was ever said with regard to repaying the sums which she advanced in furtherance of this enterprise from time to time. The truth of the matter is that the whole foundation of the argument of counsel for the appellant is undermined by the realisation that the moneys which she advanced did not constitute, and were never intended to constitute, a loan at all. They represented her contribution to the capital of a business enterprise in which she plainly had an interest herself, and, in my judgment, she is no more entitled, as against the ordinary creditors of the business, to prove in respect of her contribution than the proprietor is entitled to prove in respect of his. I am, therefore, of the opinion that the learned judge arrived at a right conclusion, and, in my judgment, accordingly, this appeal must fail.

As an alternative to the argument founded on *Re Beale* (1), counsel for the trustee advanced two further contentions. The first one was that the appellant represented to the world that she was the bankrupt's wife, and, as such, subject to the disability imposed by s. 36 of the Bankruptcy Act, 1914, and she cannot now be heard, as against the bankrupt's creditors, to say that she is not so subject. The other contention was that, although the appellant was not, in fact, a partner of the bankrupt, she held herself out to be a partner, and for this reason also she cannot prove in the bankruptcy in competition with the general creditors of the business. Having regard to the view which I have expressed on the main point which was argued on the appeal and on which the learned county court judge himself based his decision, it is not necessary for me to express an opinion on these further contentions of the trustee and I refrain from doing so.

HARMAN, J.: I agree with the judgment just delivered and am of opinion that the rejection of the proof is clearly right when the true nature of the transaction between the appellant and the bankrupt is once appreciated. As ROMER, J., has said, this transaction was in fact an investment by the appellant of part of her capital in the business which the bankrupt was to carry on and did carry on for their joint benefit. The fact that she was not a partner or sharer directly in the profits is quite irrelevant. While the business was a going concern she could not and, indeed, would not, have attempted to withdraw her investment so as to bring down the venture. If that be so, it is clear that, whatever her rights against the bankrupt may be, she cannot compete with his creditors whose debts arose out of the failure of the very business in which her money was invested. I regard this result with satisfaction. Were the appellant right, it would follow that a mistress would be in a better position than a wife. On the facts of this case,

though s. 36 (2) admittedly does not apply to the appellant, she is no better off than if it did.

Appeal dismissed.

Solicitors: *Parker, Thomas & Co.*, agents for *J. D. Douglas & Douglas*, Northampton (for the appellant); *Wigan & Co.*, agents for *Phipps & Troup*, Northampton (for the trustee).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

M. & H. STEEL (a firm) v. COCKCROFT.

[COURT OF APPEAL (Lord Tucker, Singleton and Morris, L.JJ.), May 22, 1951.]

Rent Restriction—Termination of statutory tenancy—Substitution of contractual tenancy—Agreement that tenant should pay rates instead of landlord as theretofore—Corresponding decrease in rent.

In 1925 the tenant of a dwelling-house to which the Rent Restrictions Acts applied died, leaving a widow who remained in possession of the premises as statutory tenant and paid a rent which was inclusive of rates. On June 17, 1949, the landlords wrote to the widow notifying her that in future she must pay the rates direct to the rating authority as from June 30, 1949, and that a corresponding reduction would be made in the rent. The letter ended by stating: "If you remain [in the premises] after that date it will be assumed that you have agreed to the above [arrangement]." The widow continued to live in the premises and to pay the reduced rent until Feb. 12, 1950, when she died. On a claim by the landlords for possession, her son, who was living with her at the time of her death and continued to live in the house, contended that the effect of the letter of June 17, 1949, was to put an end to his mother's statutory tenancy and to create a new contractual tenancy so that he was entitled to the protection of the Rent Acts.

HELD: the fact that a tenant and a landlord agreed between themselves for their mutual convenience that the method of payment of rates should be varied did not as a matter of law necessarily destroy the statutory tenancy which had previously existed; there was nothing in the circumstances of the present case or in the contents of the letter which compelled the court to draw the inference that the parties intended to create a new, contractual tenancy; and, therefore, the landlords were entitled to possession.

AS TO STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, paras 400, 401, and 1951 Supplement; and FOR CASES, see DIGEST, Vol. 31, pp. 575, 576, Nos. 7226-7255, and Digest Supp.

APPEAL by the defendant from a decision of A. D. GERRARD, Esq., K.C., at the Salford Hundred Court of Record, dated Aug. 29, 1950, whereby he made an order for possession of premises to which the Rent Restrictions Acts applied.

Bamber for the defendant.

T. M. Backhouse for the landlords.

LORD TUCKER: This is an appeal from a judgment of the judge of the Salford Hundred Court in which he gave possession to the landlords of certain premises known as 46, Winnie Street, Moston.

In November, 1916, the premises were let by the landlords to one Alfred Cockcroft who was the father of Reginald, the present defendant. From time to time notices of increase of rent were served on Alfred under the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 3 (2), with the result that he became the statutory tenant at a rent of about 10s. a

week, the landlords paying the rates to the local authority. On Apr. 18, 1925, Alfred died, leaving behind him his widow, Amanda, who remained in possession of the premises and paid rent. It is conceded that under s. 12 (1) (g) of the Act of 1920 she was entitled to remain on at his death. On June 17, 1949, the landlords sent to her a letter on which the present case depends. It is in the form of a circular letter and was sent to a number of different tenants, some of whose tenancies varied from that of Amanda Cockcroft. It reads as follows:

"Dear Sir or Madam, As there has arisen from time to time some question as to the proper amount of rates to be included in the rent, we have decided in the interest of all concerned to allow tenants to pay their general rates direct to the rating authority. For which purpose, therefore, we shall advise the rates department to collect their own rates as from June 30, 1949, in the manner most convenient to both parties. Your rent will, accordingly, be reduced as from July 1 to 8s. 0d. per week made up as under: Standard rent, £18 17s. 0d.; less rates, 1914, £4 13s. 4d.; nett rent, £14 3s. 8d.; 40% nett rent, £5 13s. 4d.; plus water rate, 1949, 17s. 0d.; rent payable to us £20 14s. 0d. In order, therefore, legally to conform with the above, we beg to give you notice to terminate your tenancy on June 25, 1949. If you remain after that date it will be assumed that you have agreed to the above. M. & H. Steel."

After June 25, 1949, Amanda Cockcroft remained on in the premises and paid the new rent in accordance with that letter, and she paid her rates direct to the local authority as and when they became due. On Feb. 12, 1950, Amanda died intestate, and the defendant, who was living with her at the time of her death, being the sole beneficiary, took out letters of administration, and continued to live in the house.

The landlords contended that the widow, Amanda, died a statutory tenant, and that, on that basis, the son was not entitled to hold over as a statutory tenant under s. 12 (1) (g) of the Act of 1920. The defendant agreed that, if Amanda was a statutory tenant at the time of her death, he would not be entitled to the protection of the Rent Restrictions Acts, but he contended that the result of the letter of June 17, 1949, was to put an end to the statutory tenancy and to create a new contractual tenancy and thus he was entitled to remain in possession. The learned judge decided in favour of the landlords' contention, holding that there was nothing in the letter which I have read and the circumstances which existed at the relevant time from which the inference could properly be drawn that the parties were then intending to put an end to the statutory tenancy which had existed and to create a new, contractual tenancy.

Section 2 of the Act of 1920 deals with "Permitted increases in rent," and sub-s. (1) provides:

"The amount by which the increased rent of a dwelling-house to which this Act applies may exceed the standard rent shall, subject to the provisions of this Act, be as follows, that is to say . . . (b) An amount not exceeding any increase in the amount for the time being payable by the landlord in respect of rates over the corresponding amount paid in respect of the yearly, half-yearly or other period which included Aug. 3, 1914, or in the case of a dwelling-house for which no rates were payable in respect of any period which included the said date, the period which included the date on which the rates first became payable thereafter."

Section 2 (3) provides:

"Any transfer to a tenant of any burden or liability previously borne by the landlord shall, for the purposes of this Act, be treated as an alteration of rent, and where, as the result of such a transfer, the terms on which a dwelling-house is held are on the whole less favourable to the tenant than the previous terms, the rent shall be deemed to be increased, whether or

not the sum periodically payable by way of rent is increased, and any increase of rent in respect of any transfer to a landlord of any burden or liability previously borne by the tenant where, as the result of such transfer, the terms on which any dwelling-house is held are on the whole not less favourable to the tenant than the previous terms, shall be deemed not to be an increase of rent for the purposes of this Act: Provided that, for the purposes of this section, the rent shall not be deemed to be increased where the liability for rates is transferred from the landlord to the tenant, if a corresponding reduction is made in the rent."

In the present case it is admitted that a corresponding reduction was made in the rent, so that the transfer could not be deemed to amount to an increase in rent for the purposes of this sub-section.

The argument for the defendant is that, by remaining silent on receipt of this letter and continuing in possession of the premises, the widow accepted the terms set out in the letter, and this resulted in the creation of a new tenancy at a different rent from that in the original contract between the original parties to this tenancy. It is to be observed that the penultimate sentence of this letter: "In order, therefore, legally to conform with the above, we beg to give you

notice to terminate your tenancy on June 25, 1949," in the circumstances of this case, is surplusage because the widow was already a statutory tenant and there was no need to terminate her tenancy. The mere insertion of a paragraph purporting to terminate a tenancy which has already been terminated cannot convert it into a contractual tenancy, but the words on which the defendant primarily relies are: "If you remain after that date it will be assumed that you have agreed to the above."

The question is whether the fact that a tenant and a landlord agree between themselves for their mutual convenience that the method of payment of rates shall be varied of itself as a matter of law necessarily destroys the statutory tenancy which was previously in existence (and which in the present case had been in existence for nearly twenty-five years) and creates a new contractual tenancy. The learned judge held that it did not, and I am of the same

opinion. When one looks at s. 2, and, particularly, at the proviso to s. 2 (3), it is clear that it is implicit in the section that the legislature is contemplating that that which was done in the present case can be done without amounting to a contravention of the provisions of the Act. The court is not compelled to draw the inference that when the parties have taken advantage of a provision of this kind they must as a matter of law be held to be intending to do that which, in

my view, they manifestly were not intending to do, namely, to put an end to the nature of the relationship between them which had existed over this long period and create a new contractual tenancy. The statute indicates that parties may properly make an arrangement of this kind for a different method of payment of rates—a mere matter of machinery—providing always that the proper corresponding reduction is made in the rent. That was done in the present case and

I agree with the learned judge in the view he formed that there is nothing in the circumstances of the case or in the contents of the letter which compels the court to draw the inference that the parties intended to create a new contractual tenancy. For these reasons I think the appeal fails.

SINGLETON, L.J.: I am of the same opinion.

MORRIS, L.J.: I agree.

Appeal dismissed.

Solicitors: *Guscotte, Wadham & Co.*, agents for *D. F. Bland & Co.*, Manchester (for the defendant); *Rising & Ravenscroft*, agents for *Bernard Kuit & Steinart*, Manchester (for the landlords).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

NOTE.**HIGHAM v. HAVANT AND WATERLOO URBAN DISTRICT COUNCIL.**

[COURT OF APPEAL (Cohen, Singleton and Morris, L.JJ.), June 4, 5, 1951.]

Town and Country Planning—Compulsory acquisition—Compensation—Possibility of service of enforcement notice—Notice to treat served after the passing of the Town and Country Planning Act, 1947, and before the “appointed day” —Planning permission—Caravan site—Licence under Public Health Act, 1936 (c. 49), s. 269 (1)—Town and Country Planning Act, 1947 (c. 51), s. 75 (1).

Appeal by the claimant from a decision of the Divisional Court (LORD GODDARD, C.J., HILBERY and PARKER, JJ.), dated Dec. 14, 1950, and reported [1951] 1 All E.R. 173, on a Case stated by an arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 6 (1).

The claimant owned two sites which she had purchased in plots at dates prior to Apr. 16, 1931, and Aug. 27, 1936, respectively, and, except during the war, had used the whole of one site and part of the other as caravan sites. On Dec. 4, 1937, she applied for and acquired a licence under the Public Health Act, 1936, s. 269, to use the land for caravans. No town planning scheme had been prepared for the area in which the sites were situated, but on Dec. 7, 1928, the Minister of Health confirmed a resolution to prepare a scheme passed by the then local planning authority, the interim development order applicable at that time being the Portsmouth and District Town Planning (General Interim Development) Order, 1928. No application for consent to the user of the sites for caravans under the Town and Country Planning Acts had been made or granted. By the Havant and Waterloo Urban District Council Act, 1947, power was given to the relevant local authority to acquire (*inter alia*) the two sites in question, and on June 17, 1948, notices to treat were served on the claimant. The compensation fell to be assessed under Part V of the Town and Country Planning Act, 1947 (in particular, s. 55 thereof), which was passed on Aug. 6, 1947, Part V coming into force immediately. The remainder of the Act, including s. 75 (which deals with the position where existing development contravenes previous planning control), by virtue of the Town and Country Planning Act, 1947 (Appointed Day) Order, 1948, dated Feb. 9, 1948, came into force on July 1, 1948. In the assessment of compensation to be paid to the claimant the question arose whether on or after July 1, 1948, the actual use of the two sites could be the subject of an enforcement notice under s. 75 of the Act of 1947, and, if so, whether the arbitrator might take that into account in assessing compensation.

The Divisional Court held that (i) the grant of a licence under s. 269 of the Act of 1936, even though it was granted by the local authority which was also the planning authority, did not amount to planning permission, and, therefore, as no permission for the use of the land for caravan sites had been given by or under the interim development order, having regard to s. 75 (9) of the Act of 1947 the claimant's use of the land was begun in breach of previous planning control; (ii) on the true construction of s. 75 (1) of the Act of 1947 (which applies Part III of the Act with regard to enforcement notices, including, in particular, s. 23, and provides that an enforcement notice shall not be served in respect of any use at any time after three years from the appointed day), that sub-section provided a substituted, and not an additional, limitation to that provided by s. 23 (which imposes a limitation of four years from the beginning of the change of user), and, therefore, an enforcement notice served when s. 75 came into force would not be out of time; (iii) it could not be implied, having regard to s. 75 (6), that where no enforcement notice had been served the arbitrator could not take into consideration the possibility of its being served; although at the date of the notices to treat s. 75 had not become law, it was then known that

the section would come into force on July 1, 1948, and that an enforcement notice could then be served; and, therefore, the arbitrator was not debarred from taking into consideration the possibility of such service.

Percy Lamb, K.C., and *G. Howard* for the claimant.

H. B. Williams, K.C., and *W. L. Roots* for the urban district council.

The COURT OF APPEAL agreed with the conclusions and reasoning of the Divisional Court and dismissed the appeal.

Decision of Divisional Court affirmed.

Solicitors: *Mortimer Silverman & Co.*, agents for *James Barnes*, Hayling Island (for the claimant); *Lees & Co.*, agents for *B. R. W. Gofton*, Havant (for the urban district council).

J.D.P.

KOHNKE v. KARGER.

[KING'S BENCH DIVISION (Lynskey, J.), May 2, 3, 4, 7, 22, 1951.]

Estoppel—Estoppel by record—Judgment of foreign court—Separate causes of action against different defendants, but in respect of same damage—Action for damages for negligence—Plaintiff injured in motor car collision in France—Claim brought against French driver in penal proceedings in France—Damages recovered against French driver, but insufficient to compensate plaintiff—Action in High Court against English driver.

While travelling in France in a motor car driven by the defendant, the plaintiff was injured in a collision between the defendant's car and a motor lorry driven by a Frenchman. In penal proceedings in France against the lorry driver for involuntarily causing, by negligence, personal injuries to the plaintiff, the driver was held two-thirds responsible for the accident and the defendant was held one-third liable, and the plaintiff was awarded £1,428 damages in respect of her injuries. That judgment was satisfied. While the French proceedings were pending the plaintiff brought an action against the defendant (who resided in England) in the High Court, claiming damages for personal injuries and loss caused or contributed to by his negligence. The defendant contended that she was not entitled to recover damages against him as she had already obtained a satisfied judgment of a competent court in respect of the damage suffered by her. The plaintiff contended that in the penal proceedings in France she had not been able to recover full compensation for the damage suffered by her as (a) in those proceedings she was not able to claim for damage to or loss of goods, and (b) no damages were awarded in respect of any subsequent aggravation of her injuries. She undertook to give credit to the defendant for the damages awarded to her in the French proceedings.

HELD: the plaintiff was entitled to bring her claim against the lorry driver in France and against the defendant in England, and the fact that she had obtained a satisfied judgment in France against the lorry driver did not prevent her from obtaining damages against the defendant except to the extent that she had received compensation from the lorry driver in respect of the same damage; as the principles on which damages were assessed were different in the French and the English courts and the award of the French court was less than what an English court would have regarded as full satisfaction of the plaintiff's claim for the injuries and loss suffered by her, the court was not bound by the French court's assessment of the damages; and, therefore, the plaintiff was entitled to recover from the defendant the balance in respect of the damage which she had suffered.

AS TO DEFENCE OF "JUDGMENT RECOVERED," see HALSBURY, *Hailsham Edn.*, Vol. 13, pp. 415-419, paras. 470-472; and FOR CASES, see DIGEST, Vol. 21, pp. 225, 226, Nos. 586-593.

Cases referred to:

- (1) *Bird v. Randall*, (1762), 3 Burr. 1345; 97 E.R. 866; 34 Digest 171, 1337.
- (2) *Morris v. Robinson*, (1824), 3 B. & C. 196; 107 E.R. 706; 21 Digest 226, 589.
- (3) *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1940] 4 All E.R. 20; [1941] A.C. 1; 109 L.J.K.B. 919; 164 L.T. 139; 2nd Digest Supp.
- (4) *Barber v. Lamb*, (1860), 8 C.B.N.S. 95; 29 L.J.C.P. 234; 2 L.T. 238; 141 E.R. 1100; 11 Digest 467, 1233.
- (5) *Taylor v. Hollard*, [1902] 1 K.B. 676; 71 L.J.K.B. 278; 86 L.T. 228; 11 Digest 407, 759.

ACTION for damages for personal injuries and loss arising out of the negligence of the defendant.

On July 20, 1948, while spending a holiday in France, the plaintiff was seriously injured in a collision between the motor car in which she was travelling, and which was driven by the defendant, and a motor lorry driven by a Frenchman, M. Mahieu. Under French law negligence causing personal injury is a punishable offence and also gives rise to a claim for damages, and by the procedure of the French courts injured persons may claim in the criminal proceedings for damages for personal injuries which they have suffered, but not for damage to or loss of goods. If proceedings were brought in a civil court against the same defendant in respect of the same damage, the claim would be met by a plea of *res judicata*, but, if there were subsequent aggravation of the injuries, a plaintiff might recover in the civil courts further compensation in respect of the aggravation, and in such proceedings the civil judge was not bound by the assessment of damages by the correctional court although in practice he accepted the award in respect of the injuries known at the time of the hearing by the correctional court. On Feb. 11, 1949, a correctional court found the lorry driver guilty of causing, by negligence, the personal injuries to the plaintiff, and, in dealing with her civil claims, held that the accident was attributable as to three-fourths to the lorry driver and as to one-fourth to the defendant. On an appeal by the lorry driver and his employers, the Court of Appeal in Paris apportioned the responsibility for the accident as to two-thirds to the lorry driver and as to one-third to the defendant. Damages amounting to £1,428 (1,400,000 francs) were awarded to the plaintiff against the lorry driver and his employers, and the whole of this sum had been received by the plaintiff on Feb. 10, 1951, the defendant later reimbursing to the lorry driver one-third of these damages. On Dec. 7, 1949, the plaintiff commenced an action in the High Court in England against the defendant, who resided in England, claiming damages for personal injuries and loss caused or contributed to by his negligence. The defendant contended *inter alia* that, as the plaintiff had taken proceedings in France against the lorry driver and had obtained judgment against him in respect of the damage suffered by her and the judgment had been satisfied, she could not claim a second time in respect of the same damage even though the claim was against an independent wrongdoer, and, therefore, she could not recover damages in the present action against the defendant. The plaintiff contended that the damages recovered in the French proceedings did not cover the whole of the damage which she had suffered, but she undertook to give credit to the defendant for the amount recovered by her in the French proceedings.

Salmon, K.C., and *Mattar* for the plaintiff.

Diplock, K.C., and *Marven Everett* for the defendant.

Cur. adv. vult.

May 22. **LYNSKEY, J.**, read a judgment in which he stated the facts and continued: Counsel for the defendant did not here suggest that he could rely on a plea of *res judicata*. His submission was: Where one *damnum* is caused by separate *injuria* for which two or more persons are responsible a

satisfied judgment by a court of competent jurisdiction for that *damnum* is a bar to any further action in respect of any *injuria* which caused that *damnum*, or, put more shortly, a satisfied judgment for a single *damnum* is a bar to another action for the same *damnum* based on any *injuria* causing that *damnum*. If a person suffers damage as a result of the independent wrongs of two others and recovers, whether as a result of a judgment or otherwise, in respect of the whole of his damage from one of them, then, apart from any question of subrogation, he could not claim in respect of any of that damage a second time from the other of the wrongdoers: see *Bird v. Randall* (1), *Morris v. Robinson* (2), per BAYLEY, J. (3 B. & C. 205) and *United Australia, Ltd. v. Barclays Bank, Ltd.* (3), per VISCOUNT SIMON, L.C. ([1940] 4 All E.R. 31). He cannot obtain double satisfaction. Where the judgment which is satisfied is that of a court of competent jurisdiction in this country and is in respect of the same damage, although resulting from different wrongs, the old courts of equity, and now the High Court exercising its equitable jurisdiction, would interfere to prevent such double satisfaction.

If, however, the court giving the judgment which is satisfied is a foreign court, the matter is not so clear. If a plaintiff has brought proceedings in a foreign court against a defendant for damages in respect of a cause of action and obtains judgment and that judgment is satisfied, it appears on the authorities that he cannot proceed in respect of the same debt or damages based on the same cause of action against the same defendant in the courts of this country: see *Barber v. Lamb* (4) and *Taylor v. Hollard* (5). In *Barber v. Lamb* (4) ERLE, C.J., stated the principle (8 C.B.N.S. 100) as being

“ . . . that the plaintiff has obtained the judgment of a tribunal to which he has resorted for enforcing his debt, and that the judgment so obtained has been satisfied by payment of the sum awarded.”

KEATING, J., said (*ibid.*, 101):

“ But the ground is, that there has been a judgment of a court having jurisdiction over the subject-matter, and that that judgment has been satisfied by payment.”

In *Taylor v. Hollard* (5) JELF, J., said ([1902] 1 K.B. 681):

“ . . . I think [the plaintiff] had elected to take the judgment of the foreign country to which he had appealed in discharge of the whole cause of action, and could not afterwards sue for the residue of the debt in England.”

He then quoted a passage from *Barber v. Lamb* (4), where ERLE, C.J., said (29 L.J.C.P. 236):

“ It would be contrary to all principle for the party who has chosen such tribunal, and got what was awarded, to seek a better judgment in respect of the same matter from another tribunal.”

Both *Barber v. Lamb* (4) and *Taylor v. Hollard* (5) were actions between the same parties for the same debt based on the same cause of action. The question which I have to consider is whether, where there are separate causes of action against different defendants for the same damage, a judgment obtained against one of them in a foreign court which has been satisfied is a bar to proceedings against the other for the same *damnum* in the courts of this country. If I was satisfied that the amount recovered in this case by the plaintiff from the lorry driver in France was sufficient to compensate her for the damage which she has suffered, the principle of the decision in *Bird v. Randall* (1) against double satisfaction would apply and the plaintiff's claim would be dismissed. If, however, as is the case, I am satisfied that the amount recovered by the plaintiff is not sufficient to compensate her for the damage from personal injuries which she has suffered, am I bound by the decision of the French court as to the

assessment of the damages? So far as I am aware, and so far as counsel could find, there is no direct authority on this question. The decisions in *Barber v. Lamb* (4) and *Taylor v. Hollard* (5) both seem to rest on the principle that the plaintiff, having elected the tribunal to decide the claim against the defendant and obtained judgment from that tribunal and satisfaction of that judgment, is bound by his election of the tribunal to decide the issue between the parties. When, however, there are two causes of action against separate defendants, but founded on the same damage, a question arises whether there is anything to prevent the injured person choosing one tribunal to decide his claim against one defendant and another tribunal to decide his claim against the other defendant.

The plaintiff brought her claim against the lorry driver and his employers in France, in which country they resided and where their assets were, and she brought her claim against the defendant in this country, where he resides and where, no doubt, his assets are. In my view, there is nothing in principle which prevents her adopting this course, and her election of one tribunal to deal with her claim against the lorry driver and his employers, even when she obtains judgment which is satisfied, will not avail the defendant except to the extent that the damages to which she would be entitled have been in part satisfied by the money recovered from the lorry driver. This last statement is made on the assumption that I am not bound by the French court's assessment of damages and not bound to treat that assessment as correct. The principles on which damages are assessed differ in different countries, but in assessing damages I must apply the law and practice of these courts. I am satisfied on the evidence that, when the French courts assess damages in a claim grafted on penal proceedings for causing personal injuries by negligence, the claimant cannot recover for damage to property: *e.g.*, in this case the claim by the plaintiff for the loss of her wrist watch could not be recovered in those proceedings, and this is conceded by the defendant. As a claim can subsequently be made for aggravation of injuries, the risk of such aggravation, presumably, is not taken into account in assessing the damages, whereas in this country damages are assessed once and for all. In the French courts, according to the evidence, the general damages vary according to the social position of the injured person; the better the social position the higher the general damages, and that, of course, apart from loss of earning capacity. In my view, it may well be, and in this case I think it is, that the award of the French court is less than what would be regarded here as full satisfaction of the plaintiff's claim for the injuries and loss which she sustained. I am of opinion that I am not bound by the assessment by the French court of the damages in the plaintiff's claim against the lorry driver and his employers in assessing the damages in the plaintiff's claim against the defendant. I am not called on to decide the question whether in these proceedings the plaintiff must give credit for the damages which she has received from the lorry driver, as she has always been ready to give such credit. If I had to decide it, I should have thought that, as the damages to which she was entitled had been *pro tanto* satisfied by what she had received from the lorry driver, her damages must be reduced by that amount in her claim against the defendant.

[His LORDSHIP then assessed the damages and gave judgment for the plaintiff for £835.]

Judgment for the plaintiff.

Solicitors: *Amery-Parkes & Co.* (for the plaintiff); *Barlow, Lyde & Gilbert* (for the defendant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

T. v. B. (formerly T.) and B.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), May 28, 1951.]
Divorce—Collusion—Agreement for disposal of matrimonial property—Receipt by wife of reduced share in consideration of husband's foregoing right to claim damages against co-respondent—Claim for damages subsequently included in petition—Matrimonial Causes Act, 1950 (c. 25), s. 4 (2) (c).

A By their answers to a husband's petition for the dissolution of his marriage on the ground of his wife's adultery with the co-respondent the wife and the co-respondent alleged that the husband was guilty of collusion. The substance of the particulars in support of that allegation was that, on becoming aware of the wife's adultery, the husband began negotiations with her for the disposal of the matrimonial property; that a sum was agreed as the wife's share; and that, in consideration of the husband's foregoing any right to claim damages against the co-respondent, the wife consented to accept a sum which was less than her agreed share of the matrimonial property. It was further alleged that that agreement was carried into effect and that a sum representing the wife's share less the amount deducted in respect of the husband's foregoing the claim for damages was paid by the husband to the wife before the institution of the divorce proceedings, but when the petition was filed it contained a claim for damages against the co-respondent. On an application by the husband to strike out the allegation of collusion in the answers with the particulars thereunder as disclosing no reasonable answer to the petition,

D HELD: although, by including in his petition a claim for damages against the co-respondent, the husband had not carried out one part of the agreement, he had obtained the benefit of the other part by paying to the wife a reduced share of the matrimonial property; if the agreement were collusive, it remained collusive notwithstanding that the husband had broken one of its terms; so long as he had not purged himself by paying back what he had received, the allegation that the proceedings were subject to a collusive bargain between the parties providing for the conduct of the suit in relation to the measure of damages raised a matter which the court had a duty to investigate, and, as such, disclosed a reasonable answer to the petition; and, therefore, the allegations in the answers would not be struck out.

F AS TO COLLUSION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 677, 678, paras. 1000-1003; and FOR CASES, see DIGEST, Vol. 27, pp. 332-336, Nos. 3123-3160.

Cases referred to:

- (1) *Churchward v. Churchward & Holliday*, [1895] P. 7; 64 L.J.P. 18; 71 L.T. 782; 27 Digest 334, 3143.
 (2) *Lowndes v. Lowndes*, [1950] 1 All E.R. 999; [1950] P. 223.

G APPEAL by the husband from an order of Mr. Registrar COMPTON-MILLER, made on Apr. 27, 1951, whereby he refused to strike out paragraphs, together with the particulars thereunder, contained in the answers of the wife and the co-respondent to the husband's petition for divorce on the ground of adultery.

Picard for the husband.

H *Friend* for the wife and the co-respondent.

WILLMER, J.: This is an appeal from an order of Mr. Registrar COMPTON-MILLER, made on Apr. 27, 1951, by which the learned registrar refused to strike out a paragraph (together with the particulars thereunder) contained in the answers of the wife and the co-respondent to the husband's petition for divorce on the ground of adultery. The husband now appeals against that order, and, in pursuance of the powers conferred by R.S.C., Ord. 25, r. 4, asks me to say

that the learned registrar was wrong and that that paragraph in the answers of the wife and the co-respondent should be struck out on the ground that it discloses no reasonable answer to the petition.

The particulars objected to are lengthy and I do not propose to read them all. The allegation to which the particulars are directed is to the effect that the husband is guilty of collusion, and the substance of the particulars in support of that allegation is that, on the husband becoming aware of the wife's adultery, he began to negotiate with her for the disposal of the matrimonial property. A It is alleged that a certain sum was arrived at as being appropriate to be the wife's share of the matrimonial property. It is further alleged that in the course of the negotiations an agreement was arrived at whereby, in consideration of the husband foregoing any right to claim damages against the co-respondent in the proceedings, he would pay to the wife less than he would otherwise have had to pay as her share of the matrimonial property. B It is alleged that that agreement was carried into effect, and that the net sum so agreed on—i.e., the wife's share less the price of foregoing the claim for damages—was paid by the husband to the wife before the institution of the present proceedings. C It is to be noted that, whether or not it is true that that agreement was made, the husband has included in his petition a claim for damages against the co-respondent. I am not concerned with the merits of the allegations now made by the wife and the co-respondent. It is conceded that for the purposes of the present application I must assume that those allegations are capable of proof. D The question is not whether they are meritorious, but whether, assuming their truth, they are relevant to the matters in issue between the parties. Only if they disclose no reasonable answer to the petition can an order be made that they be struck out *in limine* so as to debar the wife and the co-respondent by order of the court from bringing them forward at the trial.

The matter is put by counsel for the husband in this way. He says that it is not a material averment to say that the husband is guilty of collusion. If one looks at the Matrimonial Causes Act, 1950, s. 4 (2) (c), (and be it remarked in parenthesis that so far as this point is concerned the Act of 1950 corresponds with what the law has been ever since 1857) it appears that it is only where the court is not satisfied on the evidence that "the petition is not presented or prosecuted in collusion with the respondent" that collusion is an answer E to the petition, or, indeed, becomes a material question at all. Here it is not in terms alleged that the petition is presented or prosecuted in collusion with the wife or with the co-respondent; the paragraph objected to merely says F that the husband is guilty of collusion. In reply to a suggestion that that matter is one that could be cured by amendment, counsel for the husband replies that, if the paragraph were amended so as to follow the wording of the subsection, the particulars delivered would not support the allegation in its amended form. G All that is alleged in the particulars is that there was at some time previous to the institution of the proceedings a bargain between the parties which might have been a collusive bargain, but, bearing in mind that the present petition was launched, not in pursuance of any such bargain, but, on the contrary, in breach of it, if any such bargain did exist, it cannot be alleged, H having regard to the particulars given, that the petition is presented or prosecuted in collusion with the wife or the co-respondent so as to bring it within the wording of s. 4 (2) (c) of the Act of 1950. Counsel for the husband points out quite correctly that in most of the cases which are cited as authorities on the question of collusion it has been recognised that collusion is not necessarily a permanent obstacle in the way of a petitioner obtaining relief, that is to say, it is always open to a petitioner, if he has been guilty of collusion, to purge his collusion and then bring proceedings which are not tainted therewith. What has usually been said is that the collusive suit must be discontinued or got rid of first, and then a fresh suit, not tainted with collusion, can properly be

instituted. Here, however, it is said on behalf of the husband that he has already purged any collusion to which he may have been a party by not bringing any suit in pursuance of the alleged collusive bargain, but by bringing this suit in flat defiance of it. In those circumstances it is contended for the husband that the allegation is not only bad in form, as not bringing the matter within the four walls of the sub-section, but that it is also bad in substance because the facts alleged do not support the suggestion that the petition is presented or prosecuted in collusion with the wife, and, therefore, the facts alleged are not such as would in any case require the court to refuse relief and do not disclose any reasonable answer to the petition.

The argument on behalf of the wife and the co-respondent is that this complaint on the part of the husband is based on a complete misunderstanding of what the wife and the co-respondent are trying to allege. Counsel for the wife and the co-respondent has referred to *Churchward v. Churchward and Holliday* (1), and I think it is right that I should refer to what was said by SIR FRANCIS JEUNE, P., in that case, because this, as I understood counsel, is really the corner-stone of his argument. The learned President said ([1895] P. 30):

“ . . . if the initiation of a suit be procured, and its conduct (especially if abstention from defence be a term) provided for by agreement, that constitutes collusion . . . ”

That, in the submission of the wife and the co-respondent, is exactly what has happened here. This is a case in which the conduct of the suit has been provided for by agreement—that is to say, before the launching of the petition there was a bargain as to a most material part of the suit, namely, the measure of damages which the co-respondent ought to be required to pay. That bargain constituted an attempt on the part of the parties to oust the jurisdiction of the court with regard to the award of damages, and, still more, objection is taken to the fact that that bargain seeks to prevent the court from retaining control over any money paid by way of damages as between the co-respondent and the husband. In such circumstances it is contended that the bargain is one which tends to pervert the course of justice, to use a phrase which has been used in more than one case in relation to collusion, I think most recently by myself in *Lowndes v. Lowndes* (2) ([1950] 1 All E.R. 1005). The alleged bargain, it is pointed out on behalf of the wife and the co-respondent, has two sides to it. First of all it provides for the damages which are to be paid by the co-respondent in respect of his adultery with the wife. In that respect reliance is placed on the fact, as is alleged, that that part of the bargain was carried out, because the agreed damages were paid in the sense that they were taken into account in paying the wife her share of the matrimonial property. The other side of the bargain was that, in consideration of the damages so paid or deemed to be paid in advance, the husband should include no claim for damages against the co-respondent in the petition which he was proposing to launch. The fact that the husband has violated that alleged term of the agreement has not, in the submission of the wife and the co-respondent, any relevance. The agreement made and in part executed before trial remains a collusive agreement notwithstanding that the husband has broken one of its terms.

The point which is taken by counsel for the wife and the co-respondent—and, in my judgment, well taken—is that, if any such agreement was made, and if it is true, as I must assume it to be true for the present purpose, that the damages were paid in the sense of being taken into account in the amount paid to the wife, it is no longer competent for the husband to purge himself of the taint of collusion except by restoring the *status quo*, i.e., by paying back what he has received, albeit indirectly, in pursuance of the agreement. It is said that, if he were to do that and thereby were to restore the position to what it was before there had been any discussion about finance in relation to the present petition, he could clearly say that, notwithstanding his having been

a party to a collusive agreement, he had washed his hands of it, and proceedings could then be instituted free from any taint of collusion, but so long as he retains the benefit of the agreement, as it is alleged that he does, it cannot be said that the present suit is not the subject of an agreement which provides for its conduct. If that is so, that is an allegation which brings the present suit directly within the sub-section as interpreted in *Churchward v. Churchward and Holliday* (1) and raises a matter which it would be the duty of the court to investigate. As such, it discloses a reasonable answer to the petition, and, accordingly, it is said that it would be wrong to order that this allegation and the particulars thereunder be struck out.

I have come to the conclusion that the argument for the wife and the co-respondent is well founded. It appears to me that, when properly understood, the wife's allegation is really that the present suit is presented in collusion with her and the co-respondent, in the sense that a collusive bargain was struck between the parties providing for the conduct of the suit in relation to the matters of which particulars are given. Had the matter been pleaded in that way in the first instance I do not know whether the present application would ever have been made. It may be that the husband would still have said just the same, namely, that the particulars given do not support the allegation made. That, however, seems to me to go only to the costs of this application. I regard this pleading as being defective in form in that it does not in terms bring the wife and the co-respondent within the wording of s. 4 (2) (c) of the Act of 1950. If they desire to raise the question of collusion on the lines indicated in the argument before me, it seems to me that their answers should be amended so as to bring them within the wording of the sub-section. The defect in the pleading is, however, a matter which goes to the form and not to the substance, and it seems to me it is clearly curable by an amendment of the sort I have already referred to in the course of the argument and in this judgment. The order that I shall, therefore, make is that the application to strike out this paragraph of the answer in each case fails, but I direct that the paragraph and the particulars thereunder be amended.

Appeal dismissed.

Solicitors: *Lesser & Co.* (for the husband); *Kingsford, Dorman & Co.* (for the wife and the co-respondent).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

KEANE v. CLARKE.

[COURT OF APPEAL (Sir Raymond Eversherd, M.R., Denning, L.J., and Roxburgh, J.), May 24, 1951.]

Rent Restriction—Standard rent—Proof—Recovery of over-paid rent—No evidence of letting on or before Sept. 1, 1939—Evidence of letting in 1944—Prima facie evidence of standard rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (a) and s. 14 (1) (as amended by Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (1), sched. I).

In 1949 the landlord let to the tenant premises to which the Rent and Mortgage Interest Restrictions Act, 1939, applied, at a weekly rent of 35s. In an action for the recovery of rent over-paid the tenant proved that in 1944 the premises were let at a weekly rent of 22s. 6d. and that subsequently there was a permitted increase of 1s. Neither party adduced any evidence as to a previous letting of the premises.

HELD: in the absence of evidence regarding the letting of the premises on or before Sept. 1, 1939, by proving the terms of the letting in 1944 the tenant had established a *prima facie* case that 22s. 6d. was the standard rent of the premises, and, in the absence of evidence by the landlord to displace that *prima facie* case, the tenant was entitled to succeed.

Veale v. Cabezas ([1921] W.N. 311) and *Bolger v. Daly* ([1925] 2 Ir. R. 42), applied.

FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 12 (1) (a) and s. 14 (1), the RENT AND MORTGAGE INTEREST RESTRICTIONS ACT, 1939, s. 3, the RENT AND MORTGAGE INTEREST RESTRICTIONS ACT, 1923, s. 8 (2), and the INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1938, s. 7 (6), see HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 998, 1015, 1077, 1038 and 1074.

Cases referred to:

(1) *Veale v. Cabezas*, [1921] W.N. 311; 31 Digest 565, 7124.

(2) *Bolger v. Daly*, [1925] 2 Ir. R. 42; 31 Digest 564, f.

APPEAL by the plaintiff from a decision of His Honour JUDGE DONE, sitting at Clerkenwell County Court, dated Jan. 30, 1951, dismissing her claim against the landlord for the repayment of over-paid rent for premises to which the Rent and Mortgage Interest Restrictions Act, 1939, applied, on the ground that she had not discharged the onus of proof regarding the standard rent. The plaintiff proved that the premises were let in 1944, but neither side adduced evidence as to the rent on Sept. 1, 1939, or as to the date on which the premises were first let. The facts appear in the judgment of SIR RAYMOND EVERSHERD, M.R.

B. Lewis for the plaintiff.

N. N. McKinnon for the landlord.

SIR RAYMOND EVERSHERD, M.R.: In this action the plaintiff sued the landlord for an alleged over-payment of rent which had been made by her to the landlord whose tenant she had formerly been. The plaintiff went into possession of the premises, which consist of a flat known as No. 11 Park Avenue, North Hornsey, in November, 1949. The rent was 35s. a week. She left the premises in October, 1950. By virtue of the provisions of s. 8 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, as amended by s. 7 (6) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, she is entitled in respect of that period to claim repayment of any sums charged to her in excess of the standard rent of the premises plus any permissible increases. The plaintiff must satisfy the court that she has, in truth, been over-charged, and the landlord admits that on May 27, 1944, these premises had been let to one Woods at a rent of 22s. 6d. per week. It was also established that Woods was succeeded as tenant by a Mrs. Urry, the mother-in-law of the then owner

of the premises, one Williams, from whom the landlord acquired them. In cross-examination the landlord said:

"I bought with one tenant (*i.e.*, Mrs. Urry). She had first floor big front, medium kitchen, medium back bedroom, and use of bath, w.c. and coal cellar. She had same accommodation as plaintiff at rent of £1 3s. 6d., including 1s. increase of rates. When I let same accommodation to plaintiff I increased rent to 35s. I did that to enable me to meet my commitments. I know nothing of the previous history."

It is, therefore, clear that the landlord—I do not suggest he was guilty of anything dishonest—took the opportunity on the change of tenancy to increase the rent to a figure which he did not purport to base on any knowledge which he had about the previous history of the premises, and, in particular, about the standard rent, though, of course, there is a statutory obligation laid on landlords to charge only the rent which the statute permits. It is clear that there was no evidence of any letting of the premises at any time before the letting to Woods on May 27, 1944.

Counsel on both sides have conceded that this flat is what is known as a "1939 dwelling-house," and, therefore, the standard rent is defined as being the rent at which the premises were let on Sept. 1, 1939, or, if not then let, the rent at which they were last let before that date or that at which they were first let after that date. Counsel for the landlord pointed out that in an action for recovery of over-paid rent it is for the plaintiff to establish to the satisfaction of the court that the rent which he paid was in excess of the rent which the landlord could legitimately charge and to do that he must bring evidence before the court from which the court can properly infer what was the rent legitimately chargeable. The county court judge clearly took the view that a plaintiff who was only able to prove a letting of the premises in suit at a date after September, 1939, and could not prove whether the premises were let on Sept. 1, 1939, or were let before that date, necessarily failed to make good the claim. He said:

"I held that the onus was on the plaintiff to prove that she had paid rent in excess of the standard rent, and that, as she had failed to call evidence sufficient to enable the court to determine the standard rent, she had not discharged that onus."

With great respect to the learned judge, I think he imposed too grave a burden on the plaintiff in such a case as this. In all matters of evidence each case must depend on the materials put before the court. There was here evidence of the letting to Woods in May, 1944; there was evidence that the rent he paid, plus the 1s. increase in respect of rates, continued until the plaintiff went into occupation in 1949, when the landlord raised it by 11s. 6d. It is true that there was no evidence called by the plaintiff regarding any letting previous to that to Woods. The judge seems to have thought that it was for the plaintiff to have produced as a witness the former landlord, Mr. Williams. That seems to me altogether too severe a burden on a plaintiff in cases of this kind. On the other hand, the landlord, by his particulars—I do not suggest they conclusively bind him—inferentially stated that the standard rent before the addition which he made was 22s. 6d. and no more.

What then, I ask myself, is the proper inference which the court should draw from the materials laid before it? I think the proper inference is that the standard rent of these premises was 22s. 6d., but I think also that the permissible rent should be treated as 23s. 6d. It seems to me that, in the absence of any evidence of previous lettings, the letting to Woods should be treated as the first letting of these premises and that the figure at which the premises were let to Woods should be treated as the then permissible, or the standard, rent. In taking that view I find some support from the decisions which have

been cited by counsel for the plaintiff. I propose to refer to two of them—*Veale v. Cabezas* (1) and *Bolger v. Daly* (2). In *Veale v. Cabezas* (1) two points arose. The first was whether for the purpose of assessing the standard rent it was permissible to take the sum of the rents at which portions of the premises had been let at the material date or whether it was necessary to look to the first letting of the premises as a whole. To that question the answer was in favour of the second alternative. We are not concerned with that point in this case. In addition, a point was taken that there was no evidence to show that any rent had been charged in respect of the premises on or before the relevant date, Aug. 3, 1914, the only evidence being the letting to the defendant at a date very much later. As regards that latter point, the Divisional Court (HORRIDGE and SHEARMAN, JJ.) said this ([1921] W.N. 312):

“As to the period before Aug. 3, 1914, there was no evidence that the house had been let before that date at any rent other than the ground rent. The house was first let after that date to the defendant at the rent of £1 3s. a week, and that in the circumstances was therefore the ‘standard rent.’”

That is, at any rate, some support for the view that when there is no evidence of previous lettings an inference can be drawn as to the figure of the standard rent from evidence of a later letting. That case is not binding on this court, but it has stood unchallenged for a generation, and in these Rent Act matters many persons may well have regulated their affairs in accordance with that decision. Unless, therefore, I felt clearly disinclined to accept it, I should be very much against casting doubt on it at this date.

Bolger v. Daly (2), equally, does not bind us, but the point raised was of a similar character, and in the course of the leading judgment in the Supreme Court KENNEDY, C.J., said ([1925] 2 Ir. R. 46):

“The application of the Act depends on whether the standard rent or the valuation is within the maximum limit prescribed by the statute in defining the premises to which it applies. No evidence as to valuation is before this court, nor was any such evidence given before JOHNSTON, J.; and the case is, therefore, further narrowed down to a question as to whether there is evidence that the standard rent was such as to bring the premises within the Act. The letting to the defendant was proved. Under that letting he was given vacant possession on Nov. 1, 1918, and he was to hold from that date at a rent of £50 a year. If that figure represent the standard rent, the tenancy was within the Act. No evidence as to any previous letting of the premises having ever been made was given on the part of either party. It was contended on the part of the plaintiff that the onus was upon the defendant of showing whether or not the premises were let on Aug. 3, 1914, and, if not then let, when they were first let after that date, and whether such letting was at a rent within the prescribed limits of application of the statute, and, if so, what was the amount of the standard rent according to the definition in the statute. Now, on the evidence before the court in this case, we find a letting of the premises made on Nov. 1, 1918, which, no earlier letting having been proved, appears to be a first letting, and at a rent within the limits of application of the Act which gives us the statutory ‘standard rent.’ In my opinion, in that state of facts, the onus rested on the plaintiff to displace the *prima facie* case made by the defendant bringing the premises within the Act. No attempt has been made by the plaintiff to displace that *prima facie* case. We must, therefore, assume that the premises were let at a standard rent within the Act, namely, £50 a year, from which it follows that the decision of the learned judge at the trial cannot be sustained.”

I may say that the action was one in which the landlord sued the tenant for rent of a dwelling-house, and the tenant's defence was that the rent charged was in part irrecoverable.

I accept that reasoning and think it should be applied to the present case. I agree with counsel for the landlord that the onus in such an action as this lies in the first instance on the tenant, but I think that in the circumstances here the plaintiff has discharged it and established a *prima facie* case, and, to quote KENNEDY, C.J. (*ibid.*): "No attempt has been made by the [landlord] to displace that *prima facie* case." In those circumstances, I think the court must draw the inference that 22s. 6d. was the standard rent of these premises and that 23s. 6d. was the rent which the landlord was permitted to charge the plaintiff during the period of her tenancy. This appeal should be allowed, and the plaintiff should recover the difference between the rent that she paid, namely, 35s. a week, and the rent which she ought to have been charged, namely, 23s. 6d. a week, during the relevant period. A B

DENNING, L.J.: I agree. If the county court judge had had the authorities before him, he would have decided differently. Since 1938 it has been the duty of a landlord, in the case of a house within the Rent Restrictions Acts, to provide a rent book, and to insert in it a statement of what the standard rent is: see s. 6 of the Act of 1938. That shows that it is the duty of the landlord to find out what the standard rent is, and to tell it to the tenant. That is good sense, because the landlord is in a much better position to know it than is the tenant. The matter can be tested by asking this question. When the landlord issued a rent book to the plaintiff in November, 1949, what figure ought he to have inserted as the standard rent? He knew that he himself, since he bought the house, had been receiving 23s. 6d. rent. If he had made a few inquiries, he would have found that since May, 1944, the rent had been 22s. 6d., and had been increased by 1s. to 23s. 6d. on account of an increase in rates. On that information, what was the figure which he should have inserted in the rent book as the standard rent? There is only one answer possible, 22s. 6d. The contention of counsel for the landlord leads logically to the conclusion that the landlord could have inserted in the rent book any figure he chose as the standard rent, for it is argued that, because there is no evidence of the rent at which the house was let in 1939, it is impossible to say that the 35s. is wrong. That is obviously untenable. On the evidence in this case the proper inference was that the standard rent is 22s. 6d. unless the landlord could prove it was some other figure, and he did not prove it. I agree, therefore, that the appeal should be allowed. C D E F

ROXBURGH, J.: I also agree.

Judgment for the tenant.

Solicitors: *Vincent & Vincent* (for the plaintiff); *Craigen, Hicks & Co.* (for the landlord).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.] G

BIGGIN & CO., LTD. AND ANOTHER v. PERMANITE, LTD.
BERRY WIGGINS & CO., LTD., THIRD PARTIES.

[COURT OF APPEAL (Somervell, Singleton and Birkett, L.JJ.), April 19, 20, 23, 24, 25, 26, 1951.]

Damages—Measure of damages—Foreseeable consequence of breach of contract—Series of contracts—Plaintiffs compromising claim by ultimate purchaser—Liability of original vendor to plaintiffs.

In February, 1945, the Royal Netherlands government asked the plaintiffs to supply an adhesive for use with certain roofing felt. The plaintiffs passed the inquiry to the defendants, who ordered the material from the third parties. Deliveries of the material, which was called Permasec, began in April, 1945, and in the winter of 1945 substantial amounts were applied by contractors to whom it was supplied by the Dutch government. In April, 1946, the Permasec which had been applied began to drip and run, or "creep," and claims were made on the government. The government asked the plaintiffs and the defendants to take back 1,400 tons of Permasec which had not been used, but they refused. Subsequently, the government having withheld payment of £55,000 due to the plaintiffs, it was arranged to refer to arbitration the question of the plaintiffs' liability to the government, but, on the first day of the hearing, the plaintiffs settled the dispute by accepting liability to the extent of £43,000 and costs. The plaintiffs claimed those amounts from the defendants, together with the plaintiffs' own costs of the arbitration, and the defendants made similar claims against the third parties. It having been held that the defendants were in breach of their contract with the plaintiffs and that the third parties were in breach of their contract with the defendants, on the question of the measure of the damages,

HELD: although the amount paid by the plaintiffs in settlement of the claim of the Dutch government was not conclusive of the extent of the defendants' liability to the plaintiffs and although it was the upper limit of that liability, if, having regard to the facts and on the evidence, the amount was reasonable, it should be taken as the measure of damages; on the facts and evidence, including the fact that the settlement had been made on legal advice, the settlement was reasonable; and, therefore, the defendants were liable to the plaintiffs in £43,000 and costs.

Grébert-Borgnis v. Nugent (1885) (15 Q.B.D. 85), applied.

Decision of DEVLIN, J. ([1950] 2 All E.R. 859), reversed on question of damages.

AS TO MEASURE OF DAMAGES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 126-129, paras. 160-164; and FOR CASES, see DIGEST, Vol. 17, pp. 103-106, Nos. 173-194, Vol. 39, p. 684, Nos. 2695-2702.

Cases referred to:

- (1) *Hammond & Co. v. Bussey*, (1887), 20 Q.B.D. 79; 57 L.J.Q.B. 58; 39 Digest 476, 995.
- (2) *Hadley v. Baxendale*, (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 156 E.R. 145; 17 Digest 93, 101.
- (3) *Grébert-Borgnis v. Nugent*, (1885), 15 Q.B.D. 85; 54 L.J.Q.B. 511; 39 Digest 669, 2569.
- (4) *Kiddle v. Lovett*, (1885), 16 Q.B.D. 605; 17 Digest 111, 222.
- (5) *Fisher v. Val de Travers Asphalte Co.*, (1876), 1 C.P.D. 511; 45 L.J.Q.B. 479; 35 L.T. 366; 17 Digest 113, 233.
- (6) *Elbinger Act. v. Armstrong*, (1874), L.R. 9 Q.B. 473; 43 L.J.Q.B. 211; 30 L.T. 871; 38 J.P. 774; 17 Digest 105, 191.

APPEAL by the plaintiffs against an order of DEVLIN, J., dated July 28, 1950, reported [1950] 2 All E.R. 859.

The plaintiffs, Biggin & Co., Ltd., and Archibald Bathgate (Building Materials), Ltd., two associated firms, in 1945 were asked to supply the Royal Netherlands government with large quantities of an adhesive for use with roofing felt. The plaintiffs passed the inquiry to the defendants, for whom the third parties manufactured the required material. The Royal Netherlands government re-sold the adhesive to various contractors, who, when it was found to be unsatisfactory, made claims for compensation on the government. The government in turn claimed against the plaintiffs, who settled the claim against them by the payment of £43,000 and certain costs and now claimed damages against the defendants. The defendants claimed to be indemnified by the third parties.

DEVLIN, J., held that the defendants were in breach of certain conditions of their contract with the plaintiffs and that the third parties were in breach of their contract with the defendants. The learned judge rejected, as the measure of the defendants' liability, the amount paid by the plaintiffs to the government, and on this question the plaintiffs appealed. The third parties did not appeal.

Beyfus, K.C., and Stenham for the plaintiffs.

Sir Walter Monckton, K.C., Karmel, K.C., and Beddington for the defendants.

SOMERVELL, L.J.: Early in 1945, the Royal Netherlands government (which I will call "the Dutch government") were ordering material, among other things, for building, with a view no doubt to the reconstruction which would be necessary when Holland was liberated. They had in this country an agency which was called N.O.R.R., and was managed by a Mr. Kraayvanger. The Dutch government had, previous to the contracts which give rise to this case, bought some felt for building from the plaintiffs, and the plaintiffs had obtained that felt from the defendants. Nothing turns on that contract, except that at the time when troubles arose the Dutch government owed the plaintiffs £55,000 in respect of felt which had been delivered. The relevance of that will appear later.

This case concerns contracts for what is called non-bituminous adhesive mastic, and its use, or its main use, is for sticking felt on to roofs made of wood or concrete. Some mastic or adhesive material is made of bitumen and some of pitch. The plaintiffs were not able to get mastic made of bitumen, or it was not available because bitumen could not be exported. So the material in question here had, as its base, pitch. There are also two sorts of mastic. One is applied hot, and the other is applied cold, or at any rate more or less cold, and the Dutch government wanted adhesive material which could be applied cold, because there was a great shortage of fuel. The contract was concluded for this material between the Dutch government and the plaintiffs, and between the plaintiffs and the defendants. The plaintiffs thought, until a comparatively late date, that the defendants were the manufacturers. They were not in fact the manufacturers. They had themselves contracted with the third parties in these proceedings, Berry Wiggins & Co., Ltd., who actually made the material. All concerned contemplated the sale to the Dutch government, and the commodity was being passed from the third parties to the defendants, the defendants to the plaintiffs, and the plaintiffs to the Dutch government for use in Holland. There were two contracts which covered 2,500 tons, and deliveries were made in the latter part of 1945 and early 1946. The material, when finally made, was called "Permasec" in Holland, and I will refer to it by that name.

The Permasec was not, as the learned judge found, in accordance with the contract. Its main defect was that, after it had been applied, the heat of the sun caused it to creep and drip through any orifice there was. The Dutch government claimed damages as against the plaintiffs in respect of what they alleged to be breaches of contract. They claimed to withhold the £55,000 on the ground that the damages which they had suffered in respect of the Permasec exceeded that amount. They agreed to submit the dispute as between themselves and the

plaintiffs to arbitration. In the statement of claim, after setting out the contract and the alleged defects, para. 12 (*d*) says:

A "After inspection of the documents disclosed by the Dutch government in the said arbitration it became apparent to Biggins and their advisers that it would be virtually impossible successfully to resist the claim of the Dutch government and accordingly a compromise was arrived at and Biggins consented to a final award in favour of themselves for £55,083 4s. 11*d.* on their claim [for the felt] and in favour of the Dutch government for £43,000 with the costs of the arbitration including the costs of the award to be taxed if not agreed on the claim of the Dutch government for damages. The said compromise was reasonable."

B The next paragraph says:

"In the premises the damages recoverable from the defendants include the said sum of £43,000, the costs payable to the Dutch government, the defendants' own costs of the arbitration as between solicitor and own client, and interest."

C The learned judge allowed an amendment to the statement of claim, and in para. 12 (*g*) the plaintiffs claimed damages in this way:

"Alternatively the plaintiffs reasonably incurred costs and became liable for costs of the Dutch government in disputing the claim of the Dutch government as to liability for breach of contract, have lost interest as afore-said, and were liable to pay to the Dutch government damages in respect of breach of contract, as follows . . ."

D Then there are set out heads of damage which will have to be referred to more in detail later. The first, head A, is in respect of quantities of Permasec which were not sold, and the second, head B, in respect of damage sustained by the Dutch government in respect of the material which was sold and used and which dripped.

E The learned judge found for the plaintiffs on the issue of liability, and on that there is no appeal. He rejected the £43,000 as the measure of what the plaintiffs were entitled to claim from the defendants, although it was admitted that they could not recover more, apart from the costs. The costs were not disputed, and that item, therefore, passes out of the picture. He awarded £6,750 in respect of Permasec unsold (head A), and he directed an inquiry as to head B, the loss sustained by the Dutch government in respect of the 1,100 tons which were sold, subject to certain limitations. From that judgment the plaintiffs appeal. Counsel for the plaintiffs submits that £43,000 was a reasonable settlement and is the measure. On the question whether it was a reasonable sum, he submits that the learned judge was wrong in assessing only £6,750 for head A. He also submits that the limitations imposed on the inquiry (which would, it will be seen, limit the amount of the damages recoverable under that head) were also wrong.

F G If, of course, we came to the conclusion, as the learned judge did, that the £43,000 was not the measure and was to be disregarded, the arguments to which I have just referred would be equally applicable. The third parties were in a somewhat different position, and they do not appeal.

H The learned judge found that Permasec had three defects. The first I have referred to, *viz.*, that in warm weather it crept and dripped, and this (in the learned judge's words) prevented it being properly described as an efficient adhesive. Secondly, he found that this material, when spread, had to be left an unduly long time before it became what is called "tacky." It appears clearly from the evidence that any adhesive applied cold or fairly cold has to be left a little time for preliminary drying off until it becomes sticky, and then you put the felt on, but, for reasons which emerge in the evidence, it becomes unsuitable if it has to be left too long—not, I think, necessarily unsuitable for every type of operation, but, as one of the witnesses said, when building is going on, there

is usually a lot of dust about, and, if it has to be left too long, the dust gets on it and renders it useless. Ten to fifteen minutes might be all right, but this material, to get properly "tacky," had to be left thirty to sixty minutes. The third defect he found was that, on the description on the sale, it should have been suitable to be used with what is called bituminous felt. He found it was not suitable for that, being made of pitch.

[HIS LORDSHIP referred to correspondence and other evidence, and continued:] The first problem is, in my opinion, whether the learned judge was right in rejecting the £43,000 altogether, treating it as irrelevant. I will read what he said ([1950] 2 All E.R. 865):

"Accordingly, I rule that the plaintiffs cannot prove their damages by reference to the settlement which they made with the Dutch government and that evidence relating to such a settlement is irrelevant and inadmissible. I must make it clear that no criticism has been made of the counsel and solicitors who unanimously advised the settlement, nor of the wisdom of their advice."

The plaintiffs' submission was that, if one can show that a settlement has been made under competent advice and one submits the advisers to cross-examination, that is enough. I do not accept that view, as will appear, but counsel for the plaintiffs put it in another way, and counsel for the defendants agreed that it was put in this way below. He said it was enough to call evidence which, though it may not strictly prove every item of your damage, shows that this was a reasonable settlement, having regard not to the wisdom of the advisers, but having regard to the evidence as called. There is no suggestion that the defendants did not contemplate the sale by the plaintiffs to the Dutch government, and the defendants do not dispute that the damages are to be assessed on the basis of liability to the Dutch government, subject, if necessary, to its being shown that some different term had been introduced or something of that sort. The only question, therefore, at the moment is: What is the effect of a settlement in these circumstances?

We were referred to the well-known case of *Hammond & Co. v. Bussey* (1). In that case the plaintiffs had been sued by a sub-vendee, and the defendant insisted, as here, that the goods were according to contract, and he refused, as it were, to take part in or be bound by the proceedings. The plaintiffs were sued by the sub-vendee, and damages were awarded against them. The defendant admitted his liability to pay those damages, so the case does not throw any light on what would have been the position if he had not. The argument took place as to the costs, and the court held that the plaintiffs could recover the costs they had had to pay in the proceedings. BOWEN, L.J., in his judgment, said (20 Q.B.D. 94):

"The defendant knew for what purpose the plaintiffs were purchasing the coal, *viz.*, to re-sell it to the owners of steamers, and he must have known as a business man what damages might naturally result to the sub-vendees if it was not reasonably fit for the purposes of steamships, and therefore could not be used by the sub-vendees for such purposes. He may therefore be reasonably supposed to have contemplated, if the warranty were broken, that claims for damages would be made against the plaintiffs by the sub-vendees, and also, if he thought about it, he must have known that the plaintiffs, if such claims were made, would be in a position of difficulty: on the one side would be the sub-vendees who had tried the coal insisting that it was bad and incapable of being used as steam-coal, and that they had in consequence sustained damage; on the other side would be the defendant who knew more about the origin of the coal than the plaintiffs did, and who might refuse to be bound by any action they might take with regard to the sub-vendees' claims and assert that such action was unreasonable. What under such circumstances might the defendant be reasonably supposed to

contemplate in the event of such a contingency happening? Obviously that the plaintiffs would come to their vendor in order to know how to deal with the claim, and that it would depend very much on what he said what course they would take, and whether they would defend the action or not. If the vendor said that the assertions of the sub-vendees with regard to the inferior quality of the coal were unfounded, the plaintiffs would naturally attach much weight to that; on the other hand, if he said that he had been imposed on by his vendors, naturally they would submit to the claims of their sub-vendees. What further could the defendant reasonably be supposed to contemplate? Why that, if under such circumstances he told the plaintiffs that, if they did not defend the action, it would be at their own responsibility and risk, and that the coal he sent was according to contract, the plaintiffs' only reasonable course would be to fight the action in order to thrash the question out; and then, of course, if the plaintiffs succeeded in their defence, there would be no occasion for their making any claim over; but if they failed the defendant must in reason be taken to have contemplated that they would have to pay damages and costs. All these matters I have mentioned seem to me to be matters that may reasonably be supposed to have been within the contemplation of the parties at the time they made the contract, and therefore the question whether the case comes within the second branch of the rule in *Hadley v. Baxendale* (2) seems to me to be answered, unless the argument of the defendant's counsel with regard to the construction of that rule is to be accepted."

Later in his judgment, he rejects the argument of the defendant's counsel.

We were also referred to *Grébert-Borgnis v. Nugent* (3). That was a similar case of a sub-vendee. The sub-vendee had been sued in a French court and was held liable to pay £28. The court held that the £28 which the French court had given might be treated as not an unreasonable sum at which such damages might be assessed. It was in that case that BOWEN, L.J., stated what was accepted by the learned judge in this case, that where you have an award or a judgment or, as here, a settlement, that is the limit of what the plaintiff can claim against the defendant. BOWEN, L.J., said (15 Q.B.D. 93): "The limit of the liability must clearly be what the purchaser had to pay." Dealing with the £28, BOWEN, L.J., said (*ibid.*, 94):

"Now here, looking to the circumstances, can it be said that £28 was an unreasonable sum to give when it was quite certain there would be some liability as a matter of business and the plaintiff actually did suffer £28 damage?"

BOWEN, L.J., I think, clearly did not treat the fact that it was a judgment of the court as concluding the matter. It must be considered whether it was a reasonable sum.

Here, of course, we are dealing with a settlement, and counsel for the defendants drew our attention to *Kiddle v. Lovett* (4). There a platform put up for the plaintiffs by the defendant, to enable the plaintiffs to paint a house, fell and hurt a painter in the employment of the plaintiffs. The injured man brought an action under the Employers' Liability Act, 1880, against the plaintiffs for injuries sustained in consequence of the defective state of the boat-staging. The plaintiffs settled the action by paying him £125. They then sued the defendant for breach of his contract, and it was held

"that the defendant was liable under the contract; but that, inasmuch as the plaintiffs had employed a competent contractor to put up the boat-staging, and there was, on the facts, no evidence of negligence by the plaintiffs, they were not liable to their servant for the injury he had sustained, and therefore the money which they had paid to settle his action was not recoverable as damages from the defendant for his breach of contract."

That, of course, turned on the Employers' Liability Act, 1880, and it shows—and counsel for the plaintiffs did not dispute this—that it is open to the defendant to show: "You were not liable to pay anything, and, therefore, you cannot say that what you did pay is a sum you can recover against me."

Counsel for the plaintiffs also relied on *Fisher v. Val de Travers Asphalte Co.* (5). I will read the headnote (45 L.J.Q.B. 479):

"In consequence of the defective state of some asphalte pavement belonging to a tramway company, H., while driving over it in his cart, was thrown out and injured, and forthwith made a claim for compensation on the tramway company. The tramway company had made a contract with the plaintiffs, by which the plaintiffs were to lay down the asphalte and keep the same in repair for one year (at the time of the accident unexpired), and the plaintiffs had entered into a similar contract with the defendants. On receiving notice of H.'s claim the tramway company gave notice to the plaintiffs to meet it, and the plaintiffs handed on the notice to the defendants. The defendants refused to meet the claim, and the plaintiffs were compelled to undertake the case themselves, and forthwith entered into negotiations with H., which eventually resulted in a compromise of the claim for a certain sum paid to H. by way of compensation, with costs of settlement. In an action by the plaintiffs over against the defendants to recover the sum paid by way of compromise to H. and the costs incidental thereto, the jury found, that the compromise was reasonable and that the costs were reasonably incurred."

It was held, and this was the point that was overruled in *Hammond & Co. v. Bussey* (1), that the costs were not in law recoverable. The action was tried by LORD COLERIDGE, C.J., and a special jury, and the learned judge left two questions to the jury, which, with respect, really are only one question, but the jury held

"that the plaintiffs had acted reasonably in compromising Hicks's claim, and that the sum paid as compensation was reasonable."

I think the effective question left was: Was the compensation reasonable? I think that indicates that there must have been at any rate some evidence (as, for instance, the nature of the injuries and so on) on which the jury could come to a conclusion on that point.

I think the learned judge, with respect, was wrong in regarding the settlement as wholly irrelevant. I think, though it is not conclusive, the fact that it is admittedly an upper limit would lead one to the conclusion that, if reasonable, it should be taken as the measure. The result of the learned judge's conclusion is that a plaintiff must prove his damages strictly and must show that they equal or exceed £43,000. If that involves, as it would here, a very complicated and expensive inquiry, still that has got to be done. The law, in my opinion, encourages reasonable settlements, particularly where, as here, strict proof would be a very expensive matter. The question, in my opinion, is: What evidence is necessary to establish reasonableness? I think it is relevant to prove that the settlement was made under legal advice. The client himself could do that, but I do not think that the advisers would normally be relevant or admissible witnesses. I say "normally," for it may be in special cases that they might be. The plaintiff must, I think, lead evidence, which can be cross-examined to, as to facts which the witnesses themselves prove and as to what would probably be proved if, as here, the arbitration had proceeded, so that the court can come to a conclusion whether the sum paid was reasonable. The defendant may, by cross-examination, as was done here, seek to show that it was not reasonable, or call evidence which leads to the same conclusion. He might in some cases show that some vital matter had been overlooked. In the present case, of course, counsel for the defendants relies, rightly, on the learned judge's finding with

regard to the first head of damage, on the fact that the evidence showed that too much was bought, and so on, but if there is evidence at the end of the matter of the kind which I have indicated, on which the court can come to a conclusion that this was a reasonable settlement in the circumstances, then I think it should be the measure. Parties, as BOWEN, L.J., said in *Hammond & Co. v. Bussey* (1) (20 Q.B.D. 94), have been held to contemplate litigation in the sort of circumstances which have arisen here. It would, I think, be unfortunate if they were not also held to contemplate reasonable settlements in the type of circumstances which have arisen here.

If that is right, then I pass to the next question, which was: Do the plaintiffs show that, on the evidence, this was a reasonable settlement? That makes it necessary to examine the learned judge's conclusion on the two points, because I think that if the learned judge was right on the first point, *viz.*, that only £6,750 was due in respect of the first head of damage, the unsold 1,400 tons, it might be difficult for the plaintiffs to satisfy me, at any rate, that the settlement was reasonable. With regard to those 1,400 tons, fifty were sold at about £11 per ton, and 1,350 were sold at £6 per ton in October, 1946. The learned judge referred to, and the defendants relied on, a number of statements in the inter-departmental communications with regard to the scarcity or plentifulness of the Dutch mastic and, what is very much the same thing put in another way, as to the view that too much Permasec had been bought. [His LORDSHIP considered the evidence relating to the reasonableness of the settlement. He came to the conclusion that the plaintiffs would have been fortunate if they had succeeded in keeping a claim under head A to £24,600, and he then continued:] I now pass to head B. The learned judge directed an inquiry, but he put certain limitations on it. Some limitations, of course, were accepted by everybody. The Dutch government would have had to show, in respect of a claim against them, that it had arisen from a defect covered by their contract with the plaintiffs. If they sold the material on different terms, more onerous terms, of course they could not make the plaintiffs responsible. The plaintiffs, as against the defendants, would have to show it was similarly covered by their contract. I am bound to say that the nature of the damage due to dripping, *prima facie* at any rate, would be a claim that could be passed on, because it goes, as the judge found, to the description of the article as an efficient adhesive.

The most important limitation is based on the principle to which the learned judge refers when he says ([1950] 2 All E.R. 868):

"It is, I think, clear that in this sort of case a plaintiff cannot pass on his liability to an outside party for bad quality if, before the sale to the outside party, he had notice of the defect in quality . . ."

As a principle, I think that would be accepted. Suppose, for example, the Dutch government had been told, before they sold any Permasec, that it would creep in hot weather and come dripping down through any holes that there might be, and they had still sold it for building, they could have claimed, of course, for the difference in value, if they paid for it, but they could not claim in respect of claims against them due to its creeping. The learned judge deals with the facts which he thinks lead to the limitation I am considering where he says:

"The defendants say that, if not at the time of the contract, at any rate by September, 1945, the Dutch government knew or ought to have known of the defects in the compound and should have taken action accordingly."

[His LORDSHIP considered the relevant facts and evidence and continued:] My conclusion with regard to this is that I do not think the defendants succeed in establishing that the Dutch government knew of anything with regard to this material which ought to have prevented them selling the quantities they did sell during the period before the creeping occurred, and it is not suggested that they sold any afterwards except the 1,350 tons at the £6 and another sale when

the defects were well-known to everybody. That limitation, therefore, to my mind, cannot stand.

[HIS LORDSHIP considered the specific claims made against the Dutch government by persons who had used Permasec, or on whose houses the material had been used. The claims, which were mainly by contractors who understood the technicalities of costing, totalled (discounting some of them and disregarding others) some £32,000, and HIS LORDSHIP continued:] In these circumstances, having regard to the evidence here, I have come to the conclusion that this was a reasonable settlement. In my opinion, for the reasons which I have tried to give, the £43,000 is the measure of the defendants' liability to the plaintiffs, and there must be judgment for that amount, with the items of costs which are not disputed and with some arrangement as to interest about which we can be told.

SINGLETON, L.J.: This is a very complicated dispute which arises out of two contracts for the sale of the material known as Permasec. At the time that the contracts were entered into, the defendants were informed by the plaintiffs of their negotiations with the Royal Netherlands government and of the purpose for which the material was required. The learned judge, in the course of his judgment, said ([1950] 2 All E.R. 863): "It is not disputed that the defendant ought to have foreseen a claim by the Dutch government . . ." That was, of course, in the event of a breach of contract. The facts are stated in the learned judge's judgment as follows (*ibid.*, 861):

"Deliveries began in April, 1945, f.a.s. Miller's Wharf on the Thames. The Dutch government transported the material to Holland and re-sold it to numerous Dutch roofing contractors. The results of the application of Permasec were in many cases unsatisfactory. Most of it was applied in the winter of 1945, and in the warm spring of April, 1946, it began to drip and run—'creep' is the term used in the trade. Outside the buildings it dripped down from the eaves, and it found its way through the roofs and dripped inside the buildings too. The roofs had to be repaired or renewed, and claims were made on the Dutch government. In May, 1946, the government asked the plaintiffs and the defendants to take back 1,400 tons of the stuff which was unused, but they would not."

The result of this was a very large claim by the Royal Netherlands government against the plaintiffs. That government would not submit to the jurisdiction of the courts of this country, but they were willing to submit and did submit the dispute to arbitration. If they had sued in this country, the present plaintiffs would have been able to bring in the defendants, Permanite, Ltd., as third parties. The defendants were not willing to be bound in any sense by the arbitration. They disputed liability throughout. The arbitrator was to decide, in the first place, the question of liability between the Royal Netherlands government and the plaintiffs. Though there was much information as to the measure of damages in the event of liability being established, it is by no means clear that all the material was available. The present plaintiffs settled the dispute with the Dutch government on the basis of a payment or an allowance of £43,000 and costs. In due course the plaintiffs claimed against the defendants. The defendants contested the claim. **DEVLIN, J.**, gave judgment in favour of the plaintiffs, but he did not accept the plaintiffs' contention that the proper measure of damages was the sum of £43,000, the settlement figure. In this court the defendants have not sought to dispute liability, and we have been concerned almost wholly with the plaintiffs' appeal that the damages awarded by the learned judge should be increased.

[HIS LORDSHIP read para. 12 (d) of the statement of claim, referred to para. 12 (g), and continued:] The plaintiffs said the damages should be the sum of £43,000, the amount of the settlement, which, they claimed, was reasonable. They did not ask for more. They must prove their damage. It is not enough for

them to say: "We were advised to settle for £43,000 and we did so, and we now claim that sum." Before the court can award a sum as damages, there must be evidence on which the court can act. If the evidence they call satisfies the judge or a jury that the settlement was a reasonable one, the damages awarded will be the amount of the settlement and the costs reasonably incurred. I do not think that any good purpose is served by calling counsel who advised the settlement to say that he did so advise, even if the evidence is admissible. It could only be followed by questions as to why he so advised, and that would be asking him to do the work of the judge. Moreover, the duty of the judge at the trial is to determine the damages, and the facts proved before him might be quite different from those known to counsel at the time of his advice to settle for so much. The trial judge must make up his own mind on the facts he finds proved before him. At the same time, I am far from saying that the settlement ought to be disregarded. No one can think that a person or a company will agree to pay £43,000 damages lightly. It is a matter for consideration that the settlement was arrived at under advice, the more so as the party settling may be quite uncertain whether he can recover anything against someone else. If, on the evidence, the judge is satisfied that the damages would be somewhere around the figure at which the plaintiffs have settled, he will be justified in awarding the settlement figure. I do not consider that it is part of his duty to examine every item in those circumstances. The plaintiffs put forward their claim and call evidence to establish it. The defendants have an opportunity of cross-examining the plaintiffs' witnesses and of calling evidence themselves. The plaintiffs must establish a *prima facie* case that the settlement was a reasonable one. If the defendants fail to shake that case, the amount of the settlement can properly be awarded as damages. The position is much the same, though, perhaps, not quite so strong, as in a case in which damages have been assessed in a suit between other parties involving the same facts. The judgment is not binding, but the court will not lightly disregard it in the absence of fresh evidence or new factors.

In this case, there was before DEVLIN, J., some evidence which may not have been available at the time of the settlement. I refer to the answers of Mr. Hijdelaar which show that the Royal Netherlands government had over-bought to some extent. It may be that this was before the plaintiffs' advisers at the time of the arbitration, for it was clearly indicated in the documents. Nonetheless, the answers did provide material on which the defendants were able to base an argument that the damages were not so high as the plaintiffs claimed. After full examination of all the evidence, I do not think it was sufficient to displace the case which the plaintiffs had set up, that this was a reasonable settlement. The question is not whether the plaintiffs acted reasonably in settling the claim, but whether the settlement was a reasonable one, and, in considering it, the court is entitled to bear in mind the fact that costs would grow every day the litigation was continued. That is one reason for saying that it is sufficient for the purpose of the plaintiffs if they satisfy the judge that a figure in the neighbourhood of the settlement would have been awarded as damages.

This view is supported by the decision in the case of *Fisher v. Val de Travers Asphalte Co.* (5), to which my Lord referred and in which the second of the questions left by the learned judge to the jury was whether the sum paid as compensation was reasonable and the jury found that it was. In that case, in the course of the argument, BRETT, J., asked counsel (45 L.J.Q.B. 480):

"Supposing Hicks had claimed £1,000, which, as the damages really amounted to £110, we now know would be excessive, and the plaintiffs had paid, could they have recovered that from the defendants?"

Counsel gave the answer: "No, because the plaintiffs would have to show they paid the proper compensation." That I believe to be the test. It is interesting

to notice that, according to the report of that case in the LAW TIMES REPORTS, in the judgment of BRETT, J., there appeared this passage (35 L.T. 368):

"As to the damages themselves, we refused to grant a rule to the defendants to enable them to raise the question as to their liability to repay them to the plaintiffs, and the Court of Appeal have held that we were right in so refusing."

It, therefore, appears that the same question was considered by the Court of Appeal in that case.

In *Grébert-Borgnis v. Nugent* (3), DENMAN, J., the trial judge,

"having found as a fact the contract and breach and that the defendants knew that the contract was to enable the plaintiff to fulfil his contract with Messrs. Seppe as above stated, and that the profit which the plaintiff lost by not fulfilling his contract with Messrs. Seppe was £34, held that the plaintiff was entitled to recover not only £34, but also £28, which, on the principle laid down in *Elbinger Act. v. Armstrong* (6), he assessed as a reasonable sum by way of damages for the breach of contract by the defendants. The learned judge therefore gave judgment for the plaintiff for £62."

The Court of Appeal held that DENMAN, J., had assessed the damages on the right principle. He had evidence before him and he came to the conclusion that the amount awarded in the French court of £28 was a reasonable sum by way of damages.

In this arbitration there were two heads of damages put forward by the Royal Netherlands government. They were, under head A, £49,300 in respect of the 1,400 tons left on the hands of the Dutch government, and, under head B, something over £52,000 in respect of claims for damages received by the Royal Netherlands government through the material being faulty. Several large items under head B seem to me to have been clearly established by the evidence given before the learned judge. (I should add that further large claims were received after the date of the arbitration and after the settlement). I do not know whether head A or head B is the more important. I regard them both as highly important, and, having for a number of days considered the evidence, I am of opinion that the plaintiffs were fortunate in being able to settle with the Royal Netherlands government at £43,000. I do not think it is necessary for the plaintiffs to show that there was a liability of at least £43,000, though I think there was. I am satisfied that this was not only a reasonable settlement, but a good one from the point of view of the plaintiffs in this action, and I think the judge ought to have so held. The judge awarded a very much smaller sum than I should have done in respect of the 1,400 tons left on the hands of the Royal Netherlands government, and he directed an inquiry in regard to the measure of damages recoverable for the use of the faulty material, head B. The cost of such an inquiry must be extraordinarily high, involving the employment of Dutch lawyers and others, and prolonged investigations in Holland. It would be necessary, if there was a doubt as to the wisdom and righteousness of the settlement. I am happy to think it can be avoided. The plaintiffs have satisfied me that the settlement was proper in every sense. The damages could not have been less. The plaintiffs are entitled to judgment against the defendants for the amount of the settlement, and there is no necessity for the inquiry which the learned judge directed. I agree that the appeal of the plaintiffs should be allowed.

BIRKETT, L.J.: I agree with the judgments which have been delivered.

Appeal allowed.

Solicitors: *Carpenters* (for the plaintiffs); *Allen & Overy* (for the defendants).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

Re PEROWNE (deceased). PEROWNE AND ANOTHER v. MOSS AND OTHERS.

[CHANCERY DIVISION (Harman, J.), May 4, 1951.]

Power of Appointment—"For the benefit of my family"—No gift over in default of appointment—Implication of gift to members of class—Power in nature of a trust.

By her will (which was home-drawn), dated Apr. 5, 1944, a testatrix, who died on Feb. 19, 1945, gave and bequeathed "unto my dear husband. All my real and personal estate of whatever nature for his absolute benefit for life. Knowing that he will make arrangements for the disposal of my estate, according to my wishes, for the benefit of my family after his death . . . Should my husband predecease me, I wish all the clauses of his will, and the desires expressed, to stand." The testatrix's husband survived her, dying on Nov. 16, 1948, and by his will, dated Feb. 12, 1946, purported to appoint her estate (in the events which happened) to the widows of deceased brothers of the testatrix. The court having held that the purported appointment was excessive and void, on the question as to the devolution of the testatrix's estate,

HELD: notwithstanding the absence of a gift over in default of the husband's exercise of his power of appointment, no trust in favour of the class described as "my family" could be implied because the words of the will were not imperative and did not otherwise indicate a clear intention what class should take, and, therefore, the court would not exercise the power and the property devolved on the intestacy of the testatrix.

Re Weekes' Settlement ([1897] 1 Ch. 289) and *Re Combe* ([1925] Ch. 210), applied.

Cruwys v. Colman (1804) (9 Ves. 319), distinguished.

AS TO POWERS IN THE NATURE OF A TRUST, see HALSBURY, Hailsham Edn., Vol. 25, pp. 596-600, paras. 1052-1056; and FOR CASES, see DIGEST, Vol. 37, pp. 523-532, Nos. 1135-1233.

Cases referred to:

- (1) *Grant v. Lynam*, (1828), 4 Russ. 292; 6 L.J.O.S. Ch. 129; 38 E.R. 815; 44 Digest 888, 7450.
- (2) *Harding v. Glyn*, (1739), 1 Atk. 469; 26 E.R. 299; 44 Digest 890, 7477.
- (3) *Cruwys v. Colman*, (1804), 9 Ves. 319; 32 E.R. 626; 44 Digest 888, 7449.
- (4) *Re Weekes' Settlement*, [1897] 1 Ch. 289; 66 L.J.Ch. 179; 76 L.T. 112; 44 Digest 530, 3468.
- (5) *Re Combe*, [1925] Ch. 210; 94 L.J.Ch. 267; *sub nom. Re Coombe*, 133 L.T. 473; 37 Digest 527, 1181.
- (6) *Re Hughes*, [1921] 2 Ch. 208; 91 L.J.Ch. 10; 127 L.T. 117; 44 Digest 785, 6421.
- (7) *Snow v. Teed*, (1870), L.R. 9 Eq. 622; 39 L.J.Ch. 420; *sub nom. Sum v. Teed*, 23 L.T. 303; 44 Digest 888, 7455.
- (8) *Re Llewellyn's Settlement*, [1921] 2 Ch. 281; 90 L.J.Ch. 493; 126 L.T. 285; 37 Digest 531, 1228.

ADJOURNED SUMMONS to determine, on the true construction of the will of Florence Ada Perowne, (i) whether her husband was entitled to an absolute interest in the whole of her estate or was entitled during his life only; (ii) if the husband was entitled only to a life interest, whether the will made any disposition beyond that life estate; (iii) if the husband was by the will given a power of appointment, whether he had validly exercised it by his will; and (iv) if the said power had not been validly exercised, whether there should be implied in the will of the testatrix a gift to any and what class of persons, or whether the property devolved on the intestacy of the testatrix.

HARMAN, J., held that (i) the husband was entitled to a life interest only; (ii) the husband was entitled to a power to appoint the property among the family of the testatrix; and (iii) the purported exercise thereof by the husband's will was excessive and void. On question (iv), on which the case is reported.

G. D. Johnston for the plaintiffs, the executors of the husband and (by representation) of the testatrix.

Winterbotham for the first and second defendants, personal representatives of a deceased brother of the testatrix.

D. A. Ziegler for the third defendant, a nephew of the testatrix.

Bland for the fifth and seventh defendants, a nephew and a sister-in-law of the testatrix.

J. L. Arnold for the sixth defendant, a nephew of the testatrix.

The fourth defendant died before the summons was heard.

HARMAN, J.: I have now to decide whether there is a gift impliedly to some class in default of appointment or merely a power to the husband of the testatrix not coupled with a trust. If the latter, he had no duty to exercise it and the court has no duty to exercise it for him, and the property will, therefore, go on the intestacy of the testatrix. The words are:

"Knowing that he will make arrangements for the disposal of my estate, according to my wishes, for the benefit of my family after his death."

The object of the wish or the knowledge or the trust is "my family after his death." One must, therefore, first inquire what may have been meant by that.

"Family," when regarded as an object of a power, means anybody with blood relationship and is not confined to those nearest of kin or the statutory next of kin of the testator. That appears from *Grant v. Lynam* (1), where the side-note reads:

"Where a donor recommends or directs, that the donee, at her death, shall give his personal property to such of his family or such of his relations as she shall think fit, the donee has a power to select the objects of her bounty amongst his relations or family, though not within the degree of next of kin. But if the donee does not exercise the power, the word 'relations,' or the word 'family,' will be construed 'next of kin,' unless the special expressions of the donee have a different import."

SIR JOHN LEACH, M.R., says (4 Russ. 296):

"Upon the other point, whether the gift to John Grant [a person in whose favour the donee of the power purported to exercise it] is good he not being one of the testator's next of kin, the leading case is *Harding v. Glyn* (2), imperfectly reported in *Atkyns*, but correctly referred to in other cases . . ."

Then he deals with *Harding v. Glyn* (2), where there was a gift to one Henry Swindale. As reported, that case did not deal with the question whether the gift of a house to Henry Swindale was good or not, but SIR JOHN LEACH, M.R., by sending for the record, discovered that the gift to Henry Swindale was established, and he concludes (*ibid.*, 297):

"The principle, therefore, of that case is, that, where the author of the power uses the term 'relations,' and the donee does not exercise the power, there the court will adopt the statute of distributions as a convenient rule of construction, and will give the property to the next of kin; but that the donee, who exercises the power, has a right of selection among the relations of the donor, although not within the degree of next of kin."

Therefore, the donee of the power (the husband) in the present case had a wider class to select from than the statutory next of kin of the donor of the power. It would appear that, if there is to be an implication, it must be one in favour, not of the class among which the donee of the power could scatter his bounty, but of the

narrower class which the court would choose, because otherwise the gift would be void for uncertainty. It seems to me that the question can be shortly stated: Does the power here given to the husband import a trust, or does it not? If it does, then there appears to be conclusive authority for the view that the court will exercise the power in favour of the narrower class in *Cruwys v. Colman* (3). There, SIR WILLIAM GRANT, M.R., came to the conclusion that, the lady who was the donee of the power having refused to exercise it in favour of her family, the court would exercise it in favour of her next of kin, but he had no difficulty there in finding that there was a trust. He said (9 Ves. 324):

"But all that Bridget [the donee of the power] has said, is, that she does not think fit to exercise her power. Therefore the trust remains unexecuted; . . . that is, in favour of the next of kin . . ."

If, therefore, this power be one coupled with a trust, that case teaches me how to decide, but the question is whether there is such a trust, and that depends, I think, on *Re Weekes' Settlement* (4) and *Re Combe* (5). Those cases are both to the same effect. In FARWELL ON POWERS, 3rd ed. (published in 1916), p. 529, the learned editor, SIR CHRISTOPHER FARWELL, expressed some disapproval of *Re Weekes* (4), and was of the opinion that the rule of implying a gift to a class in default of appointment was inflexible. SIR ROBERT ROMER did not think so in *Re Weekes* (4), and TOMLIN, J., when he came to decide *Re Combe* (5), agreed with ROMER, J. I must take it, and I think it has been accepted by the profession since, that the law is that there is no rigid rule, and FARWELL ON POWERS puts it too high. In *Re Combe* (5) TOMLIN, J., says ([1925] Ch. 216):

"The matter then stands really in this way. Am I to approach this will governed by an inflexible and artificial rule of construction to the effect that where I find a power of appointment to a class not followed by any gift in default of appointment, I am bound to imply a gift to that class in default of the exercise of the power? Or ought I to approach this will for the purpose of construction in the same spirit as I approach any other will and endeavour to construe it and arrive at the testator's meaning by examining the words expressly used, only implying those things which are necessarily and reasonably to be implied?"

Then he says that FARWELL ON POWERS would have him take one view and *Re Weekes* (4) would have him take the other. He then discusses *Re Hughes* (6), a decision of SARGANT, J., and comes to the conclusion that that does not quarrel with *Re Weekes* (4). Finally he says (*ibid.*, 218):

"I therefore propose, in construing this will, to govern myself by the principle which has been enunciated by ROMER, J."

That principle was explained by ROMER, J., in *Re Weekes' Settlement* (4) as follows ([1897] 1 Ch. 292):

"The authorities do not show, in my opinion, that there is a hard and fast rule that a gift to A for life with a power to A to appoint among a class and nothing more must, if there is no gift over in the will, be held a gift by implication to the class in default of the power being exercised. In my opinion the cases show . . . that you must find in the will an indication that the testatrix did intend the class or some of the class to take—intended in fact that the power should be regarded in the nature of a trust—only a power of selection being given, as, for example, a gift to A for life with a gift over to such of a class as A shall appoint."

Where there is in a marriage settlement a gift to such of the children as A shall appoint, or in trust for such members of a class as he shall by writing indicate, it is very easy to assume a gift over in default, because that is the natural thing to suppose, but where the class is large and indefinite it seems to me much more difficult to suppose it. It is true that SIR WILLIAM GRANT did hold that there was

a trust in *Cruwys v. Colman* (3), but in that case there were very imperative words, mandatory words, in the will. They were "it is my absolute desire." In *Re Combe* (5) there was a gift over which was initially absolute, but which was cut down in favour of relations of the whole blood, whatever that might have meant. "Relations" is not much more indefinite than "family," which may in fact mean relations of the whole blood or, indeed in certain circumstances, may, apparently, mean persons not related by blood. It seems to me, therefore, that I must find very clear words to imply a trust here, because it follows from the artificial rule that the court has had to adopt that the persons in whose favour the trust, if any, is to be implied are not the persons among whom the power of selection existed. That alone makes it very difficult to import a trust. The testatrix says:

"Knowing that he will make arrangements for the disposal of my estate according to my wishes . . ."

One would guess that she knew that her husband knew what her wishes were and, for some reason or other, she did not wish to dispose of her estate herself. She hoped he would do it, and then she says "for the benefit of my family." I cannot spell a trust out of that. It seems to me to constitute a mere power to distribute among a large and indefinite class of people, different from those in whose favour an implied trust would operate. I do not feel able to imply a trust, and so I come to the conclusion that, the husband having failed to execute the power, the property passed on her intestacy.

Order accordingly.

Solicitors: *Stunt & Son* (for the plaintiffs); *Austin J. Wright*, agent for *Lawson, Lewis & Bairstow*, Eastbourne (for the first and second defendants); *Wray, Smith, Paterson & Co.* (for the third defendant); *Nutt & Oliver* (for the fifth and seventh defendants); *Rooks & Co.* (for the sixth defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

VINEY v. VINEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Havers, J.), May 24, 1951.]

Divorce—Condonation—Condonation by husband—Adultery of wife—Resumption of sexual intercourse—No fraud on part of the wife.

In 1947 the wife, having obtained a maintenance order against the husband on the ground of his wilful neglect to maintain her, left him, taking with her the children of the marriage, but a few months later the order was discharged on the ground of the wife's adultery. In March, 1950, the wife returned to the husband's house because she had nowhere to go and on several occasions the husband had sexual intercourse with her. In October, 1950, the husband turned the wife out of the house. The wife then took out a summons for desertion.

HELD: as the husband, with full knowledge of the wife's adultery and without any fraud on her part, had sexual intercourse with her, he could not be heard to say that he had not condoned her adultery and reinstated her as his wife; he had turned her out of the house in October, 1950; and, therefore, there was no answer to her charge of desertion.

Henderson v. Henderson and Crellin ([1944] 1 All E.R. 44), followed.

Whitney v. Whitney ([1951] 1 All E.R. 301), disapproved.

Mummery v. Mummery ([1942] 1 All E.R. 553), explained.

AS TO CONDONATION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 679-682, paras. 1004-1009; and FOR CASES, see DIGEST, Vol. 27, pp. 339, 340, Nos. 3184-3203, and Digest Supps.

Cases referred to:

- (1) *Whitney v. Whitney*, [1951] 1 All E.R. 301; [1951] P. 250; 115 J.P. 71.
- (2) *Mummery v. Mummery*, [1942] 1 All E.R. 553; [1942] P. 107; 111 L.J.P. 58; 166 L.T. 343; 2nd Digest Supp.
- (3) *Bartram v. Bartram*, [1949] 2 All E.R. 270; [1950] P. 1; [1949] L.J.R. 1679; 113 J.P. 422; 2nd Digest Supp.
- (4) *Henderson v. Henderson and Crellin*, [1944] 1 All E.R. 44; [1944] A.C. 49; 113 L.J.P. 1; 170 L.T. 84; 2nd Digest Supp.
- (5) *Abercrombie v. Abercrombie*, [1943] 2 All E.R. 465; 169 L.T. 340; 107 J.P. 200; 2nd Digest Supp.

APPEAL by the wife against an order of a metropolitan magistrate, made on Dec. 5, 1950, dismissing her summons against her husband for a maintenance order on the ground of his desertion.

Empson for the wife.

Hollins for the husband.

LORD MERRIMAN, P.: This is a wife's appeal from the dismissal by a metropolitan magistrate of her summons on the ground of the husband's desertion. In my opinion, this case raises a question of some importance, and it will be necessary to consider the bearing on it of certain authorities. None of these authorities, nor, indeed, any authority, was brought to the attention of the learned magistrate. Before I deal with the law it is necessary to give an outline of the facts. The magistrate plainly accepted the version of the husband in preference to that of the wife, and I propose to deal with this case on the footing that where there is any conflict of evidence the husband's version is, therefore, to be preferred.

The parties were married in June, 1945. They had two children, now aged six and four respectively, and a guardianship order had been made in February, 1950, in favour of the husband. In July, 1947, the wife obtained a maintenance order on the ground of the husband's wilful neglect to provide reasonable maintenance. She left her husband and went to live with her mother, taking the children with her, but on Nov. 28, 1947, her order was discharged on the ground of her adultery. There was no appeal from that discharge. On a date in 1950, about which there is some controversy, but which I will assume is correctly stated by the husband as being Mar. 30, she returned to her husband's roof. According to her own account she meant to effect a reconciliation, but the magistrate accepted the version of the husband that she never really tried, so to speak, to pull her weight, and that it was his efforts at reconciliation which were unavailing.

I come now to the crucial point in the case. On more than one occasion—certainly, I think, not less than three times—the husband had sexual intercourse with his wife. [HIS LORDSHIP reviewed the evidence, said that it was completely destructive of any suggestion that the wife induced the husband to resume sexual relations with her by false pretences, and continued:] Now I come to a fact which is vital to the wife's case, and about which there is no dispute. On Oct. 27, after this uneasy attempt at a fresh start, the husband turned the wife out. He says that he did so because “she was coming and going as she pleased, and I could not stand it any longer.” The position, therefore, is this. It is quite clear that when the wife returned to the husband's home she was completely at his mercy. He says that he received her out of pity, because she had nowhere to go, and I assume that to be the case, and it is clear that if she came, so to speak, merely as a lodger or a refugee, the husband's position, established by the revocation of the wife's order of 1947 on the ground of her subsequent adultery,

would remain completely unimpaired. That, in effect, is what the magistrate found. He said:

"I was quite satisfied that there had been no resumption of cohabitation between the parties. I believe that the husband took the wife into his home because she was destitute and had nowhere to go. His housekeeper endeavoured to effect a reconciliation between them and the husband co-operated and had sexual intercourse with her for this purpose. The attempt failed by reason of the conduct of his wife. I was satisfied that she was, during the period she resided there, very rarely in the house, and that she never attempted to do any housework or behave as a wife. In so far as her evidence conflicts with the evidence of her husband and/or his housekeeper I unhesitatingly prefer their evidence."

The question is whether, as a matter of law, it is possible for the magistrate to have satisfied himself that there had been no resumption of cohabitation between the parties. So far as I am aware no authorities were cited to the magistrate, but there is a decision of WILLMER, J., in *Whitney v. Whitney* (1) which it is plainly necessary for us to consider. So far as I am aware, it is the only authority by which this decision could possibly be supported. The point of the decision in *Whitney v. Whitney* (1), as appears in the headnote, is this:

"(i) Desertion, once established, continued until it was proved to have been brought to an end; the fact that intercourse took place on a number of occasions during genuine efforts by the husband to effect a reconciliation did not bring the wife's desertion to an end; and, therefore, the husband was entitled to a decree of divorce. (ii) even if, whenever intercourse took place, the husband must be taken to have condoned the wife's previous desertion, that desertion was on each occasion revived by the wife's repeated refusal to resume cohabitation."

Two authorities were considered in the course of that case, and it will be necessary for us to consider them and their bearing on this case, and one authority was not considered, which seems to be decisive both of this case and of *Whitney v. Whitney* (1). The two authorities which were considered were *Mummery v. Mummery* (2), a decision of my own which has had the approval of the Court of Appeal, and *Bartram v. Bartram* (3), the case in which *Mummery v. Mummery* (2) was approved. The case which was not considered is *Henderson v. Henderson and Crellin* (4).

I need not go into *Mummery v. Mummery* (2) in detail, because it was fully reviewed in *Bartram v. Bartram* (3), but it is, I think, desirable to say this. It was a very special case. The wife had been deserted for years, but she ardently desired to effect a reconciliation and she took advantage of the fact that her husband, rescued from Dunkirk, had called on her on his way to the home where he was living, to attempt to effect a reconciliation by letting him sleep with her that night and have sexual intercourse. The question was whether the desertion theretofore established was interrupted, or, alternatively, condoned, by that fact. The key to the decision was that the wife alone desired reconciliation, while the husband made it plain beyond the shadow of a doubt that he had not the slightest wish or intention to resume cohabitation with her. The two things which it is, in my opinion, vital to remember in *Mummery v. Mummery* (2)—and I say this because when we come to *Bartram v. Bartram* (3) and the use of certain passages from one of the judgments in that case by WILLMER, J., in *Whitney v. Whitney* (1), it will be seen, I think, that WILLMER, J., has misunderstood the true effect of *Mummery v. Mummery* (2)—are these: (i) that it was the wife who was the petitioner, not the husband, and (ii) that there was no bilateral intention to resume cohabitation. It was plainly a case of a unilateral wish on the part of

the wife, rejected in the plainest possible terms by the husband. I need cite only one sentence from my judgment ([1942] 1 All E.R. 555):

“I think the law is that, as regards the wife at any rate, an act of sexual intercourse is not conclusive on the question of condonation; and that it does not raise an irrebuttable presumption that cohabitation has been resumed.”

A I pause to observe that that judgment was given before the House of Lords, in *Henderson v. Henderson and Crellin* (4), re-emphasised in unmistakable manner the essential difference between the position of a husband and that of a wife in relation to evidence of sexual intercourse as proof of condonation.

B *Henderson v. Henderson and Crellin* (4) was a case of a husband's petition on the ground of adultery. The wife had committed adultery, but she promised her husband that, if he would forgive her, she would break off all acquaintance with the co-respondent. Thereupon, intercourse took place, but early next morning the wife's attitude changed and she said she did not see why she should stop seeing the co-respondent. It was held that, as there was no evidence that, when it was made, the wife's promise was a fraudulent mis-statement of her state of mind, the husband's act in consenting to intercourse amounted to condonation
C debarring him from obtaining a divorce; sexual intercourse amounted to condonation of a wife's adultery unless she had induced it by a fraudulent mis-statement of fact; and a breach of an assurance as to future conduct would not remove the disabling consequences of condonation, since there was no such thing as contingent condonation. It is vital to the decision of the present appeal to consider the essential points in the reasoning of VISCOUNT SIMON, L.C., whose
D opinion was formally concurred in by the other learned Lords. He said ([1944] 1 All E.R. 45):

“The essence of the matter is (taking the case where it is the wife who has been guilty of the matrimonial offence) that the husband with knowledge of the wife's offence should forgive her and should confirm his forgiveness by reinstating her as his wife. Whether this further reinstatement goes to the
E length of connubial intercourse depends on circumstances, for there may be cases where it is enough to say that the wife has been received back into the position of wife in the home, though further intercourse has not taken place. But where it has taken place, this will, subject to one exception, amount to clear proof that the husband has carried his forgiveness into effect.”

F LORD SIMON went on to deal with the issue of fraud. I have already dealt with that, and counsel for the husband frankly admitted that it was impossible for him to say, in view of the evidence, that the sexual intercourse in this case had been obtained by fraud. *Mummery v. Mummery* (2) had been cited to their lordships. It was not specifically mentioned in the speech of LORD SIMON, but he said (*ibid.*):

G “It has been more than once pointed out that the conclusion of condonation by an innocent wife of her husband's previous misconduct is not in all cases so strictly drawn from the fact of subsequent intercourse, for there may be instances where the innocent wife, owing to the difficulties of her situation, may have no means of immediately breaking off relations.”

I need not read the rest of the passage, but it develops the same point, and
H LORD SIMON, after referring to a decision of this court in *Abercrombie v. Abercrombie* (5), which was exactly in point, said (*ibid.*, 46):

“Condonation is not a contract at all; it is the overlooking of past wrongs accompanied by action on the part of the aggrieved spouse which shows that they are really forgiven, and the circumstance that the guilty party, before or at the time of condonation, makes promises as to future conduct cannot lead to the consequence that previous offences are no longer condoned, if and when the promises are afterwards repudiated.”

Then he refers once more to the question of fraud, with which I need not deal further.

It seems to me that the magistrate unfortunately did not have this case cited to him and the statement of his reasons expresses exactly the contrary of what LORD SIMON said at the beginning of his speech. After saying that there had been no resumption of cohabitation between the parties and that the husband had taken the wife into his home because she was destitute and had nowhere to go, the magistrate said:

"His housekeeper endeavoured to effect a reconciliation between them and the husband co-operated and had sexual intercourse with her for this purpose. The attempt failed by reason of the conduct of his wife."

LORD SIMON said exactly the opposite. He said there may be a reinstatement without sexual intercourse, but, as against the husband, if there is sexual intercourse and no fraud, that is conclusive of the fact that the husband has confirmed his forgiveness by reinstating his wife as his wife. The magistrate treated as being the vital matter the husband's wish to effect a reconciliation and not the conclusive acts which show that a reconciliation had, in fact, been effected.

Bartram v. Bartram (3) affirms and approves the judgment in *Mummery v. Mummery* (2). It is necessary to refer to it because the judgment of the magistrate can only be supported by upholding the decision in *Whitney v. Whitney* (1), and *Whitney v. Whitney* (1) turns, as I think, on an incorrect appreciation of the effect of *Bartram v. Bartram* (3). It is essential to remember in considering *Bartram v. Bartram* (3) that the element of sexual intercourse was completely absent. That is all-important, because it was a case in which the husband was the petitioner. His petition was based on an allegation of desertion. As in this case, the husband took the wife under his roof because she had nowhere else to go, but she resolutely refused all overtures of reconciliation, and, as I say, no sexual intercourse took place. In those circumstances the Court of Appeal adopted from *Mummery v. Mummery* (2) the view that a resumption of cohabitation involved bilateral intention, and I only think it necessary to make one passing comment, if I may be allowed to do so, on one passage in the judgment of DENNING, L.J. He said ([1949] 2 All E.R. 273):

"Once the period of desertion has begun to run, it does not cease to run simply because the parties attempt a reconciliation and for that purpose come together again for a time. That was laid down by LORD MERRIMAN, P., in *Mummery v. Mummery* (2), and has never been doubted since."

I should not venture to make even this observation if it were not that this particular passage forms the foundation of the judgment of WILLMER, J., in *Whitney v. Whitney* (1). I have already tried to explain that the whole point of *Mummery v. Mummery* (2) was that the parties (in the plural) did not attempt a reconciliation. It was one party who attempted the reconciliation, while the other resolutely resisted it. That is not merely the point of the decision itself, but is also the point of the argument, so to speak, leading up to the decision, for I see that I am reported as saying ([1942] 1 All E.R. 555):

"It would, for example, be quite ludicrous if, because during a period of desertion the parties met by arrangement to talk over their difficulties, and the deserted wife did her very best to persuade her husband to come back, while he remained obdurate, one were bound to hold that meetings of that sort, however protracted, and even if they involved spending the night under the same roof together or several nights under the same roof together, interrupted or brought to an end the state of desertion."

The whole emphasis was on the fact that the intention or the attempt to effect a reconciliation was unilateral, and not bilateral. For the rest, although that passage in the judgment of DENNING, L.J., is used by WILLMER, J., in support of

his decision in *Whitney v. Whitney* (1), I think it is only necessary to say that when DENNING, L.J., said that ([1949] 1 All E.R. 273)

“... the period of desertion does not cease to run unless, and until, a true reconciliation has been effected... Any other view would greatly hamper attempts at reconciliation, because it would mean that the deserted party would be disinclined to take the other back for fear of losing his legal rights in case the reconciliation was unsuccessful”,

the passage must be read, as every judgment must be read, according to the subject-matter. It is not fair to DENNING, L.J., to take it out of its context and to assume that he is laying down that in all circumstances, including such circumstances as those in the present case, because a reconciliation does not ultimately come about, therefore desertion should be held to have been continuing the whole time. It was a judgment delivered in a case of a husband's petition where the element of sexual intercourse, not induced by fraud, was completely lacking.

That brings me finally to the judgment in *Whitney v. Whitney* (1). In December, 1945, the wife left her husband in circumstances which were held to amount to desertion on her part. Between that time and August, 1947, the husband visited the wife on a number of occasions to effect a reconciliation. On those occasions the parties resumed marital intercourse, but the wife maintained throughout her determination not to return to live with her husband. The husband's answer alleging desertion by the wife was dated July 17, 1950. In other words, the date in August, 1947, when the husband last visited the wife, was within the triennium. WILLMER, J., held, nevertheless, that there was no interruption to the period of desertion, and, incidentally, that there was no condonation. I have already observed that *Henderson v. Henderson and Crellin* (4) does not appear to have been referred to. *Mummery v. Mummery* (2) was examined at length, including the sentence which I have already read about the act of sexual intercourse not being conclusive on the question of condonation, as regards the wife, at any rate. With regard to that WILLMER, J., said ([1951] 1 All E.R. 304):

“Clearly in that case LORD MERRIMAN, P., stated the proposition of law on which he was relying in terms wide enough... to cover the present case. It may be argued that what the President said was peculiar to the case before him, which is a conclusive authority only in a case where a single act of intercourse took place and where the innocent party was the wife. Here we have, not one occasion, but a number of occasions to deal with, and it may be said that this is not, like *Mummery v. Mummery* (2), a case of an innocent party permitting intercourse on only one occasion at the instance of the other party. The facts in this case are, undoubtedly, different from those in *Mummery v. Mummery* (2), and if that case stood alone, wide as the President's words are, I might have experienced some difficulty in holding that they extended to cover the present case. But I have also received assistance from *Bartram v. Bartram* (3), a decision of the Court of Appeal.”

Before I pass on to what the learned judge said about *Bartram v. Bartram* (3), I venture to dissent from the description of my judgment in *Mummery v. Mummery* (2) implied in the phrase “wide as the... words are.” Although, as I have said, at that time *Henderson v. Henderson and Crellin* (4) had not been decided, I was very careful to say ([1942] 1 All E.R. 555) “as regards the wife at any rate”, and I was dealing with the petition of a deserted wife. Then WILLMER, J., goes on to deal with *Bartram v. Bartram* (3). He refers to the citation in that case of *Mummery v. Mummery* (2) and then relies on the passage in the judgment of DENNING, L.J., contained in the first paragraph of that judgment, to which I have just referred, and concludes ([1951] 1 All E.R. 306):

"That case, it appears to me, carries with it an authoritative statement on principle by the Court of Appeal, and it is for me to apply that principle as best I can to the present case."

Applying it, he came to the conclusion that desertion had never been interrupted.

I venture to say that the learned judge misdirected himself, because he ignored the vital facts that in *Bartram v. Bartram* (3) there was lacking the essential element, which is present in this case, that the husband petitioner had voluntarily had sexual intercourse with his wife and that *Henderson v. Henderson and Crellin* (4) decides that that is absolutely conclusive of the fact that he has thereby reinstated her as his wife. It seems to me, with the greatest possible respect to the learned judge, that it is impossible to hold, in relation to a long period during which at intervals the husband has voluntarily had sexual intercourse with his wife with the express object of effecting a reconciliation, that there has been no reinstatement at all and that desertion was running continuously throughout the period, or that an alternation of condonation and revival after each act of sexual intercourse leads to the same conclusion.

The judgment of the magistrate in the present case can only be supported, in my opinion, if *Whitney v. Whitney* (1) was rightly decided. I think it was wrongly decided and that it is our duty to say so. I think, equally, that the magistrate's judgment is insupportable when once the suggestion of fraud is eliminated, and it is admitted that it is eliminated by the history of the resumption of sexual intercourse in this case. For these reasons I think that this appeal succeeds, for, there being no longer the impediment of her adultery, the wife has been thrown out of the matrimonial home for reasons which could not possibly be considered as being "a grave and weighty matter," if once it is established, as I think it is established, that the husband had in law reinstated her as his wife. That being so, there is no answer to her charge of desertion, and the matter must be referred back to the magistrate for him to settle the amount of the order unless an amount can be agreed on.

HAVERS, J.: I agree with the conclusion at which my Lord has arrived, and also with the reasons which he has given for that conclusion. As, however, we are differing from the magistrate, I think it desirable to give my own reasons in my own words. This is a wife's appeal from the dismissal by the magistrate of her summons against her husband on the ground of desertion. I desire to say that, in view of the reasons which the magistrate has given, I shall base my judgment, so far as the facts are concerned, on the evidence of the husband where it conflicts with the evidence of the wife.

[His LORDSHIP stated the facts and continued:] The question for us to determine is whether, as regards a husband, an act or acts of sexual intercourse is or are conclusive on the question of condonation. No authorities were cited to the learned magistrate. If the decision of the House of Lords in *Henderson v. Henderson and Crellin* (4) had been cited to him, I cannot help feeling that he would have been very unlikely to come to the conclusion to which he did. My Lord has already cited the passages from the speech of VISCOUNT SIMON, L.C., in *Henderson v. Henderson and Crellin* (4), a speech with which the other learned Lords agreed, and it seems to me that the passage in [1944] 1 All E.R. 45, already read by my Lord, clearly establishes the law relating to condonation in a case where it is the wife who has been guilty of the matrimonial offence. LORD SIMON specified the one exception, namely, a case where the intercourse was induced by fraudulent mis-statement of fact by the wife. In another passage he said (*ibid.*, 46):

"There cannot be such a thing as contingent condonation by a husband of his wife's adultery—certainly not when the condonation includes the irrevocable act of sexual connection."

In the light of that decision it seems to me to be clearly established that a husband who, with knowledge of a matrimonial offence committed by his wife, has

sexual intercourse with her, cannot in law be heard to say that he has not condoned that matrimonial offence and reinstated her as a wife. I leave out the particular exception to which LORD SIMON referred, since, as my Lord has mentioned in his judgment, it was made clear by counsel for the husband that he was not in a position to contend on the facts of the present case that the sexual intercourse which took place was effected by means of any fraud on the part of the wife. In my opinion, the decision in *Henderson v. Henderson and Crellin* (4) is conclusive on the case which we have to determine, and in the light of that decision it seems to me that the magistrate's decision cannot possibly be supported in law.

It would be enough to dispose of this case for me to leave the matter there, but, as certain cases have been discussed in argument, and, it may be, that one of those cases was in the mind of the magistrate when he reached his conclusion, I will make a brief reference to them. The first is *Mummery v. Mummery* (2). As my Lord has pointed out, there were two fundamental facts on which that judgment was based. The first fact was that there it was an innocent wife who was the petitioner and consented to the act of marital intercourse and not a husband, and the second fact was that only one party desired a reconciliation, namely, the wife. In my view, the scope of the judgment can be ascertained from a short passage which my Lord has already cited ([1942] 1 All E.R. 555). I find nothing in *Henderson v. Henderson and Crellin* (4) which is in the least degree inconsistent with that judgment having the limited application which I think it has and was intended to have. On the contrary, LORD SIMON said ([1944] 1 All E.R. 45):

"It has been more than once pointed out that the conclusion of condonation by an innocent wife of her husband's previous misconduct is not in all cases so strictly drawn from the fact of subsequent intercourse, for there may be instances where the innocent wife, owing to the difficulties of her situation, may have no means of immediately breaking off relations."

That case, as I read it, has no application to the facts of this case at all.

The only other case to which I think I ought to refer is *Whitney v. Whitney* (1), because it may be prayed in aid to support the decision of the magistrate in this case. My Lord has already pointed out that the facts there were that in December, 1945, the wife left her husband in circumstances which were held to amount to desertion on her part. Between that time and August, 1947, the husband visited the wife on a number of occasions to effect a reconciliation. On those occasions the parties resumed marital intercourse, but the wife maintained throughout her determination not to return to live with her husband, and the husband's answer alleging desertion by the wife was dated July 17, 1950. WILLMER, J., held, first of all, that

"desertion, once established, continued until it was proved to have been brought to an end; the fact that intercourse took place on a number of occasions during genuine efforts by the husband to effect a reconciliation did not bring the wife's desertion to an end; and, therefore, the husband was entitled to a decree of divorce";

and he held, secondly:

"even if, whenever, intercourse took place, the husband must be taken to have condoned the wife's previous desertion, that desertion was on each occasion revived by the wife's repeated refusal to resume cohabitation."

If I interpret the judgment correctly, WILLMER, J., seems to have founded himself partly on the view which he took of the decision of my Lord in *Mummery v. Mummery* (2), and partly on the decision of the Court of Appeal in *Bartram v. Bartram* (3), but he does appear to have had some doubt whether *Mummery v.*

Mummery (2) was ever intended to be applied beyond the particular facts to which it related, because he said ([1951] 1 All E.R. 304):

"Clearly in that case LORD MERRIMAN, P., stated the proposition of law on which he was relying in terms wide enough, it seems to me, to cover the present case. It may be argued that what the President said was peculiar to the case before him, which is a conclusive authority only in a case where a single act of intercourse took place and where the innocent party was the wife. Here we have, not one occasion, but a number of occasions to deal with, and it may be said that this is not, like *Mummery v. Mummery* (2), a case of an innocent party permitting intercourse on only one occasion at the instance of the other party. The facts in this case are, undoubtedly, different from those in *Mummery v. Mummery* (2), and if that case stood alone, wide as the President's words are, I might have experienced some difficulty in holding that they extended to cover the present case."

It seems that, notwithstanding that passage, the judge did take the view that *Mummery v. Mummery* (2) was wide enough to cover the facts of the case with which he was dealing. I feel unable to take the same view as to the extension of *Mummery v. Mummery* (2) beyond the facts of the case to which it related. It will be observed that *Henderson v. Henderson and Crellin* (4) was not cited in *Whitney v. Whitney* (1), and if and so far as *Whitney v. Whitney* (1) purports to decide that a husband who, with full knowledge of his wife's matrimonial offence, has sexual intercourse with her does not in law condone that offence, I feel constrained to say that I am unable to agree with it, and am bound to express my opinion that it has not been correctly decided.

The other case from which the learned judge stated that he derived assistance was *Bartram v. Bartram* (3). It is unnecessary for me to do more than say that with regard to that case my Lord has pointed out that one essential element was missing in *Bartram v. Bartram* (3), namely, there was no intercourse by the husband with his wife, and, for the reasons which my Lord has given, I take the view, with great respect to the learned judge, that *Bartram v. Bartram* (3) does not support the conclusion at which he arrived. I am, therefore, of the opinion that this case is covered by the decision of the House of Lords in *Henderson v. Henderson and Crellin* (4), and that in law the conclusion of the magistrate cannot be supported. I agree that the appeal must succeed.

Appeal allowed.

Solicitors: *Hepburns* (for the wife); *Hawker & Wheatley* (for the husband).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

HARLING v. EDDY.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning, L.J., and Roxburgh, J.), May 24, 25, 1951.]

Sale of Goods—Condition—Warranty—Auction—Conditions in catalogue excluding warranty unless specially mentioned and appearing in account—Oral guarantee.

A catalogue relating to a sale by auction of cattle described therein as tuberculin-tested Guernseys contained the condition: "(12) No animal, article, or thing is sold with a 'warranty' unless specially mentioned at the time of offering, and no warranty so given shall have any legal force or effect unless the terms thereof appear on the purchaser's account." On June 30, 1950, at the sale, the defendant offered for sale a freshly calved heifer. Buyers were reluctant to bid owing to the unpromising appearance of the heifer, and the defendant thereupon stated that nothing was wrong with her, that he would absolutely guarantee her, and that he would be willing to take her back if she proved not to be as he stated. The plaintiff bought the heifer, but no reference to the defendant's statement appeared on

the plaintiff's account. The heifer yielded little milk, and in October, 1950, she died from tuberculosis. The plaintiff now claimed damages.

HELD: the defendant's statement at the sale amounted to a condition and not a mere warranty, and as condition No. 12 related only to a warranty the plaintiff was not precluded thereby from claiming damages for breach of the condition; even if the statement were merely a warranty, the defendant thereby implied that the heifer should be sold on the faith thereof to the exclusion of condition No. 12; and, therefore, the plaintiff was entitled to succeed.

Wallis, Son & Wells v. Pratt & Haynes ([1911] A.C. 394), applied.

Couchman v. Hill ([1947] 1 All E.R. 103, approved and applied.

Hopkins v. Tanqueray (1854) (15 C.B. 130), distinguished.

B AS TO PARTICULARS AND CONDITIONS OF SALE BY AUCTION AND ORAL STATEMENTS BY AUCTIONEER, see HALSBURY, Hailsham Edn., Vol. 1, pp. 705, 706, paras. 1161, 1162; and FOR CASES, see DIGEST, Vol. 3, pp. 15-18, Nos. 111-136.

AS TO CONDITIONS AND WARRANTIES GENERALLY, see HALSBURY, Hailsham Edn., Vol. 29, pp. 52-56, paras. 64-68; and FOR CASES, see DIGEST, Vol. 39, pp. 414-422, Nos. 480-546.

C Cases referred to:

(1) *Wallis, Son & Wells v. Pratt & Haynes*, [1911] A.C. 394; 80 L.J.K.B. 1058; 105 L.T. 146; 39 Digest 477, 996.

(2) *Couchman v. Hill*, [1947] 1 All E.R. 103; [1947] K.B. 554; [1948] L.J.R. 295; 176 L.T. 278; 2nd Digest Supp.

D (3) *Hopkins v. Tanqueray*, (1854), 15 C.B. 130; 23 L.J.C.P. 162; 23 L.T.O.S. 144; 139 E.R. 369; 39 Digest 417, 503.

(4) *Lee v. Gray*, (1929), unreported.

(5) *Taylor v. Bullen*, (1850), 5 Exch. 779; 20 L.J.Ex. 21; 16 L.T.O.S. 154; 155 E.R. 341; 39 Digest 435, 644.

(6) *Curtis v. Chemical Cleaning & Dyeing Co., Ltd.*, [1951] 1 All E.R. 631; [1951] 1 K.B. 805.

E (7) *Olley v. Marlborough Court, Ltd.*, [1949] 1 All E.R. 127; [1949] 1 K.B. 532; [1949] L.J.R. 360; 2nd Digest Supp.

APPEAL by the defendant from an order of His Honour JUDGE NEAL at Ashford County Court, dated Feb. 5, 1951, awarding to the plaintiff damages amounting to £67 12s. 6d. for breach of an oral warranty given by the defendant at the sale by auction of a heifer. The learned judge rejected the defendant's argument that liability in respect of any such warranty was excluded by the printed conditions under which the sale took place and which were appended to the sale catalogue.

Laskey for the defendant.

Jupp for the plaintiff.

G **SIR RAYMOND EVERSLED, M.R.:** The defendant is a substantial dealer in cattle, and on the relevant occasion he was offering for sale by auction a large number of Guernsey heifer cows. The catalogue describes them as tuberculin-tested Guernseys, and there is contained in the catalogue a number of conditions, including:

H " (5) All statements made either in the catalogue or by the auctioneers at the time of the sale relating to the tuberculin or any other test are to be taken as statements of fact only. No such statements shall guarantee the purchaser of an animal against loss arising through the subsequent reaction of such animal to any test administered after the sale and the vendor shall not be liable in any way should this occur . . . (12) No animal, article, or thing is sold with a 'warranty' unless specially mentioned at the time of offering, and no warranty so given shall have any legal force or effect unless the terms thereof appear on the purchaser's account."

To complete my references to the catalogue, the particular animal in question was lot No. 9, and was described by the following words: "Non-pedigree Guernsey heifer, freshly calved. Earmark".

It appears from the findings of the judge that when this animal No. 9 came into the ring to be sold it received a somewhat frigid reception owing to its unpromising appearance. No one made any bid or evinced any desire to do so. Thereupon the defendant, the seller, who was present, made certain statements. There was a dispute before the judge on the question of what had been said. According to the defendant he made no representations or statements which might be construed as such. The plaintiff said that the defendant stated that there was nothing wrong with the heifer, that he would absolutely guarantee her in every respect, and that he would be willing to take her back if she turned out not to be what he stated she was. That statement by the plaintiff was supported by two other witnesses, who added at the end of their recital the words "at any time," but, so far as that addition "at any time" is concerned, the learned judge preferred the plaintiff's account, and intimated that he thought the addition on the part of the plaintiff's son and the other witness was an exaggeration of what the defendant had said. On this vital matter it is plain that the judge rejected the defendant's denial, and in terms he stated that he accepted the evidence of the plaintiff, and, with the one small qualification which I have mentioned, that of his supporting witnesses. The defendant having given that description of his animal, the bidding was begun, and in the result the animal was knocked down to the plaintiff for £65.

We have before us the record of the milk obtained from the animal after the sale, and it is apparent that she was disappointing in her performance. For a time she appears to have yielded something in the nature of two to two and a half gallons per day, but by the middle of September the yield very substantially fell. According to his evidence, the plaintiff was a little concerned about the animal from the start, and he called in a veterinary surgeon. The veterinary surgeon then thought she was suffering from the common complaint of indigestion, and so treated her. According to the record, in the first two weeks in August her yield improved, but in September it became apparent that the animal was suffering from some disease which was far more serious than a mere gastric disorder. [HIS LORDSHIP referred to letters written by the plaintiff to the defendant the first of which, dated Sept. 21, 1950, informed the defendant that the heifer was wasting and was yielding only one gallon of milk a day. The plaintiff added that he proposed to return her. The last letter, dated Oct. 30, 1950, informed the defendant that the heifer had died. HIS LORDSHIP continued:] This animal died in October, and as the result of a post-mortem examination the cause of her death was found to be tuberculosis. To dispose of one point immediately, that does not mean that any claim could be made in this case on the basis that the animal had not been tuberculin-tested at the time of the sale. There is, indeed, before us a certificate which shows that the test was made shortly before the sale, and that a satisfactory reaction followed. The certificate would have been admissible under the Evidence Act, 1938, and, having regard to that fact and to condition No. 5, which I have read, no question can turn on the circumstance that the heifer at the date of the sale was, as the judge found, suffering substantially from tuberculosis.

The question is: Does the statement which the defendant made at the sale immediately before the bidding entitle the plaintiff now to say: "The animal was not as you stated her to be, sound in every respect, and I now take advantage of the offer you made to me and claim from you the price I paid for the animal, or equivalent damages"? The difficulty arises from the circumstance that No. 12 of the conditions, which I have already read, *prima facie* seems intended to render nugatory any mere warranty given at the sale. But the first answer, in my judgment, to the defence based on condition No. 12 is that, in the circum-

stances, this statement by the defendant was a condition. It has been said many times, and particularly in *Wallis, Son & Wells v. Pratt & Haynes* (1), that whether any statement is to be regarded as a condition or a warranty must depend on the intention to be properly inferred from the particular statement made. A statement that an animal is sound in every respect would, *prima facie*, be but a warranty, but in this case the learned judge found as a fact that the defendant went further and promised that he would take the animal back if she were no good. I use the words used by the plaintiff himself in evidence and in the letter which he wrote in September. On this matter there can be no doubt whatever that the learned judge disbelieved the defendant, and, having read the judge's note of the evidence, I am not surprised. Nor is it to be passed over without comment that when the plaintiff made the suggestions he did in his letters in September and October the defendant never chose to challenge them in any way. The defendant's statement having, therefore, included words to the effect: "If there is anything wrong I will take it back," it seems to me plain that the language he used could not have been intended merely as a warranty, for a warranty would give no right of rejection to the purchaser. The final words involve necessarily a right to the purchaser to reject, that is, to return the animal. They convert the statement, to my mind, from a warranty to a condition.

If, then, it is a condition, what would be the right of the plaintiff? Counsel for the defendant has argued forcibly that the plaintiff must at least exercise his right of rejection in due time. On Sept. 21, 1950, he plainly purported to do so. He called on the defendant to take the animal back. In my judgment, in the circumstances of the case the period between July 1, 1950, and the middle of September, 1950, would not be unreasonable. But, however that may be, it is plain also from *Wallis, Son & Wells v. Pratt & Haynes* (1) that a person entitled to the benefit of a condition, as was the plaintiff in this case, can turn the condition in effect into a warranty by claiming damages as for breach of warranty instead of exercising his right of rejection. By the time that this claim had been formulated the animal was dead, and the plaintiff could, in truth, do no other than claim damages, and, in my judgment, he was entitled to treat the condition to that extent as though it were a warranty. If that is right, the question still remains: Does No. 12 of the conditions apply? In my judgment, the answer is: No. Condition No. 12 is limited in its terms to a statement made which is a mere warranty and is not a condition, and the language in the second part of it, "... and no warranty so given shall have any legal force or effect ..." can only refer to the warranty previously mentioned, *viz.*, a statement which is a warranty and no more. In other words, in my judgment, condition No. 12 cannot be relied on by the defendant to defeat the right of the plaintiff to sue for damages for the breach of the condition under which he purchased.

Since this matter is of some importance, however, I think it is desirable that I should also express a view on the conclusion properly to be reached if this statement were a warranty merely. On that aspect of the matter I derive considerable assistance from the decision of this court in *Couchman v. Hill* (2). That was a case of the sale of heifers under the description of "unserved." There was a special condition in the auction particulars:

"The lots are sold with all faults, imperfections, and errors of description, the auctioneers not being responsible for the correct description, genuineness, or authenticity of, or any fault or defect in, any lot, and giving no warranty whatever."

In that case, as in this, there was a certain nervousness in regard to the particular animals offered, and when they were in the ring the plaintiff, the buyer, asked both the seller and the auctioneer: "Can you confirm heifers unserved?", and both replied affirmatively to that question. It later transpired that one of the heifers so purchased was not unserved, but died from a miscarriage through the strain of carrying a calf at too young an age for breeding. The plaintiff sued for

damages, and the defendant, the seller, relied, among other things, on the condition which I have read. In that case the plaintiff's question and the answer to it amounted to a warranty and no more. SCOTT, L.J., in giving the leading judgment, expressed himself thus ([1947] 1 All E.R. 105):

"The real question is: What did the parties understand by the question addressed to and the answer received from both the defendant and the auctioneer? It is contended by the defendant that the question meant 'having regard to the onerous stipulations which I know I shall have to put up with if I bid and the lot is knocked down to me, can you give me your honourable assurance that the heifers have in fact not been served? If so, I will risk the penalties of the catalogue.' The alternative meaning is: 'I am frightened of contracting on your published terms, but I will bid if you will tell me by word of mouth that you accept full responsibility for the statement in the catalogue that the heifers have not been served, or, in other words, give me a clean warranty. That is the only condition on which I will bid'."

The learned lord justice decided on the facts of that case that it was clear that the question and answer should be interpreted in the second alternative sense, and that, if that were so, the express warranty must necessarily be regarded as having overridden the printed conditions and as having formed part of the contract to the exclusion of the printed conditions. SCOTT, L.J., further said (*ibid.*):

"The county court judge in a careful reserved judgment has found that this oral statement was made, and he refers to it as a warranty, but holds that its value was destroyed by the qualifying stipulations. He has not in terms put the question to himself: 'Did the parties by this question and answer intend to exclude the stipulations from the contract that resulted on the fall of the hammer?'"

The learned lord justice, putting that question to himself, answered it in the way that I have indicated.

The terms of the printed conditions in the present case differ from the terms of the printed conditions in *Couchman v. Hill* (2), and the language used by the respective defendants differs also, but I think the matter may be put precisely and properly, as it was suggested in the course of the argument, by ROXBURGH, J. I do not re-state the facts as found by the judge, but, bearing those facts in mind, and, in particular, the initial silence which greeted the entry of this animal into the ring and the fact that bidding only began when the statement had been made, the question may properly be formulated thus: Did the defendant imply by this statement that the animal should be sold on the faith of what he stated to the exclusion of the printed clause, condition No. 12, or of any other condition which might be found in the auction particulars which would of itself appear to exclude any oral statement made? Counsel for the defendant argued that neither party may have had in mind, when this particular incident occurred, what the exact terms of the conditions of sale were, though I should suppose that, both being experienced in the buying and selling of cattle, they would be aware, according to common practice, that there would be stultifying conditions of some kind in the auction particulars. If that were the question to be posed, in my judgment, it should be answered affirmatively on the facts as found by the judge. I, therefore, would hold that, even if the language used here were a warranty only and not a condition, still the plaintiff would be entitled to succeed.

Before leaving *Couchman v. Hill* (2), I would like to say one further word about it. According to the report which I have, there is an editorial note referring to a much earlier case of a hundred years ago, *Hopkins v. Tanqueray* (3), relating to the sale of a horse at Tattersalls. In that case the seller and the buyer met, not at the sale, but the day before the sale, and the conversation which is

related in this note formed no part of the transaction which occurred at the sale itself. At the meeting between the seller and the buyer a statement was made about the soundness of the horse, and later the auction took place. The question was raised whether what had passed in the conversation could affect a stultifying condition in the auction particulars. The court in *Hopkins v. Tanqueray* (3) found that the promise made by the seller in his private conversation formed no part of the contract which was formed as a result of the sale at the auction and comprehended the conditions set out in the auction particulars. It is plain, therefore, that that case is wholly distinguishable from *Couchman v. Hill* (2), and equally from this case. I say that because the note to which I have alluded suggests that, had *Hopkins v. Tanqueray* (3) been referred to at the time of the hearing in this court of *Couchman v. Hill* (2), the decision in *Couchman v. Hill* (2) might have been different. I do not think so, and there is no reason for suggesting that *Couchman v. Hill* (2) was other than rightly decided. It binds this court in any case, but I desire to express my entire concurrence with the decision in *Couchman v. Hill* (2). For the reasons which I have stated, therefore, it seems to me that the plaintiff's right to succeed is made good.

DENNING, L.J.: I agree. I think it probable that the representation by the seller was a condition, but I propose to proceed on the assumption that it was only a warranty. I do this because it is only pleaded as a warranty. I do not think there was any implied condition of merchantable quality, because this was not a sale by description, but a sale of specific goods. The case must rest on the express oral warranty, and the question is whether it is excluded by the conditions in the catalogue. In my opinion, the law is that if a seller of goods by auction gives an express oral warranty, he cannot escape from his responsibility for it by saying that the catalogue contained an exempting clause. This was decided in *Lee v. Gray* (4), an unreported case in 1929 in which I was counsel, and I have refreshed my memory of it by reference to the records kept by the court. The judgment of the county court judge in that case was in these words:

"The plaintiff brings this action to recover damages for breach of warranty on the sale of a horse. If he is entitled to recover, the damages are agreed at £26. The sale was by auction on Oct. 7, 1928, the horse in question being described in the printed catalogue as a chestnut gelding 'quiet and good worker in all gears.' Those words were read out by the auctioneer before the horse was put up, and they are plain words of warranty, intended to be acted on, and in fact relied and acted on by the purchaser, who had no means by inspection of ascertaining for himself whether the definite statement as to the horse were true or false. On the evidence I find that the animal, though in many respects a good and useful farm horse, would not work in shafts, and was not quiet in them, it being practically impossible for anyone, except perhaps a man to whose handling he was specially accustomed, so to use him . . . I come without hesitation to the conclusion that in material respects the horse did not answer the description given in the catalogue and repeated from the rostrum immediately before the sale. It is, however, contended for the defendant that if the buyer had read the 'Conditions' printed elsewhere in the catalogue he ought to have realised that the representations made about the horse in that document, and emphasised by the seller's auctioneer, meant nothing, and that he must not be so foolish as to attach the least importance to them. The 'Conditions of Sale' were in fact not read by the plaintiff, nor do I for a moment suppose he would have realised their effect in the unlikely event of him reading them, but he knew that the catalogue contained *some* conditions, and I hold that in point of law he ignored them at his risk, and that their terms bind him. That being so, it is said for the defendant that in the absence of fraud (which is not suggested here) the conditions relieve him from any responsibility whatever for the representations made by his authority,

and render the description of the horse contained in the catalogue wholly idle. That view is not one to which I am disposed to accede with undue willingness. Condition No. 4 relied on for the defence, is in these terms: 'The whole of the lots . . . shall be taken with all faults and errors of description . . .' I find myself unable to distinguish the case before me from *Taylor v. Bullen* (5), and the result is that the catalogue was a trap for the unwary—a trap well calculated to catch ninety-nine out of every hundred of the class of persons who attend farm sales. Authority constrains me to hold that it has successfully trapped the plaintiff. I may not construe the condition as leaving the plain words of warranty to stand, even as to things where the most cautious of bidders could not ascertain the truth by examination of the lot. I am bound to hold that there was no warranty at all. The action therefore fails and is dismissed; and though in my view there could hardly be a defence more bare of merits, I cannot punish the defendant in the matter of costs for choosing to rely on what I hold to be his rights in point of law . . ."

The buyer appealed to the Divisional Court. The appeal was heard by MACKINNON, J., and HUMPHREYS, J., on May 1, 1929, and they allowed the appeal. They held that the express oral warranty given by the auctioneer overrode the stultifying condition in the printed catalogue, and that the case was distinguished from *Taylor v. Bullen* (5) because there the buyer had actually signed the document containing the exempting condition.

The decision of this court in *Couchman v. Hill* (2) is to the same effect. *Hopkins v. Tanqueray* (3) is distinguishable, because there was there no warranty at all. I have before me SCOTT, L.J.'s copy of the volume of the ALL ENGLAND LAW REPORTS containing the report of *Couchman v. Hill* (2), and I see he has noted in his own handwriting:

"*Hopkins v. Tanqueray* (3), a case of a conversation a day before the sale, is distinguishable."

The principle which underlies these cases is that if a person wishes to exempt himself from a liability which the common law imposes on him, he can only do it by an express stipulation brought home to the party affected and assented to by him as part of the contract: see *Curtis v. Chemical Cleaning & Dyeing Co., Ltd.* (6). The party who is liable at law cannot escape liability by simply putting up a printed notice, or issuing a printed catalogue, containing exempting conditions. He must go further and show affirmatively that it is a contractual document and accepted as such by the party affected: see *Olley v. Marlborough Court, Ltd.* (7). That was not the case with this catalogue. I agree that the appeal should be dismissed.

ROXBURGH, J.: I agree with the Master of the Rolls that the statement made by the defendant became a "condition" of the contract, but, even if this were not so, I am entirely in agreement with what both the Master of the Rolls and DENNING, L.J., have said, *viz.*, that, if the oral statement be regarded as a warranty, having regard to the circumstances in which it was given it overrode condition No. 12.

Appeal dismissed.

Solicitors: *Balderston, Warren & Co.*, agents for *Ratcliffe, Son & Henderson*, Helston (for the defendant); *Mowll & Mowll* (for the plaintiff).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

R. v. ARMSTRONG.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Lynskey and Devlin, JJ.),
June 4, 1951.]

*Criminal Law—Evidence—Previous convictions—Report in newspaper—Committal
for trial.*

A On an application by the applicant to the justices at the preliminary investigation of an indictable offence evidence of the applicant's previous convictions was given and was reported in certain local newspapers. Subsequently the applicant was convicted at quarter sessions.

HELD: although it was very undesirable that a newspaper should disclose such evidence, that by itself was not a ground for quashing the conviction.

B *R. v. Dyson* (1943) (169 L.T. 237), explained.

Case referred to:

(1) *R. v. Dyson*, (1943), 169 L.T. 237; 107 J.P. 178; 2nd Digest Supp.

APPLICATION for leave to appeal against conviction.

C The applicant was convicted at Surrey Quarter Sessions on two charges of larceny and was sentenced to four years' corrective training. He contended that the publication in certain newspapers of evidence of previous convictions at the preliminary hearing before justices was a ground for quashing the conviction.

J. C. D. Harington for the applicant.

The Crown was not represented.

D **LYNSKEY, J.**, delivered the following judgment of the court. In this case the appellant, Richard Duncan Armstrong, is applying for leave to appeal against his conviction at the Surrey Quarter Sessions on two charges of larceny in a dwelling-house, for which he received a sentence of four years' corrective training. The point which has been taken by counsel for the applicant was that the fact that he had previous convictions was mentioned in the *Epsom Herald and Gazette*, the *Surrey Advertiser*, and other Surrey papers, all of which might have
E been read by persons who were members of the jury at his trial.

The facts of the case were extremely clear, and, on the evidence, the jury could only come to one conclusion, namely, that the applicant was guilty of both offences. It is, however, said that when the applicant applied to the justices for bail his previous convictions were disclosed to them, and a report of those previous convictions—it is suggested, an inaccurate report—appeared in the
F newspapers mentioned. It is, therefore, contended that this court must give him leave to appeal for consideration of the matter, with the idea that the conviction should be quashed. It is clear that it is the duty of the justices to inquire into the antecedents of a man who is applying to them for bail, and, if they find that he has a bad record—particularly a record which suggests that he is likely to
G commit similar offences while on bail—that is a matter which they must consider

before granting bail. The justices in the present case were entitled to act as they did. It is urged that the decision of this court in *R. v. Dyson* (1) indicates that the publication in local newspapers of information given to justices at the magistrates' court is a matter which ought to be taken into account with a view to quashing a conviction. That case, however, lays down no principle. There the court thought it proper that, in the special circumstances of that particular case, the
H appeal ought to be allowed and the conviction quashed. The court did not lay down, and we do not propose to lay down, that, merely because a newspaper, either local or national, discloses evidence of a man's previous convictions given at the court, on that, and that alone, this court must quash the conviction at quarter sessions or assizes of a man who, on the evidence, is clearly guilty. So far as the publication of that information is concerned, this court has no power to compel the press, but this court agrees that it is very undesirable that such information should be given. The mere fact, however, that it is given is no ground

for this court to infer either that the jurors who tried the case had read it, or, if they had read it, that they were biased against the applicant for the purpose of the trial. There is no reason here for interfering with the verdict of the jury, and the application will be dismissed.

Application dismissed.

Solicitors: *Reid Sharman & Co.* (for the applicant).

[Reported by H. McL. MORRISON, Esq., *Barrister-at-Law.*]

A

Re CUNLIFFE-OWEN (*deceased*). MOUNTAIN *v.* COMBER AND OTHERS.

B

[CHANCERY DIVISION (Wynn-Parry, J.), April 12, May 4, 8, June 6, 1951.]

Legacy Duty—Incidence—Freedom from duty—Foreign duties.

Estate Duty—Allowance—Double taxation—Canadian succession duty—South African succession duty—Benefit of allowance—Person bearing the estate duty—Amount of allowance where differing rates of foreign duty chargeable.

C

By cl. 7 of his will, a testator provided: "... I direct that so much of the death duties payable with reference to my death in respect of all legacies whether specific or pecuniary annuities and all benefits given by this my will as shall be equal to the death duties at the rates in force at the date of this my will shall be paid and discharged out of my residuary estate." By cl. 9 it was provided: "Subject to the payment of my funeral and testamentary expenses and debts and the legacies and annuities given by this my will or any codicil hereto and all estate duty and succession or legacy duty payable on my real estate (including chattels real) and the duties on any legacies or annuities given free of duty by this my will or any codicil hereto . . ." the residuary estate should be dealt with in a certain manner.

D

HELD: the term "the death duties" in cl. 7 could be construed as including duties other than United Kingdom duties, notwithstanding that there was no express reference in the will to foreign duties, providing that the surrounding circumstances were sufficiently compelling; evidence that the testator had substantial foreign assets and had taken advice for the purpose of minimising duties on those assets was not of itself sufficient to justify the wider construction of the term; and, having regard especially to the provisions of cl. 9, the term ought to be construed as referring only to United Kingdom death duties.

E

Re Norbury ([1939] 2 All E.R. 625), applied.

By cl. 6 of his will the testator bequeathed £15,000 to his trustees on trust to transfer to C., if then living, as and when any part of his residuary estate was distributed, such a sum as bore the same proportion to £12,500 as the part distributed bore to the whole residuary estate "and in addition to raise thereout and pay the duties on the said sum." The court having held that the direction in cl. 6 to pay duties did not extend (*inter alia*) to Canadian and South African duties, the further question arose whether allowances to be made (a) against estate duty in respect of Canadian succession duty by virtue of the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, art. 5, and (b) against the capital of personalty situate in South Africa in respect of South African succession duty enured for the benefit of C. It was established by evidence that Canadian succession duty assessed in respect of any succession under the will of the testator was payable by the successor, and that, similarly, South African succession duty was payable by the successor.

G

H

HELD: there being nothing in the will to displace the rule that "testamentary expenses" must be construed as excluding estate duty on foreign personalty, notwithstanding the provisions of cl. 9 of the will C. would have to bear that estate duty, and, therefore, the benefit of the allowances in respect of both the Canadian succession duty and the South African succession duty so far as referable to the bequest to C. should enure for the benefit of C., and the sums paid to him or applied in payment of duties under cl. 6 ought to be treated as paid out of assets situate in Canada or South Africa (as the case might be) in respect of which relief was accorded and the other assets of the testator in the proportions which the values (as at the date of the testator's death) of the former class of assets bore to the latter.

It was further established by evidence that Canadian succession duty and South African succession duty were each assessed at rates which varied according to the relationship of the relevant beneficiary to the testator, so that a stranger-in-blood would be charged to duty at a higher rate than *e.g.*, the testator's children. Persons beneficially interested in the testator's residuary estate under cl. 9 of his will included a stranger-in-blood, but all others were lawful issue of the testator.

HELD: the benefit of the allowances in respect of the Canadian and South African duties referable to the residuary estate ought to be apportioned to the shares of the residuary beneficiaries, not in proportion to the amount of Canadian or South African duty borne by each beneficiary, but according to their respective interests in the residuary estate.

AS TO FREEDOM FROM FOREIGN DUTY, see HALSBURY, Hailsham Edn., Vol. 13, p. 299, para. 312; and FOR CASES, see DIGEST, Vol. 21, p. 130, Nos. 955-959.

Cases referred to:

- (1) *Re Norbury*, [1939] 2 All E.R. 625; [1939] Ch. 528; 108 L.J.Ch. 219; 160 L.T. 572; Digest Supp.
- (2) *Re Scott*, [1915] 1 Ch. 592; 84 L.J.Ch. 366; 112 L.T. 1057; 21 Digest 130, 959.
- (3) *Re Quirk*, [1941] Ch. 46; 110 L.J.Ch. 4; 164 L.T. 333; 2nd Digest Supp.
- (4) *Re Frazer*, [1941] 2 All E.R. 155; [1941] Ch. 326; 110 L.J.Ch. 120; 165 L.T. 346; 2nd Digest Supp.
- (5) *Re Clemow*, [1900] 2 Ch. 182; 69 L.J.Ch. 522; 82 L.T. 550; 21 Digest 31, 191.
- (6) *Re Scull*, (1917), 87 L.J.Ch. 59; 118 L.T. 7; 21 Digest 27, 151.
- (7) *O'Grady v. Wilmot*, [1916] 2 A.C. 231; 85 L.J.Ch. 386; *sub nom. Re O'Grady*, 114 L.T. 1097; 21 Digest 31, 186.
- (8) *Re Sharman*, [1901] 2 Ch. 280; 70 L.J.Ch. 671; 84 L.T. 859; 21 Digest 33, 203.

ADJOURNED SUMMONS to determine, *inter alia*, (i) whether, on the true construction of the will of Sir Hugo Cunliffe-Owen, Bt., deceased, the phrase "the death duties" in cl. 7 thereof extended to duties exigible outside the United Kingdom, so as to render them payable out of the testator's residuary estate, and (ii) whether allowances to be made against estate duty in respect of Canadian succession duty and against the capital of South African personalty in respect of South African succession duty (for the purpose of ascertaining the value of such personalty for the purposes of estate duty) (a) enured to some, and, if so, what, extent for the benefit of a pecuniary legatee, and (b) ought, so far as referable to the residuary estate, to be apportioned between the shares of the beneficiaries in proportion to the amount of such foreign duty borne by them respectively or in proportion to their respective interests in the residuary estate. The relevant parts of the will appear in the judgment.

Denys B. Buckley for the plaintiff, one of the executors and trustees of the will.

E. I. Goulding for the first and ninth defendants, pecuniary legatees.

Pennycuick, K.C., and *J. A. Wolfe* for the second defendant, entitled to one half of the residuary estate absolutely.

Harold Christie, K.C., and *Jackson Wolfe* for the third, fourth and fifth defendants, interested for life in the other half of the residuary estate.

G. B. Parker for the sixth, seventh and eighth defendants, infant beneficiaries interested in the capital of the residuary estate. A

WYNN-PARRY, J.: The first question with which I propose to deal on this summons is whether the phrase "the death duties" which appears in cl. 7 of the will refers only to the United Kingdom death duties or whether it extends to foreign death duties payable in respect of foreign assets owned by the testator. B

Clause 7 is as follows:

"Subject to the provisions of cl. 6 hereof I direct that so much of the death duties payable with reference to my death in respect of all legacies whether specific or pecuniary annuities and all benefits given by this my will as shall be equal to the death duties at the rates in force at the date of this my will shall be paid and discharged out of my residuary estate." C

By cl. 6, to which cl. 7 refers, a sum of £15,000 is bequeathed by the testator to his trustees on certain trusts in favour of the defendant, John William Sholto Comber, the clause in effect providing that as the residuary estate is distributed from time to time a proportionate sum, up to a maximum of £12,500, is to be transferred to that beneficiary and the sum of £15,000 is to be held "in addition to raise thereout and pay the duties on the said sum." So the scheme was that the testator envisaged the beneficiary receiving £12,500, the remaining £2,500 being used to pay legacy duty. As has been pointed out by counsel for the infant beneficiaries, this sum of £2,500 represents the legacy duty which would have been payable if the testator had died immediately after the making of the will, namely, at the rate of twenty per cent. The only other provision in the will to which I need refer for present purposes is the opening passage of cl. 9, which recites: D

"Subject to the payment of my funeral and testamentary expenses and debts and the legacies and annuities given by this my will or any codicil hereto and all estate duty and succession or legacy duty payable on my real estate (including chattels real) and the duties on any legacies or annuities given free of duty by this my will or any codicil hereto I direct . . ." E

There follow directions as to the constitution and dealing with what the testator described as "my residuary estate." F

There is a rule of construction that *prima facie* a direction such as is found in cl. 7, by which duties are thrown on the residuary estate in exoneration of legacies, whether specific or pecuniary, is to be construed as referring only to United Kingdom death duties. That rule is stated by BENNETT, J., in *Re Norbury* (1), which was a simple case where a testator domiciled in England by an English will bequeathed free of duty the sum of £15,000 to his trustees on trust to pay the income to a named beneficiary whose address was given as in Berlin. It was established that under German law, as then in force, a tax known as the inheritance tax was payable by her in respect of such a legacy, and she claimed that the expression "free of duty" in the gift of the legacy to her included freedom from that inheritance tax. BENNETT, J., in a short judgment, said ([1939] 2 All E.R. 626): G

"I have been told that there is no direct authority on the question raised for decision by this summons. In *Re Scott* (2) the decision of the Court H

of Appeal did not cover the point. An English testator is to be presumed to know something of the duties imposed by the English law both on his estate and on beneficiaries under his will when he dies, but I do not suppose that many of them know much, if anything, about death duties imposed by the laws of foreign countries. Nor do I suppose that many of them would contemplate some additional burden being imposed on their estates by a change of residence on the part of a person to whom a legacy had been given. Since there appears to be no authority, I hold that, where an English testator by an English will gives a pecuniary legacy 'free of duty,' the only duties payable out of his estate in respect of the legacy are duties imposed by English law, unless there are words in the will making it clear that duties imposed by the law of a foreign country are to be paid out of such estate."

The learned judge referred to no case other than *Re Scott* (2). In *Re Norbury* (1) the testator was dealing only with property situate, or notionally situate, in England, and there is to be noted the difference between that case and this—that in the present case the testator had a large amount of property in other countries, in particular, in South Africa, the United States of America and the Dominion of Canada. The evidence further establishes that he was actively concerned during his life with the management and administration of that property and that he concerned himself in minimising, so far as he could, the burden of taxation in the various countries, and had also concerned himself with the incidence of death duties as regards that foreign property.

In *Re Quirk* (3) MORTON, J., expressly approved the judgment of BENNETT, J., in *Re Norbury* (1), but he found that in the case before him there were particular circumstances which created a sufficient context to enable him to distinguish *Re Norbury* (1). There he was concerned with the will of a British subject who stated that his domicile was in England, but he was ordinarily resident in Turkey, left immovable property in France, and died in Switzerland. The question was whether a devise free of death duties of that immovable property in France resulted in duty being payable out of the estate and not by the devisee. Towards the end of his judgment, MORTON, J., thus stated the grounds on which he distinguished *Re Norbury* (1) ([1941] Ch. 51):

"In the first place there is the fact that at the date of the will and at the date of the testator's death there was no duty payable in respect of this land other than the 'mutation' duty. In the second place the observation of BENNETT, J., that not many English testators would 'contemplate some additional burden being imposed on their estates by a change of residence on the part of a person to whom a legacy had been given' has no application to a case such as the present, where the gift is one of an immovable property . . . In the third place, this testator was a man who, as appears from his will, was ordinarily resident in Turkey and owned real property in France. I think that he was more likely to have in mind duties payable in a foreign country than a testator who was resident in England and owned no property abroad."

I take that last passage as indicating that MORTON, J., notwithstanding the last sentence of the judgment of BENNETT, J., in *Re Norbury* (1), felt free to investigate the question whether, having regard to the surrounding circumstances, the scope of such a phrase as "free of all duties" was limited so as to throw on the residue only United Kingdom duties, or whether it had any wider scope. Indeed, I think that that conclusion must follow from the earlier reasoning in the short judgment of BENNETT, J., and I take the view that such a phrase as that which I have to consider may in appropriate circumstances be given a wider scope if the surrounding circumstances are sufficiently compelling, and that that is so even in the absence of express words in the will referring to duties imposed by the law of foreign countries.

Finally, I should refer to *Re Frazer* (4), a decision of FARWELL, J. That case concerned a testator who by his will directed his trustees out of the income of his residuary trust fund to pay to his widow such a sum as would, together with the income received by her under his marriage settlement, produce an annual income for her of £2,000, "free of all taxes (including income tax) and duties." Some time after his death his widow re-married and went to live in Kenya. She claimed that the gift in the will free of all taxes including income tax operated to throw on the testator's residuary estate the income tax payable by her in respect of the income under the law of that colony. FARWELL, J., held against that contention. He says in the course of his judgment ([1941] 2 All E.R. 159), having read the judgment of BENNETT, J., in *Re Norbury* (1):

"I feel a difficulty. I think that the term 'all taxes' is very wide, and *prima facie* certainly would include the tax imposed in respect of the income, wherever imposed, by any country in which the testator's widow happened to be living. However, that is not the conclusion to which I think I ought to come. I think that I should adopt the reasoning of BENNETT, J., in *Norbury's* case (1) although I am not suggesting that his decision covers this case, or is itself a decision which I am in any way bound to follow. I think that, when the testator gave his widow an income and directed that the amount of it should be calculated free of payment of all taxes, including income tax and duties, he was contemplating only such taxes and duties as were properly payable from time to time under the laws of England, and he did not contemplate or intend including . . . any duty . . . to which his widow might have become liable by reason of her change of residence after his death."

I read that passage as supporting the view which I have expressed that, notwithstanding the words at the end of the judgment of BENNETT, J., in *Re Norbury* (1),

"unless there are words in the will making it clear that duties imposed by the law of a foreign country are to be paid out of such estate,"

a wider scope to such words as are found in cl. 7 can be given if the surrounding circumstances are sufficiently compelling.

I take the view, however, that before giving to such words as "the duties" the wider scope contended for by counsel for the pecuniary legatees the court should be satisfied that the surrounding circumstances are of a really compelling nature. Here, the evidence establishes that the testator had widely spread foreign interests and had, among other activities, been concerned in obtaining advice as to how to minimise the incidence of death duties on those various assets, but, in my view, that evidence, taken by itself, is not enough to constitute such a compelling circumstance as to justify me in departing from the rule laid down by BENNETT, J., as the rule *prima facie* to be followed in a case like this. I think there is great force in the contention which has been put forward by counsel for the second defendant and counsel for the third, fourth and fifth defendants that had the testator desired to exonerate the beneficiaries and throw the burden of foreign death duties on the residue, nothing would have been simpler than for him to have inserted express words in his will to deal with this matter. There is another circumstance which prevents me from giving to the words "the death duties" in cl. 7 the wide scope contended for, and that emerges from the submission which was made to me by counsel for the infant beneficiaries and was based on the construction of the opening passage of cl. 9, which I have already read. It will be observed that, in that clause, the testator, having provided that subject to the payment of his funeral and testamentary expenses—which latter phrase would include estate duty on the personalty in the United Kingdom—and subject to his debts and the legacies and annuities given by his will, dealt with specific duties, namely,

"all estate duty and succession or legacy duty payable on my real estate (including chattels real) . . ."

In my view, in the context estate duty and succession or legacy duty can only mean United Kingdom estate duty and succession or legacy duty. Then, following on the phrase which I have so construed, comes the phrase

A "and the duties on any legacies or annuities given free of duty by this my will or any codicil hereto."

That is a perfectly usual and normally constructed clause. I think, in the context, the phrase "the duties on any legacies or annuities given free of duty" provides the clue to the meaning or scope of the phrase "the death duties" appearing in cl. 7. It is as if cl. 7 had been so constructed as to contain a direction

B that all the benefits given by the testator's will referred to in cl. 7 had been given free of duty. If it comes only to that, then there is even less ground than otherwise might be the case for saying that there is any context in the will which would justify any more extended meaning being given to the phrase "death duties" than must be given to it if the rule enunciated by BENNETT, J., in *Re Norbury* (1) is applied. For those reasons, in my view, the scope of the phrase "the death duties" in cl. 7 is limited to United Kingdom death duties.

C [HIS LORDSHIP heard argument on the remaining questions raised by the summons.]

Cur. adv. vult.

June 6. WYNN-PARRY, J., read the following judgment. A further question has been raised and argued before me, viz., what is the effect, first as between (a) Mr. Comber, on the one hand, and (b) the residuary legatees, on the other hand, and, secondly, as between (a) Miss Cunliffe-Owen, on the one hand, and (b) the other residuary legatees, on the other hand, of the provisions of the agreement of June 5, 1946, between the British and Canadian governments scheduled to the Double Taxation Relief (Estate Duty) (Canada) Order, 1946 (S.R. & O., 1946, No. 1884). The duties which are the subject of this agreement are, in the United Kingdom, the estate duty imposed in Great Britain, and in Canada the succession duty imposed by Canada. The effect of art. 5 as regards English estate duty is that the Inland Revenue must allow against so much of the estate duty as is attributable to property situate in Canada a credit (not exceeding the amount of estate duty so attributable) equal to so much of the Canadian succession duty as is attributable to such property.

F I have already held that on its true construction the direction in cl. 6 of the will to pay the duties on the sum there mentioned does not extend to (*inter alia*) Canadian succession duty, but does extend to all other death duties wheresoever payable in reference to the death of the testator (including estate duty imposed in Great Britain) in respect of movable property situate abroad at the testator's death, which, but for that direction, would be payable by Mr. Comber, and, further, that, if and so far as the provision made for payment of these latter duties shall be insufficient to pay the same in full, they must be borne by Mr. Comber personally. As regards Canadian succession duty, the expert evidence establishes that this duty, assessed in respect of any succession under the will of a testator, is payable by the successor. No part of this duty is payable ultimately out of the residuary estate. In the case of successions to the residuary estate or any share or interest therein the Canadian succession duty thereon is payable by the individual successors as in the case of a pecuniary legacy, and, if paid by the executors, is recoverable from the individual successors. I have, therefore, already held that Canadian succession duty ought to be charged against the respective shares in the residuary estate bequeathed by cl. 9 of the will. Canadian succession duty is assessed at rates which vary (*inter alia*) with the relationship of the successor to the testator, and, as Miss Cunliffe-Owen was not a relation of

the testator, she has had to bear Canadian succession duty at a higher rate than is exigible in the cases of the other residuary legatees, all of whom are children of the testator. In these circumstances I have to decide whether or not Mr. Comber is entitled to share in the relief accorded in respect of the testator's estate by the double taxation relief agreement to which I have referred. As between Miss Cunliffe-Owen, on the one hand, and the other residuary legatees, on the other hand, I have to decide whether any credit arising by virtue of the double taxation relief agreement, after providing for any part thereof to which Mr. Comber may be held to be entitled, enures as between the persons interested in the residuary estate according to their respective interests therein or among them in proportion to the amount of Canadian succession duty borne by them respectively.

It was argued that the phrase "testamentary expenses" includes the whole of the estate duty payable in respect of the testator's personal estate wherever situate, and for this proposition reliance was placed on the judgment of KEKEWICH, J., in *Re Clemow* (5). It is true that the language of the judgment appears to be wide enough to support this proposition, but it is to be observed that it does not appear from the report that any estate duty on foreign personalty was involved. In any event it cannot be doubted, since the decision of the Court of Appeal in *Re Scull* (6), following the reasoning of the House of Lords in *O'Grady v. Wilmot* (7), that, apart from any direction in the will to the contrary, the estate duty payable on foreign personalty is not a testamentary expense, because, as the foreign personalty does not come to the hands of the executor *virtute officii*, it is a charge on that personalty. Turning to cl. 9 of the will, I am unable to find any sufficient direction to displace the application of the general rule to which I have referred. It was argued that, as the testator has thrown on residue, in addition to what on its true construction is to be regarded as covered by the phrase "testamentary expenses," such further burdens as

"all estate duty and succession or legacy duty payable on my real estate (including chattels real) and the duties on any legacies or annuities given free of duty,"

he cannot have meant to exclude the estate duty payable in respect of foreign personalty, and that, therefore, the phrase "testamentary expenses" should be given a wide meaning. I cannot accept this argument. In my view, one must approach the construction of the opening words of cl. 9 with the general rule in mind and then inquire to what extent, if at all, the testator has displaced it. On this basis one must construe the phrase "testamentary expenses" as *prima facie* including, as regards estate duty, only estate duty on the personalty situate in the United Kingdom. Now, when one reads further one finds that the testator has expressly thrown on residue the estate duty on free realty, but this estate duty is not a testamentary expense: *Re Sharman* (8). To my mind, this circumstance precludes me from holding that the phrase "testamentary expenses" should be construed as including the estate duty on foreign personalty. The result is that, in accordance with the general rule, the beneficiaries concerned will eventually bear the estate duty on the foreign personalty—Mr. Comber to the extent that I have already held, and those interested in the residuary estate the remainder.

Now, the credit which is given under the double taxation relief agreement is a credit in respect of the estate duty payable in respect of the personal estate situate in Canada, which estate duty, as I have held, will have to be borne eventually by Mr. Comber and the residuary legatees. It, therefore, follows to my mind that this credit should enure, not for the benefit of the testator's estate generally, but for the benefit of the persons who have to bear the estate duty on the Canadian personalty. So far as Mr. Comber is concerned, there will be a provision in the order that any sums paid to him under cl. 6 of the will or applied in payment of any duties under the direction to pay duties contained in that

clause ought to be treated as paid out of assets of the testator's estate situate in Canada in respect of the estate duty on which double taxation relief is accorded and the other assets of the estate in the proportions which the values of these classes of assets as valued at the testator's death for the purposes of estate duty in the United Kingdom respectively bear to one another. There will be a further provision in the order that Mr. Comber is entitled as between himself and the persons interested in the residuary estate to a part of the benefit of any credit granted pursuant to the double taxation relief agreement, to which I have referred, against estate duty imposed in the United Kingdom in respect of assets of the estate situate in Canada proportionate to that part of such assets proper to be treated as applicable in payment of any sums payable under cl. 6 of the will.

There is left the question how the remainder of any such credit should be apportioned between Miss Cunliffe-Owen, on the one hand, and the remainder of the residuary legatees, on the other hand. On behalf of Miss Cunliffe-Owen it was argued that the division should be made by reference to the amount of the Canadian succession duty borne by each residuary legatee. I cannot accept this argument. I have held that in this case the residuary legatees must bear the estate duty on the Canadian personalty. They will bear this duty according to their interest in the residuary estate. I have already held that any credit given under the double taxation relief agreement is to be treated as a credit in respect of the estate duty payable in respect of the personal estate in Canada. In my view, therefore, the only logical course is to apply the benefit in the shape of any credit in the same way as the division of the burden is ascertained, that is, by reference to the respective interests of the residuary legatees in the residuary estate. There will, therefore, be a declaration in the order that the remainder of any such credit enures as between the persons interested in the residuary estate for such persons according to their respective interests therein.

The only other duty in respect of which I heard argument was South African succession duty. The position as regards this duty is different from that as regards Canadian succession duty in that there is no double taxation relief agreement covering South African succession duty. Nevertheless, the Inland Revenue, by way of concession, allow the amount exigible in respect of South African succession duty to be deducted from the value of the South African personalty, *i.e.*, they allow that duty to be treated as a debt. According to the expert evidence, South African succession duty assessed in respect of any succession is payable by the successor and if paid by the executors is recoverable by them from the successor. No part of the duty is payable ultimately out of the residuary estate. The duty is assessed at rates varying with the relationship of the successor to the testator. The question, therefore, arises how the amount of South African succession duty allowed by way of the concession to which I have referred should be apportioned. In my judgment, the same reasoning should apply as in the case of the credit given in respect of Canadian succession duty. Mr. Comber will be entitled to share in the amount of such concession on a similar formula to that which I have earlier indicated, and the residuary legatees will be entitled to have the remainder apportioned between them according to their respective interests in the residuary estate. ♡

Solicitors: *W. Gordon Hill* (for all parties except second defendant); *Charles Russell & Co.* (for the second defendant).

Order accordingly.

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

WHIPMAN *v.* WHIPMAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Grazebrook, K.C.), June 1, 4, 5, 1951.]

Legal Aid—Revocation of certificate—Revocation by court—Charge against assisted person of furnishing false information—Disclosure of information supplied to Law Society and National Assistance Board—Jurisdiction of court—Legal Aid and Advice Act, 1949 (c. 51), s. 4 (6), s. 14 (1) (a)—Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 11 (4).

At the hearing of her petition for divorce the wife applied to the court to revoke a legal aid certificate granted to her husband. In support of her application she called as witnesses a representative of the Law Society to produce the file containing the documents relating to the husband's application for legal aid and a representative of the National Assistance Board to produce the file containing details of his capital and income.

HELD: (i) the word "person" in s. 14 (1) (a) of the Legal Aid and Advice Act, 1949, did not include the court or a judge, and, therefore, the information obtained by the Law Society in connection with the application for a legal aid certificate was prohibited from disclosure under s. 14 (1).

(ii) in determining the financial position of an applicant for legal aid under s. 4 (6) of the Act the National Assistance Board was a "committee or person" to whom information was furnished on behalf of the Law Society within s. 14 (1), and, therefore, under the provisions of that subsection the information obtained by the board also was prohibited from being disclosed.

(iii) the power of the court to revoke or discharge a legal aid certificate under reg. 11 (4) of the Legal Aid (General) Regulations, 1950, could only be exercised where it appeared during the hearing of a case that there had been some false disclosure or non-disclosure by the party who had been granted legal aid (*semble*, alternatively, the court could refer the matter to the committee which had granted the certificate); no evidence of any false disclosure or non-disclosure had been given in the course of the present case; and, accordingly, the court had no jurisdiction to revoke or discharge the certificate under the regulation.

FOR THE LEGAL AID AND ADVICE ACT, 1949, s. 1 (6), s. 4 (6), s. 14 (1) (a) and s. 17, see HALSBURY'S STATUTES, Second Edn., Vol. 18, pp. 534, 538, 550, and 552.

Case referred to:

(1) *Brown v. Brown*, (1951), 101 L.Jo. 315.

APPLICATION by the wife petitioner in a divorce suit under reg. 11 (4) of the Legal Aid (General) Regulations, 1950, to revoke the husband's legal aid certificate.

Muriel M. Gibbon for the wife.

A. E. Holdsworth for the husband.

Salmon, K.C., and *A. L. Figgis* for the Law Society.

H. A. P. Fisher for the National Assistance Board.

MR. COMMISSIONER GRAZEBROOK: Before I deal with the issue raised by this petition I want to refer to another matter. When the case was called on for hearing, counsel for the wife indicated that she desired to make an application under reg. 11 (4) of the Legal Aid (General) Regulations, 1950, for the revocation of the legal aid certificate granted to the husband on Mar. 5, 1951. Regulation 11 (4) is as follows:

"At any time during the hearing of any proceedings to which an assisted person is a party the court may, upon application by or on behalf of any other party to the proceedings or by the Law Society, consider whether the

assisted person—(a) has wilfully failed to comply with any regulation as to the information to be furnished by him; or (b) in furnishing any such information has knowingly made a false statement or false representation; and on any such application the court may make an order revoking the certificate or discharging it from such date as may be appropriate and the court's decision shall be final: Provided that no order shall be made under this sub-paragraph until the assisted person has been given an opportunity to show cause why the certificate should not be discharged, or, as the case may be, revoked."

In support of that application, counsel for the wife called as a witness on a *subpoena duces tecum* Miss Spicer, who is a solicitor and an assistant secretary of the Law Society, and asked her to produce the file containing the documents relating to the application of the husband for a legal aid certificate. Counsel also called Mr. Kenneth Macaulay, an executive officer of the National Assistance Board, to produce the file relating to details of the husband's capital and income. Counsel for the wife indicated that she would be satisfied if she obtained the files relating to the husband's capital and income. I had the matter argued before me, not only by counsel for the wife, but also by counsel, appearing as *amicus curiae*, on behalf of the Law Society, by counsel representing the National Assistance Board, and by counsel for the husband.

To deal with the matter it is necessary to see how the question of granting a legal aid certificate arises. Section 1 (6) of the Legal Aid and Advice Act, 1949, says:

"A person shall not be given legal aid in connection with any proceedings unless he shows that he has reasonable grounds for taking, defending or being a party thereto, and may also be refused legal aid if it appears unreasonable that he should receive it in the particular circumstances of the case."

It is clear from that section that the party applying for a certificate has to set out his case, either in defence of proceedings brought against him, or, if he is bringing proceedings, in support of the case he proposes to put before the court, and the nature of the details required appear from the forms drawn up by the Law Society. The party has also to set out the names of the witnesses who will support his case. Section 14 (1) of the Legal Aid and Advice Act, 1949, provides against the disclosure of information obtained by the Law Society in such a way. It says:

"... no information furnished for the purposes of this Part of this Act to the Law Society, or to any committee or person on their behalf, in connection with the case of a person seeking or receiving legal aid or advice shall be disclosed otherwise than—(a) for the purpose of facilitating the proper performance by any person or body of persons of functions under this Part of this Act ..."

Under s. 14 (3), a penalty is imposed on any person who discloses such information.

It was argued on behalf of the wife that to deal with this matter under reg. 11 (4) the court must have before it the information that has been provided by the applicant for the legal aid certificate, that the court was included in the expression "person" in s. 14 (1) (a), and, therefore, the provision as to secrecy did not apply to a matter of this sort. I find great difficulty in interpreting the word "person" as meaning the court or a judge. The ordinary interpretation of the word would not be that it included the court or a judge, and I am confirmed in that conclusion by s. 17 (1) of the Act which provides:

"the expression 'person' does not include a body of persons corporate or unincorporate so as to authorise legal aid or advice to be given to such a body."

It is clear that the authors of the Act had in mind the necessity of defining certain expressions in the Act, and did not see fit to interpret this expression "person" as including the court or a judge. Therefore, I find myself unable to accede to the proposition that "person" here can include the court or a judge, and, in that event, there is nothing in s. 14 (1) (a) of the Act which takes the information that has been obtained by the Law Society for the purposes of a legal aid certificate out of the provisions of s. 14 (1) as regards secrecy. Accordingly, I hold that the information obtained by the Law Society in the course of the application of the husband for a legal aid certificate is prohibited from disclosure under s. 14 (1). A

Then comes the question of the information obtained by or disclosed to the National Assistance Board for the purposes of the part they have to play in the application for a legal aid certificate. Section 4 (6) says: B

"... a person's disposable income and disposable capital, and the maximum amount of his contribution to the legal aid fund in respect of any proceedings, shall be determined by the National Assistance Board, and the board may call attention to any special circumstances affecting the maximum amount of the lump sum and periodical payments which he could reasonably make on account of any contribution." C

It is clear from that that the National Assistance Board are the persons who have to deal with the question of the husband's means. For that purpose the board has to be supplied by the applicant with the details of his capital and income, and those details have to be exhaustive in accordance with the forms provided. Under s. 8 the administration of the Act is placed in the hands of the Law Society. Under reg. 5 (4) of the regulations of 1950 the local committee, who are appointed by an area committee, who, in turn, are appointed by the Law Society, can require the National Assistance Board to do various things, and from that I think it can be deduced that the board, although they may have an entirely separate existence and perform other functions, in regard to these matters come within the category of the "committee or person" to whom information is furnished within s. 14 (1) for the purposes of the administration of the Act in relation to applications for a legal aid certificate and so act as agents of the Law Society. Therefore, the information obtained by them comes within the provisions of s. 14 (1) and the information obtained by the board in the way I have indicated must not be disclosed. It seems clear to me, on the ordinary and natural interpretation of the Act and especially the provisions of s. 14 (1), that, if it were otherwise, it would be impossible to administer the Act because no party would be willing to disclose matters if they thought that they might be communicated to other persons. D E F

In the course of the argument it was submitted that, in addition to these provisions regarding secrecy under s. 14 (1), there was some sort of privilege similar to that attaching to the relationship that exists between solicitor and client. I do not think that it is necessary for me to go into that matter except to say that I have a certain amount of doubt whether there is any privilege of that sort because s. 14 (5) provides that information furnished to counsel or a solicitor is not information furnished to the Law Society, but, having regard to the view I have reached as to the provisions of s. 14 (1), it is unnecessary for me to deal with this. I have, therefore, come to the conclusion that the information in the possession of the Law Society and the National Assistance Board as agents for the Law Society, is prohibited from disclosure under s. 14 (1). G H

There is still the point in regard to reg. 11 (4) which provides for the court dealing with the question of the legal aid certificate. Only if during the hearing of the main matters in the case it appears to the court that there has been some non-disclosure by the party who has obtained the legal aid certificate, do I think that this court is the tribunal to deal with that matter. Indeed, the

provisions of the regulation, which says that the court *may* consider the revocation of the certificate, rather indicate that the court can, if so minded, refer the matter back to the area committee who granted the certificate. I have come to that conclusion, having regard to the provisions of reg. 11 (3) which gives the area committee ample powers to inquire into matters relating to false statements or false representations in obtaining a legal aid certificate and to revoke a certificate if they are minded to do so, having heard further evidence or obtained further information after the certificate has been granted. In *Brown v. Brown* (1), when it had become apparent during the hearing of the case that the husband had not disclosed certain capital which he had, the Divisional Court adjourned consideration of the matter of the husband's means and the taking of the evidence of any witness in regard to that matter to be dealt with at a later date. The only reason that I referred to that was because it seemed to me that it clearly supported the view to which I have come as to the limited occasions on which reg. 11 (4) comes into operation. I have had no evidence disclosed to me during the hearing of the case indicating that there has been any disclosure or non-disclosure by the husband which is incorrect or false, and, therefore, the jurisdiction under reg. 11 (4) does not seem to me to arise.

Solicitors: *Alec Woolf & Turk* (for the wife); *Gibson & Weldon*, agents for *A. H. Maxwell Lewis*, Southend (for the husband); *T. G. Lund* (for the Law Society); *Solicitor, Ministry of National Insurance* (for the National Assistance Board).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

Affirmed. C.A. post p. 936.

Re GANSLOSER'S WILL TRUSTS. CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA v. CHILLINGWORTH AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), May 30, June 7, 1951.]

Will—Class gift—Time of ascertainment of class—Joint tenancy or tenancy in common—Gift of residue to “relations” of testator and his wife subject to wife's life interest.

The testator, who died without issue on Sept. 4, 1929, was a naturalised British subject within the Straits Settlements and domiciled in Italy at the time of his death. By his will, made on Apr. 15, 1929, he directed that his residuary estate should “be divided as follows *videlicet* one half to my wife's relations one half to my own relations but not till the death of my wife. Until then my wife shall have the unrestricted use of the income of my . . . estate.” The estate consisted entirely of personalty, partly in England and partly in Singapore. Under Italian law, on which the construction and effect of the will depended, the law operative in the Straits Settlements at the time of the testator's death applied in regard to the dispositions made by the will, and, under that law, the gifts to “relations” were to be construed in the same manner as in England before 1926. The testator's wife died on Sept. 8, 1949.

HELD: (i) on the true construction of the will, the class of the wife's relations who were to take one half share of the testator's residue was to be ascertained as at the death of the testator and would consist of the persons who would have been entitled to the wife's personal estate under the Statutes of Distribution (22 & 23 Car. 2, c. 10, and 1 Jac. 2, c. 17) if she had died intestate in respect thereof on the day of the testator's death immediately after him and if those statutes had been applicable to the distribution of her personal estate.

(ii) the persons entitled to the half share of the residue expressed to be given to the testator's relations were to be ascertained as at the date of his death and would consist of those persons (other than the wife) who would have been entitled to his personal estate under the Statutes of Distribution (22 & 23 Car. 2, c. 10, and 1 Jac. 2, c. 17) if he had died intestate and the statutes had applied.

(iii) the members of each class (*i.e.*, the wife's relations and the testator's relations) would take the share to which they were entitled as joint tenants, and not as tenants in common.

AS TO TIME OF ASCERTAINING CLASS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 268-271, paras. 318-321; and FOR CASES, see DIGEST, Vol. 44, pp. 879-886, Nos. 7364-7429, and pp. 892, 893, Nos. 7504-7515.

Cases referred to:

- (1) *Re Mellish*, [1916] 1 Ch. 562; 85 L.J.Ch. 433; 114 L.T. 991; 44 Digest 881, 7385.
- (2) *Mortimore v. Mortimore*, (1879), 4 App. Cas. 448; 48 L.J.Ch. 470; 40 L.T. 696; 44 Digest 884, 7406.
- (3) *Eagles v. Le Breton*, (1873), L.R. 15 Eq. 148; 42 L.J.Ch. 362; 44 Digest 973, 8276.
- (4) *Lucas v. Brandreth* (No. 2), (1860), 28 Beav. 274; 2 L.T. 785; 54 E.R. 371; 40 Digest 580, 1158.
- (5) *Tiffin v. Longman*, (1852), 15 Beav. 275; 20 L.T.O.S. 13; 51 E.R. 543; 44 Digest 893, 7512.
- (6) *White v. Springett*, (1869), 4 Ch. App. 300; 38 L.J.Ch. 388; 20 L.T. 502; 44 Digest 886, 7428.

ADJOURNED SUMMONS to determine, *inter alia*, (i) who were the persons entitled to a half share of the testator's residuary estate expressed in the will to be given to his wife's relations on the death of the wife, and whether the persons entitled took as joint tenants or tenants in common, and (ii) who were the persons entitled to the half share of residue expressed to be given to the testator's relations on the death of the wife, and whether the persons entitled took as joint tenants or tenants in common. The facts appear in the judgment.

K. J. T. Elphinstone for the executors.

Cockle for the first defendant (a brother of the testator's wife and personal representative of a sister who survived the testator and predeceased the wife).

Bathurst for the second, third, fourth, fifth, sixth and seventh defendants (the children of a brother of the testator's wife who predeceased the testator).

F. E. Skone James for the eighth, ninth and tenth defendants (the children of a brother of the testator's wife who survived the testator and predeceased the wife).

R. R. A. Walker for the eleventh defendant (a stepbrother of the testator's wife).

J. Monckton for the twelfth and thirteenth defendants (children of a brother and sister of the testator, respectively, both the brother and sister having predeceased the testator).

Owen Swingland for the fourteenth and fifteenth defendants (a sister of the testator and her son).

The sixteenth and seventeenth defendants (personal representatives of a brother of the testator's wife who survived the testator and predeceased the wife, a widower without issue) did not appear.

Denys B. Buckley for the Custodian of Enemy Property (the testator's relations being at present resident in Germany).

Cur. adv. vult.

June 7. **VAISEY, J.**, read the following judgment. The testator, Gustav Gansloser, made his will on Apr. 15, 1929. After appointing the plaintiffs, the

Chartered Bank of India, Australia and China, as executors and giving certain directions not material to be here set forth, the testator continued as follows:

"The remainder of my estate wherever situated . . . I desire to be divided as follows *videlicet* one half to my wife's relations one half to my own relations but not till the death of my wife. Until then my wife shall have the unrestricted use of the income of my said estate."

A The testator died on Sept. 4, 1929. He left no issue. He was married once only, namely, to the wife named in his will. She married again after his death, but had no issue by either marriage. Both the testator and his wife had several collateral relations who are represented on the present summons. The will was a holograph document unwitnessed. It was, however, admitted to probate and proved in the Principal Probate Registry by the said bank on Mar. 10, 1930, as being a valid will by the laws of Italy, in which country the testator was domiciled at the date of his death. His debts and funeral expenses have long since been paid and discharged. His estate consisted wholly of personalty, partly in England and partly at Singapore. All the duties payable on his death have been discharged and also the further duties payable on his wife's death, which event occurred on Sept. 8, 1949.

C By an order made by LUXMOORE, J., on Apr. 27, 1932, in former proceedings in the matter of the testator's estate in which the bank was plaintiff and the testator's widow (who had married again and was then Elizabeth Fry) and others were defendants, it was declared: (i) that the testator was domiciled at his death in Italy; (ii) that at his death he was a naturalised D British subject within the Straits Settlements; (iii) that his will effectively disposed of all his estate wherever situate, that the construction and effect of his will depended on the law of Italy, and that under the Italian law the law operative in the Straits Settlements at his death applies. It is established by evidence in the present proceedings that under the last-mentioned law the gifts to "relations" would be construed in the same manner as in England before E 1926 and that the English authorities on the subject would be followed. On that footing I have now to determine the meaning and effect of the gifts to the relations of the testator and his wife respectively. It has long been settled that, to give a measure of certitude to the word "relations," a testamentary gift to the relations of a named person is construed as a gift to the persons who would by virtue of the relevant statute or statutes of distribution take the personal estate of that named person on his or her intestacy. This is not disputed, and it is also agreed that the relevant statutes to be looked at in the present case are those which were in force before 1926, *viz.*, the Statute of Distribution, 1670 (22 & 23 Car. 2, c. 10), and the statute 1 Jac. 2, c. 17, which regulated the law of intestate succession until repealed by the Administration of Estates Act, 1925.

G It will be observed that the wife's relations are mentioned first, a point which may have some slight significance, and I will deal first with the gift to them. The question which arises at the outset is this: Is the class of her relations to be ascertained on the assumption and footing of her having died intestate at the date of the testator's death or on the assumption and footing of her having died intestate at the actual date of her own death? On either view of the matter, do the members of the class take as tenants in common in the shares in which they H would have taken under the statutes in the event of her notional intestacy, or do they take as individuals in joint tenancy? I cannot construe the direction to divide as applying further than to the original division into halves. Neither of these questions would appear to be precisely covered by authority. As to the first, however, I think that the class should be ascertained as at the death of the testator, consisting of those persons who, if the wife had died at the date of his death, would have been her statutory next of kin. There is no difficulty about the ascertainment of an artificial class on such a hypothetical and contingent

footing: compare *Re Mellish* (1), although there the artificial class was ascertained after, and not before, the actual death. In the present case the gift to the wife's relations comes first and the life interest of the wife follows, and it seems more likely that the testator was intending to benefit such of her relations as he might be expected to have known rather than persons of whom none might have been existing in his lifetime, and, moreover, it is well settled that the court inclines to an early date of vesting: see *Mortimore v. Mortimore* (2).

As to the second question, I think that the members of the class take as joint tenants and not in the shares prescribed by the statutes, and this view appears to me to be supported by the authority of *Eagles v. Le Breton* (3) and *Lucas v. Brandreth* (No. 2) (4). *Tiffin v. Longman* (5) is rather puzzling, but the material point seems to me to be that, where we have (as here) an artificial class to be ascertained at the date of a hypothetical and not an actual death, the implied reference to the statutes should not be carried further than the ascertainment of the persons of whom the class is composed: see *White v. Springett* (6), per SELWYN, L.J. (4 Ch. App. 303) and *Mortimore v. Mortimore* (2), per EARL CAIRNS, L.C. (4 App. Cas. 451). When the gift is to next of kin and not to relations or relatives, the argument for applying the statutes for all purposes is obviously much stronger.

Though the point is, to my mind, a doubtful one, I have come to the conclusion that I should declare that, on the true construction of the testator's will and in the events which have happened, the persons entitled to the one half of the testator's residuary estate expressed in the will to be given to his wife's relations are the persons who under or by virtue of the former statutes of distribution (Statute of Distribution, 1670, and the statute 1 Jac. 2, c. 17) would have been entitled to her personal estate if she had died intestate in respect thereof on the day of the testator's death immediately after him and the said statutes had been applicable to the distribution of such personal estate, such persons to take as joint tenants and not as tenants in common.

As regards the gift to the relations of the testator, I understand that, on any view of the matter, the same persons are entitled, but I will none the less express my view and declare that, on the true construction of his will and in the events which have happened, the persons entitled to the one half of his residuary estate expressed to be given to his relations are the persons, other than his wife, who under or by virtue of the same statutes would have been entitled to his personal estate if he had died intestate in respect thereof and the said statutes had been applicable to the distribution of such personal estate, such persons to take as joint tenants and not as tenants in common. I will direct the costs of all parties taxed as between solicitor and client to be raised and retained or paid out of the capital of the testator's estate. There will be liberty to apply in case any inquiry or other further relief should be necessary.

Declaration accordingly.

Solicitors: *Linklaters & Paines* (for the executors); *J. D. Langton & Passmore, Gordon, Dadds & Co., Lethbridges*, and *Robins, Hay & Waters* (for persons claiming as the wife's relations); *Cruesemann & Rouse*, and *Nisbet, Drew & Loughborough* (for persons claiming as the testator's relations); *Treasury Solicitor* (for the Custodian of Enemy Property).

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

THOMPSON v. EARTHY.

[KING'S BENCH DIVISION (Roxburgh, J., sitting as a judge of the Division), June 8, 1951.]

Trespass—Deserted wife in occupation of dwelling-house—Undertaking by husband, on summons for maintenance, to allow wife and children to remain in house rent free—Conveyance by husband to plaintiff.

From their marriage in 1935 until July 25, 1946, the defendant and her husband lived together in a house which was the freehold property of the husband. On July 25, 1946, the husband deserted the defendant and the children of the marriage, leaving them in the matrimonial home while he went to live elsewhere. On Oct. 20, 1946, before a court of summary jurisdiction on a summons by the defendant for the custody of the children and maintenance, the husband undertook to allow the defendant and the children to continue to live in the matrimonial home rent free and to pay all outgoings in respect thereof. On June 17, 1950, the husband conveyed the house to the plaintiff, who thereupon sought possession of it from the defendant.

HELD: the defendant had no legal or equitable interest in the premises which ran with the premises and were capable of binding them in the hands of a purchaser, and, therefore, she was a trespasser and must deliver up possession to the plaintiff.

AS TO PROCEEDINGS BETWEEN HUSBAND AND WIFE IN REGARD TO PROPERTY, see HALSBURY, Hailsham Edn., Vol. 16, p. 740, para. 1211; and FOR CASES, see DIGEST, Vol. 27, pp. 260, 261, Nos. 2296-2303.

Cases referred to:

- (1) *Old Gate Estates, Ltd. v. Alexander*, [1949] 2 All E.R. 822; [1950] 1 K.B. 311; 2nd Digest Supp.
- (2) *Hutchinson v. Hutchinson*, [1947] 2 All E.R. 792; 2nd Digest Supp.
- (3) *Brown v. Draper*, [1944] 1 All E.R. 246; [1944] K.B. 309; 113 L.J.K.B. 196; 170 L.T. 144; 2nd Digest Supp.
- (4) *Bramwell v. Bramwell*, [1942] 1 All E.R. 137; [1942] 1 K.B. 370; 111 L.J.K.B. 430; 2nd Digest Supp.

ACTION.

The plaintiff was the purchaser of a freehold dwelling-house which was formerly the matrimonial home of the defendant and her husband, the vendor of the property. After being deserted by her husband, the defendant and the children of the marriage continued to live in the house, and on Oct. 20, 1946, the husband gave an undertaking before a court of summary jurisdiction to allow them to remain there rent free. On June 17, 1950, the husband conveyed the house to the plaintiff, who now sought an order for possession of the property and damages against the defendant for trespass from the date of the conveyance until possession. The defendant contended that she had an equitable interest in the house by reason of the husband's undertaking before the justices, and, therefore, she was entitled to remain in possession until the husband made other provision for her.

M. R. Hoare for the plaintiff.

Jellinek for the defendant.

ROXBURGH, J.: The plaintiff, Mrs. Bertha Thompson, asks for an order for possession of the freehold house No. 15 Warley Avenue, Hayes, Middlesex, and for damages for trespass and/or use and occupation from June 17, 1950, until possession. Prior to June 17, 1950, the freehold reversion expectant on certain mortgages was vested in Vaughan Douglas Earty, the defendant's husband. On June 17, 1950, Mr. Earty conveyed the house, subject to certain mortgages, to the plaintiff, and as from that date the legal estate in fee simple, subject to the

mortgages, has been vested in the plaintiff. The defendant, who is living in the house with her children, is, and was at all material times, in occupation of the premises as the wife of Mr. Earthy.

Evidence of the statements in the defence has not been given before me, but for the purposes of my judgment I propose to assume that those statements are true. The defence says that Vaughan Douglas Earthy is the defendant's husband

"(4) . . . and the said house is or has been their only matrimonial home since their marriage on Nov. 27, 1935. The defendant has lived in the said house continuously ever since her said marriage. There are three infant children of the said marriage who live and have lived with the defendant in the said house throughout their lives. (5) On July 25, 1946, the said Vaughan Douglas Earthy deserted the defendant and the said children, leaving them in the said matrimonial home and going himself to live elsewhere. The said Vaughan Douglas Earthy never returned to the said matrimonial home and remains in desertion of the defendant. (6) On Oct. 20, 1946, the Middlesex justices sitting at Uxbridge on the complaint of the defendant found that the said Vaughan Douglas Earthy had deserted the defendant and awarded the custody of the said children to the defendant, and, on the said Vaughan Douglas Earthy undertaking to allow the defendant and the said children to remain in the matrimonial home free of rent and to pay all outgoings in respect thereof, ordered him to pay to the defendant maintenance at the rate of £1 per week only and 5s. per week only for each of the said children."

After alleging those facts, the defence continues:

"Before the plaintiff acquired any beneficial interest in or title to the said house (if any, which is not admitted) she knew or by her solicitors acting for her knew of the matters [set out above]. In the premises the defendant will contend that the plaintiff's title, if any, to the said house is subject to the defendant's interest therein, whereby the defendant is entitled to remain in possession of the said house until the said Vaughan Douglas Earthy shall provide an alternative home for the defendant and the said children."

The position of a wife who remains in a matrimonial home which has been deserted by a husband is compendiously stated by DENNING, L.J., in *Old Gate Estates, Ltd. v. Alexander* (1), which was a case under the Rent Restrictions Acts. In his judgment DENNING, L.J., said ([1949] 2 All E.R. 825):

"If a statutory tenant goes out of occupation, leaving lodgers or sub-tenants or no one in the house, he ceases to be entitled to the protection of the Rent Restrictions Acts, but he does not, in my opinion, lose the protection if he goes out leaving his wife and furniture there. The reason is because the wife has a very special position in the matrimonial home. She is not the sub-tenant or licensee of the husband. It is his duty to provide a roof over her head. He is not entitled to tell her to go without seeing that she has a proper place to go to. He is not entitled to turn her out without an order of the court: see *Hutchinson v. Hutchinson* (2). Even if she stays there against his will, she is lawfully there, and, so long as she is lawfully there, the house remains within the Rent Acts and the landlord can only obtain possession if the conditions laid down by the Acts are satisfied."

I understand DENNING, L.J., there to be saying two separate things: (i) that the husband has a matrimonial duty to provide a roof over his wife's head, and (ii) that, as a husband cannot sue his wife in tort at common law, if he seeks to eject her he must have recourse to the provisions of the Married Women's Property Act, 1882, s. 17, and, if he does so, the court has a discretion.

In other words, the wife has a right to remain until an order is made against her. The husband has no right to turn her out, and the court, in considering how it ought to exercise its discretion under the Married Women's Property Act, 1882, s. 17, would bear in mind the matrimonial duty to which DENNING, L.J., refers.

A This, however, is not a case between husband and wife. So far as I know, there is no legal obstacle to prevent the plaintiff from bringing an action in tort against the defendant. The real question is whether or not the defendant has any legal or equitable interest in the premises which is capable of running with the premises so as to bind them in the hands of a purchaser. I have never heard of any estate or interest of this character in land, and no authority has been cited to me which suggests that there is any. The authorities which were cited suggest (though they do not decide) that there is no such estate or interest. For instance, B in *Old Gate Estates, Ltd. v. Alexander* (1) DENNING, L.J., is careful to point out ([1949] 2 All E.R. 825) that the wife "is not the sub-tenant or licensee of the husband"—I stress the word "licensee"—and in *Brown v. Draper* (3), another decision under the Rent Restrictions Acts, LORD GREENE, M.R., delivering the judgment of the Court of Appeal, said ([1944] 1 All E.R. 248):

C "In such a case the possession of the wife must, we think, be regarded as the possession of the husband . . ."

For these reasons, I should pause long before declaring the existence of a new species of equitable right hitherto never suggested, especially as the husband himself has a right to apply to the court for possession against the defendant under the Married Women's Property Act, 1882, s. 17, whether or not the court would exercise its discretion under the section in his favour. The plaintiff, D however, could not apply under that Act, and, therefore, if I were to invent this new equitable interest, she would be in a worse position than the defendant's husband from whom she has purchased. In these circumstances, I must decline to declare the existence of a suggested equitable interest for which there is no previous authority whatever. The plaintiff has proved her title to the land. E The defendant has proved no estate or interest, legal or equitable, in the land, and, accordingly, she is a trespasser, and I must order her to deliver up possession to the plaintiff.

Judgment for the plaintiff.

Solicitors: *Warmingtons* (for the plaintiff); *Reginald Johnson & Co.* (for the defendant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

WILSON v. INYANG.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Devlin, JJ.), June 13, 1951.]

G *Medical Practitioner—Falsely pretending to be a registered person—Diploma of drugless therapy—Honest belief in use of title "physician"—Reasonable ground for belief—Matters for consideration by court—Medical Act, 1858 (c. 90), s. 40.*

H The respondent, an African who had lived in England for two years, published an advertisement as follows: "Naturopath physician, N.D., M.R.D.P. Patients visited . . ." and gave his address. He was not a registered medical practitioner, but he had attended a course of instruction at a clinic of drugless therapy and had obtained a diploma and a certificate of membership of the British Guild of Drugless Practitioners. A charge that he wilfully and falsely used the title or description of "physician," contrary to s. 40 of the Medical Act, 1858, was dismissed by the magistrate on the ground that he genuinely believed that he was entitled so to describe himself

although in similar circumstances no person brought up and educated in England could reasonably have held such a belief.

HELD: a person did not commit an offence under s. 40 if he honestly believed that he was within his rights in describing himself as he did; it would not be right to say that he could not have acted honestly if he had no reasonable grounds of belief, but, in deciding whether he had acted honestly, the court must take into consideration the presence or absence of such grounds; in the present case the magistrate had done so; and, therefore, his decision must stand. A

Younghusband v. Luftig ([1949] 2 All E.R. 72), explained and applied.

AS TO UNLAWFUL USE OF TITLE, see HALSBURY, Hailsham Edn., Vol. 22, p. 313, para. 593; and FOR CASES, see DIGEST, Vol. 34, pp. 554, 555, Nos. 112-128, and 2nd Digest Supp. B

Cases referred to:

- (1) *Younghusband v. Luftig*, [1949] 2 All E.R. 72; [1949] 2 K.B. 354; [1949] L.J.R. 1513; 113 J.P. 366; 2nd Digest Supp.
- (2) *R. v. Lewis (Stipendiary Magistrate) & Frickhart. R. v. Same & Bridgwater*, (1896), 60 J.P. 392; 34 Digest 554, 115.
- (3) *Ladd v. Gould*, (1860), 1 L.T. 325; 24 J.P. 357; 34 Digest 555, 130. C

CASE STATED by a metropolitan magistrate.

On Jan. 10, 1951, at West London Magistrate's Court, an information, preferred by the appellant on behalf of the Medical Defence Union, and charging that the respondent did wilfully and falsely use the title or description of "physician," contrary to s. 40 of the Medical Act, 1858, was dismissed on the ground that the respondent had the honest belief that he was entitled to do so. D

Cumming-Bruce for the appellant.

The respondent did not appear and was not represented.

LORD GODDARD, C.J.: This is a Special Case stated by a metropolitan magistrate before whom the respondent was charged with wilfully and falsely using the title of physician, contrary to s. 40 of the Medical Act, 1858. There was a second information charging alternatively that at the same place he did wilfully and falsely use the description contrary to s. 40. E

The magistrate found that the respondent handed in the following advertisement at the South Kensington office of a weekly newspaper for publication:

"Naturopath physician, N.D., M.R.D.P. Patients visited also evening. Surgery for chiropody. For appointment." F

He gave an address. I confess that, if I had been trying the case, the fact that he used these letters "N.D." would cause me to regard his advertisement with the strongest distaste as I should have thought it was in the hope that anybody looking at it would think it was "M.D." The compositor, indeed, was so misled, because he printed it "M.D." "M.R.D.P." comes very near "M.R.C.P." G
The respondent is an African who has lived in England for about two years. He has never been a medical practitioner, but, before June, 1950 (it is stated) he had obtained the diploma of the Anglo-American Institute of Drugless Therapy. As to what drugless therapy is the magistrate does not tell us except that

"he had first undergone a course of instruction which consisted partly of a correspondence course and partly of practical training. The practical training was given to the respondent at a clinic in Bournemouth, where there were about thirty beds for in-patients and an out-patients' department. The respondent attended there for six months. He then sat for examination before obtaining the said diploma, and wrote about six papers. The respondent paid £20 for his postal and practical instruction, examination and diploma. The respondent did not know whether the persons who instructed H

and examined him had professional qualifications or not, and made no inquiries about the status or competence of the said institute. After the respondent had obtained the said diploma he obtained a certificate of membership of the British Guild of Drugless Practitioners."

The magistrate then says:

A "I was of opinion that the use of the title or description 'physician' in the said advertisement would constitute an offence if used wilfully and falsely by the respondent; that the respondent genuinely believed he was entitled so to entitle or describe himself; that, while no person brought up and educated in England could reasonably believe that the said course of instruction and examination by the said institute and membership of the said guild would entitle him to entitle or describe himself as 'physician,'

B the respondent, because he was an African brought up in Africa, who had only lived in England for two years, acted reasonably in believing that his said course of instruction, examination, diploma and guild membership qualified him so to entitle or describe himself."

Accordingly he dismissed the summons.

C I do not profess to understand the reasoning of the magistrate, but, as he saw the respondent and heard him cross-examined, it would be impossible for us to say that there was no evidence on which he could come to that conclusion of fact. Counsel for the appellant has invited us to say that the magistrate was bound to convict in this case because his findings amounted to a finding that the respondent had no reasonable ground for his belief, but, as I understand his

D finding, the magistrate has held that, though in similar circumstances he would not have said that a European or an Englishman had reasonable grounds for his belief, he thought that the respondent, being an African, had such reasonable grounds.

E What is the law on the subject? The books are full of cases under the Medical Act, 1858, and I express the hope that some day the General Medical Council will take steps to get another Act of Parliament which will clear up the anomalies and difficulties which the courts have found in applying the Act of 1858 to this class of case. In *Younghusband v. Luftig* (1) a court of five judges assembled in an endeavour to clear up what HENN COLLINS, J., in *R. v. Lewis (Stipendiary Magistrate) & Frickhart. R. v. Same & Bridgwater* (2) (60 J.P. at p. 393) described as a complete fog. The complete fog of which he spoke related to whether or not this question was one of law or of fact. In *Younghusband v. Luftig* (1), in an endeavour to give a decision which might be useful and authoritative in the future, we reviewed the whole of the cases that had been decided on this subject, beginning with *Ladd v. Gould* (3) in 1860, and the court came to the conclusion that the result of the unbroken line of authority was ([1949] 2 All E.R. 80)

G "... that to commit an offence a defendant must have acted wilfully and falsely and that it is for the justices to decide whether he has done so, and, also, that he must not commit an offence if he honestly believes that he was within his rights in describing himself as he did."

H In other words, the case came down to the question whether the defendant was acting in good faith in describing himself as he did because he had an honest belief that he was entitled to do so. It is perfectly true, and this is what counsel for the appellant so much relied on, that in giving the judgment of the court I went on (*ibid.*):

"He must, of course, have a reasonable ground for his belief. A person who has passed no examination and has received no qualification from a genuine teaching body cannot adopt one of the titles mentioned in s. 40 of the Act of 1858 and be heard to say that he believed he had such skill as would entitle him so to describe himself. We can sum up this part of the case by saying

that there must be *mens rea* and the presence or absence of that state of mind must be tested on ordinary principles and in the light of common sense."

It is clear that what the court meant in that passage was that the magistrate must apply ordinary principles and test the matter in the light of common sense, and that, generally speaking, applying ordinary principles and in the light of common sense, he would say that, if a man had no reasonable ground for believing what he said he believed, he was not acting honestly. There may be exceptions. A man may believe that which no other man of common sense would believe, but he yet may honestly believe it. One of the matters which occurred to me in addition to those mentioned by DEVLIN, J., in the course of the argument is that in the Bills of Exchange Act, 1882, s. 90, it is said:

"A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not."

That section was inserted in the Act because, although that was the effect of the old cases, there came a series of cases, most of them in LORD TENTERDEN's time, in which, if a man acted negligently, it was said he could not pass a good title as he was not acting *bona fide*. Gross negligence or strong negligence is always evidence—very often the best evidence—that a man is not acting honestly. If he has acted without any reasonable ground and says: "I had not properly inquired, and did not think this or that," that may be (and generally is) very good evidence that he is not acting honestly. But it is only evidence, and I do not think it would be right for a moment to say that we qualified the rest of our judgment in *Younghusband v. Luftig* (1), in which we emphasised the fact that the question for the magistrate was whether the defendant acted honestly, by saying that he could not have acted honestly if he had no reasonable grounds. What we were pointing out was that, in considering whether he had acted honestly, the magistrate ought to take into account the presence or absence of reasonable grounds of belief. In the present case it is obvious that the magistrate did take that into account, and he has given us his reasons for coming to the conclusion that this man did act honestly. Whether we should have come to that conclusion is neither here nor there, because we cannot disturb it if there was evidence on which he could arrive at that conclusion. He saw the respondent and heard his evidence and formed an opinion as to his credibility and honesty. Having found that, I do not think the court can interfere because to do so we should be ignoring the real ratio of the judgment in *Younghusband v. Luftig* (1), which is that whether a person acted honestly is a question of fact for the magistrate, and whether he acted reasonably or not is the deciding feature in this case.

The only satisfactory part of the case is that I hope that the respondent will understand, now this matter has been before the court and it has been explained to him what are the requirements of the English law, that he will never be able to say that he honestly believes he is entitled to use the title of "physician" because he is holding what he is pleased to call the diploma of a body that is not recognised. If he does so, he will find himself prosecuted and dealt with severely. As it is, I think this appeal must be dismissed.

LYNSKEY, J.: I agree.

DEVLIN, J.: I also agree.

Appeal dismissed.

Solicitors: *Hempsons* (for the appellant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

LORT-WILLIAMS v. LORT-WILLIAMS.

[COURT OF APPEAL (Somervell, Denning and Hodson, L.J.J.), June 12, 1951.]

Variation of Settlement—"Post-nuptial settlement"—*Life assurance policy effected for benefit of "widow or children"*—*Matrimonial Causes Act, 1950 (c. 25), s. 25.*

On Dec. 1, 1923, the parties were married, and on Nov. 19, 1936, the husband effected a policy of assurance on his life under the Married Women's Property Act, 1882, s. 11 (as amended), the sum assured being payable to two trustees "as trustees of the moneys payable under this policy, effected for the benefit of the widow or children or any of them of the assured in such shares and proportions and interest and generally in such manner as the assured shall by will or deed revocable or irrevocable appoint or so have appointed." On Nov. 30, 1949, the wife was granted a decree of divorce, which was made absolute on Jan. 16, 1950. The wife applied under s. 25 of the Matrimonial Causes Act, 1950, to vary the settlement said to have been created by the policy, but the husband objected that the policy was not a settlement within the meaning of s. 25 of the Act of 1950, and, therefore, that the court had no jurisdiction to vary it.

HELD: "post-nuptial settlement" within the meaning of s. 25 included any provision made by a husband during the existence of the marriage for the future benefit of the wife of that marriage; it did not cease to be a settlement on her because the provision was contingent or because by its terms it might be applicable for the benefit of a wife by a subsequent marriage; and, therefore, in the present case the court had jurisdiction to vary the policy.

Cousins v. Sun Life Assurance Society ([1933] Ch. 126), distinguished.

AS TO VARIATION OF SETTLEMENTS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 800-809, paras. 1274-1292; and FOR CASES, see DIGEST, Vol. 27, pp. 517-533, Nos. 5576-5778.

Cases referred to:

- (1) *Re Browne's Policy*, [1903] 1 Ch. 188; 72 L.J.Ch. 85; 87 L.T. 588; 27 Digest 152, 1227.
- (2) *Cousins v. Sun Life Assurance Society*, [1933] Ch. 126; 102 L.J.Ch. 114; 148 L.T. 101; Digest Supp.
- (3) *Hargreaves v. Hargreaves*, [1926] P. 42; 95 L.J.P. 31; 134 L.T. 543; Digest Supp.
- (4) *Prinsep v. Prinsep*, [1929] P. 225; 98 L.J.P. 105; 141 L.T. 220; Digest Supp.
- (5) *Melwill v. Melwill & Woodward*, [1930] P. 159; 99 L.J.P. 65; 143 L.T. 206; Digest Supp.
- (6) *Dormer (otherwise Ward) v. Ward*, [1901] P. 20; 69 L.J.P. 144; 83 L.T. 556; 27 Digest 521, 5629.
- (7) *Joss v. Joss*, [1943] 1 All E.R. 102; [1943] P. 18; 112 L.J.P. 19; 167 L.T. 419; 2nd Digest Supp.

APPEAL by the husband from an order of WALLINGTON, J., dated May 11, 1951, whereby he confirmed the registrar's report that a life assurance policy, effected by the husband for the benefit of his widow and children during the subsistence of the marriage, was a post-nuptial settlement variable by the court under s. 25 of the Matrimonial Causes Act, 1950. For the husband it was contended that the policy was not a settlement on the wife, and, if it was, it was not a post-nuptial settlement within s. 25.

Cross, K.C., and *Merrylees* for the husband.

Simon, K.C., and *A. H. Ormerod* for the wife.

SOMERVELL, L.J.: This is an appeal by a husband who was the respondent to his wife's petition for divorce. The marriage took place on Dec. 1, 1923, a decree *nisi* was granted to the wife on Nov. 30, 1949, and it was made absolute on Jan. 16, 1950.

Section 25 of the Matrimonial Causes Act, 1950, which reproduces s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, provides as follows:

"The court may after pronouncing a decree for divorce or for nullity of marriage inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit, and the court may exercise the powers conferred by this section notwithstanding that there are no children of the marriage."

The wife seeks to invoke the jurisdiction of the court under that section to vary the terms of a policy of assurance which was taken out during the marriage on the husband's life. We are only concerned with the question whether that policy was a post-nuptial settlement within s. 25 and whether the registrar had jurisdiction to consider the wife's application. The learned registrar decided that he had jurisdiction. WALLINGTON, J., confirmed that decision, and the husband appeals to this court.

The policy was taken out by a Mr. Yates and a Mr. Headley on the life of Sir John Rolleston Lort-Williams. It was a single premium policy for £3,000 and profits, amounting to about £1,500. It was payable to Mr. Yates and Mr. Headley, the trustees, as

"moneys payable under this policy effected for the benefit of the widow or children or any of them of the assured in such shares and proportions and interest and generally in such manner as the assured shall by will or deed revocable or irrevocable appoint or so have appointed."

Under the heading "Special Provisions" there are the words:

"Under the provisions of the Married Women's Property Act, 1882, s. 11, and [as amended by the Law Reform (Married Women and Tortfeasors) Act, 1935] this policy is issued for No. 105768, the surrender value thereof, as at Aug. 8, 1936, being the single premium under this policy to which there attaches at the date of issue bonus additions of £747 10s. 0d. being the bonus additions which attached at the aforesaid date to policy No. 105768."

Clearly the parties thought, and I have no reason to think that they were wrong in thinking, that this policy fell within the provisions of the Married Women's Property Act, 1882. Section 11 of that Act provides:

"A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts . . ."

It will be noted that the expression in the statute is "for the benefit of his wife", and the policy in question here refers to "his widow".

In *Re Browne's Policy* (1) a man effected a policy under the Act of 1882, expressed to be for the benefit of his wife and children. The wife died and the man married again and had a child by his second wife. On his death it was held that the widow and her child were entitled to participate jointly with the children

of the first marriage. The question there was whether the use of the word "wife" in the policy restricted the benefit to the wife existing at that time. KEKEWICH, J., said ([1903] 1 Ch. 190):

A "Regarding the case apart from the language of the Married Women's Property Act, 1882, one is met by the presumption, which is rather one of common parlance and common sense than of law, though it has been recognised by legal authority, that a married man speaking of his wife intends his wife at that time, and does not contemplate one whom he may marry after her death, and the observation holds good respecting allusions by another to a given man's wife. But, in construing an instrument intended to make provision for a wife after the husband's death, this seems to lose weight, and is countervailed by the consideration that he in all probability intended to provide for her who survived him, and for that reason stood in need of the provision."

C It is interesting to contrast that case with *Cousins v. Sun Life Assurance Society* (2). There a husband effected policies of assurance on his life expressed to be for the benefit of his wife named therein under the provisions of the Married Women's Property Act, 1882, and it was held by the Court of Appeal that the wife took an immediate vested interest in the policy which passed on her death in the husband's lifetime to her personal representatives as part of her estate. In the present case the wife was not named.

D WALLINGTON, J., relied in part on the construction which he put on this document as, *inter alia*, a settlement on the husband, and, therefore, on one of the parties whose marriage was the subject of a decree. Counsel for the husband submits, first, that the policy was not a settlement on the husband; secondly, that it was not a settlement on the wife; and, thirdly, that, if it was a settlement, it was not a nuptial settlement. In *Hargreaves v. Hargreaves* (3) a settlement was made by a young man, to which his widowed mother was a party. The settlement concerned certain reversionary property of the settlor who assigned to trustees on trust, subject to the life interest of his mother, to pay the income of the property to the settlor for life and after his death on the usual trusts in favour of his children or issue as he should appoint and in default of appointment in equal shares at twenty-one or marriage. The settlement contained a power to appoint by deed to or for the benefit of any wife. The settlor was not married at that time, and, though he did marry soon afterwards, the settlement did not in its terms contemplate a particular marriage. HILL, J., held that it was not an ante-nuptial settlement within s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925. He used these words ([1926] P. 45):

G "This section is dealing with ante-nuptial and post-nuptial settlements, and it refers to marriage. It refers to it because what it is dealing with is what we commonly know as a marriage settlement, that is, a settlement made in contemplation of, or because of, marriage, and with reference to the interests of married people, or their children."

H In *Prinsep v. Prinsep* (4) HILL, J., somewhat enlarged the test which he thought s. 192 imposed. He said ([1929] P. 232):

"Is it upon the husband in the character of husband or on the wife in the character of wife, or upon both in the character of husband and wife? If it is, it is a settlement on the parties within the meaning of the section. The particular form of it does not matter."

In *Melville v. Melville and Woodward* (5) it was decided by the Court of Appeal that a settlement by the wife was a post-nuptial settlement within the section.

GREER, L.J., referring to a submission of counsel for the husband in that case, said ([1930] P. 177):

"As I understand his argument it was this, that any settlement is a post-nuptial settlement, if it is a settlement during marriage by one of the parties, which gives some interest to either of the spouses or their offspring. That is a proposition which appeals to me as a fair and reasonable representation of what the section means. As I have said, it is not always wise without full consideration to say more than is necessary for the decision of the particular case before the court, and in this particular case I have no doubt whatever that this settlement of Dec. 30, 1927, was a post-nuptial settlement . . ."

ROMER, L.J. (*ibid.*, 178) had some doubt whether the general proposition as advanced by counsel for the husband was right and was more attracted by the definition which I have read given by HILL, J., in *Hargreaves v. Hargreaves* (3). In *Dormer (otherwise Ward) v. Ward* (6) there had been a decree of nullity in favour of the wife. By a marriage settlement the husband had covenanted to pay a yearly sum and also by means of a jointure rent-charge had made provision for the wife in the event of her surviving her husband. VAUGHAN WILLIAMS, L.J., having held that, although there was a decree of nullity, there was power to vary the settlement, said ([1901] P. 35):

"But there is a further objection to making an order in respect to this jointure rent-charge . . . which seems to me practically fatal—that is, that the jointure . . . could not commence till after the death of the respondent. I do not think that the court by the exercise of its powers under s. 5 [of the Matrimonial Causes Act, 1859] can vary the settlement by ignoring this condition. The reasons which I have given for holding that the court in the case of nullity has the power to vary the settlement by extending the connotation of the words 'marriage' and 'children' have no application to such a condition of the settlement. It may be that the court could make an order subject to the petitioner surviving Mr. Ward to take effect after his death; but, even if the court can, I do not think they ought to do so. The court might, however, give power to renew the application."

The provision, of course, was for the wife after the husband died. I do not think that that helps as to jurisdiction. The learned registrar referred to *Joss v. Joss* (7), which was a decision of HENN COLLINS, J., but I do not regard that as adding anything in respect of the application to the present case to what has been laid down in the other cases to which I have referred.

WALLINGTON, J., at times seemed to suggest that the position of the wife in the present case was the same as if she had been named as she was in *Cousins'* case (2). With respect, I do not think that would be right, but he puts the question accurately in this sentence:

"In this particular case, however, having regard to the use of the word 'widow,' would it be more accurate to say that the [husband] obtained the policy, not 'because of the marriage,' but rather because he was married and in order that he might provide some support for any woman to whom he might be married at the time of his death?"

Counsel for the husband admits that the words of s. 25 of the Act of 1950 have been given a wide meaning, but he relies on the fact that the interest of the wife was contingent in that (i) she has to survive the husband (ii) she has to survive him as his widow, and (iii) if there were children (the position might be obscure if there were not), she might take no interest at all if he appointed the whole fund to the children. I do not think that is sufficient to take the policy out of the meaning of "settlement" in this section.

On the point that this is not a nuptial settlement, counsel for the husband contended that the document did not contemplate a particular marriage, but was directed to the widow. The wife might die and subsequent wives might also

die, and, in those circumstances, it could not be said to be a nuptial settlement. I do not take that view. I agree that the wife's interests under this document are contingent and uncertain for it is dependent on certain factors, but it seems to me that, this document having been taken out during the married life—undoubtedly with the object of creating a fund from which the wife might benefit subject to the exercise of the power of appointment in her favour, it is, *prima facie*, a nuptial settlement in respect of the marriage then existing. It does not cease to be that because it also does something else. By using the word "widow" it provides for certain other contingencies, among them the possibility of a later marriage and the husband leaving someone other than his then wife as his widow. Having regard to the words of the section, however, and applying ordinary common sense, I do not think that a settlement ceases to be a nuptial settlement—in this case a post-nuptial settlement—because in certain contingencies the wife of a subsequent marriage, if there is one, may be the person to take. That is the view I take of the application of the section to this document and I think this appeal should be dismissed. It is unnecessary to consider whether the document could be regarded also as a settlement on the husband, though I think there was force in the contentions of counsel for the husband on that point.

DENNING, L.J.: I agree. The word "settlement" in s. 25 of the Matrimonial Causes Act, 1950, is not used in the conveyancing sense. It includes any provision made by a husband for the future benefit of his wife, if it proceeds on the footing of the then existing marriage. It does not cease to be a settlement on her because the provision is, not absolute, but only contingent, nor does it cease to be a settlement on her because it may in its terms also be applicable for the benefit of a wife by a subsequent marriage. I agree that the appeal should be dismissed.

HODSON, L.J.: I agree.

Appeal dismissed.

Solicitors: *J. D. Langton & Passmore* (for the husband); *Withers & Co.* (for the wife).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

BUDGE v. HICKS.

[COURT OF APPEAL (Somervell, Denning and Birkett, L.JJ.), May 1, 1951.]

Agriculture—Agricultural holding—Notice to quit—Exclusion of right to give counter-notice requiring the application of the Agricultural Holdings Act, 1948, s. 24 (1)—Necessity to indicate statutory ground for exclusion—Agricultural Holdings Act, 1948 (c. 63), s. 24 (1), (2)—Agriculture (Control of Notices to Quit) Regulations, 1948 (S.I., 1948, No. 190), reg. 4.

The landlord of an agricultural holding gave his tenant the following notice to quit: "I hereby give you notice to quit* and deliver up possession of the farm-house, cottage, buildings and land known as Kingbear, Northill, which you rent of me as tenant of me on Sept. 29, 1950. The reason for this notice is that you have broken the terms of your lease by cutting timber reserved in the lease wilful damage and neglect of my property and not farming the land according to the terms of the said lease and contrary to the rules of good husbandry." The tenant purported to give a counter-notice under the Agricultural Holdings Act, 1948, s. 24 (1).

HELD: while it was not indispensable, if s. 24 (1) was to be excluded, that the notice to quit should specify the paragraph of s. 24 (2) on which the landlord relied or that the precise words of the relevant paragraph should be adopted in the notice, it was necessary that the relevant paragraph should

be identified therein without ambiguity, and, as it was not possible to ascertain from the notice given by the landlord which paragraph was relied on, the notice was not effective to exclude the tenant's right to give the counter-notice.

Semble: The tenant was not bound by the Agriculture (Control of Notices to Quit) Regulations, 1948, reg. 4, to refer to arbitration the question of the validity of the notice to quit, the regulations being in this respect permissive and not imperative.

FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 24, see HALSBURY'S STATUTES, Second Edn., Vol. 28, p. 46.

APPEAL by the tenant of an agricultural holding from an order of His Honour JUDGE RAWLINS, made at Launceston County Court, and dated Feb. 12, 1951, by which possession of the holding was given to the landlord, the plaintiff in the action.

The learned judge held that a notice to quit given by the landlord to the tenant was effective under the Agricultural Holdings Act, 1948, s. 24 (2), to exclude the tenant's right under s. 24 (1) of that Act to give a counter-notice requiring that that sub-section should apply.

L. A. Blundell for the tenant.

McCreery for the landlord.

SOMERVELL, L.J.: This appeal raises a point under the Agricultural Holdings Act, 1948, s. 24, which provides:

"(1) Where notice to quit an agricultural holding . . . is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this sub-section shall apply to the notice to quit, then, subject to the provisions of the next following sub-section, the notice to quit shall not have effect unless the Minister consents to the operation thereof. (2) The foregoing sub-section shall not apply where . . . (d) at the date of the giving of the notice to quit the tenant had failed to comply with a notice in writing served on him by the landlord requiring him within two months from the service of the notice to pay any rent due in respect of the agricultural holding to which the notice to quit relates, or within a reasonable time or within such reasonable period as was specified in the notice to remedy any breach by the tenant that was capable of being remedied of any term or condition of his tenancy which was not inconsistent with the fulfilment of his responsibilities to farm in accordance with the rules of good husbandry, and it is stated in the notice to quit that it is given by reason of the matter aforesaid; (e) at the date of the giving of the notice to quit the interest of the landlord in the agricultural holding to which the notice relates had been materially prejudiced by the commission by the tenant of a breach, which was not capable of being remedied, of any term or condition of the tenancy that was not inconsistent with the fulfilment by the tenant of his responsibilities to farm in accordance with the rules of good husbandry, and it is stated in the notice that it is given by reason of the matter aforesaid."

It will be seen that under sub-s. (2) (d), to exclude sub-s. (1), there must have been, first, a notice calling on the tenant to remedy, then a failure to comply with that notice, and then a notice to quit referring to the relevant facts.

The notice to quit in the present case was given in these terms:

"I hereby give you notice to quit and deliver up possession of the farm-house, cottage, buildings and land known as Kingbear, Northill, which you rent of me as tenant of me on Sept. 29, 1950. The reason for this notice is that you have broken the terms of your lease by cutting timber reserved in the lease, wilful damage and neglect of my property, and not farming

the land according to the terms of the said lease and contrary to the rules of good husbandry."

A The learned county court judge held that that was a good notice for the purposes of para. (e), and from that decision the tenant appeals. The main argument below appears to have turned on the submission that the notice was bad because the words "materially prejudiced" were not inserted therein. The learned judge rejected that, and, in so far as he based himself on the principle that in a case of this kind, where the statute prescribes no form, one must not be technical and it is not necessary, for instance, to set out the exact words of the relevant section, I agree. The learned county court judge referred to a precedent for a notice under s. 24 (2) (e) in *JACKSON ON AGRICULTURAL HOLDINGS AND TENANT RIGHT VALUATION*, 10th ed., p. 472, which included the words: "Breach of a term or condition of the tenancy being a breach not capable of being remedied." B That formula does not contain the words "materially prejudiced," but it plainly indicates that reliance is placed on para. (e) and not on para. (d). In my view, the notice ought to make it clear on which paragraph the landlord is seeking to rely. I find it unnecessary to lay down what formula or formulae in different cases would attain that end. I am not drawing precedents, but it might be argued C with success in some cases that, if the notice set out the nature of the damage, it might be so plain that it was irremediable and that the landlord's interest had been materially prejudiced that the court might hold that that was a sufficient indication that the landlord was relying on para. (e). Generally, however, I think it desirable that the indication should be more express than that. I do not regard this as a technicality, because, in my opinion, the tenant who receives D a notice and wishes to consider whether or not it is valid is entitled to know with certainty by which route the landlord is seeking to proceed. Take an example under para. (e). It may be that, although there is an irremediable breach, it would be impossible for the landlord to show that he has been materially prejudiced.

E I do not think that the notice which was given in the present case sufficiently indicates which paragraph is relied on. It refers to cutting timber, but that may be a very small matter. The landlord may not be "materially prejudiced," and the breach of the tenancy may be capable of being remedied. I do not know. An allegation of wilful damage and neglect might well cover cases in which the matter could be remedied, and so could an allegation that the land was not being F farmed according to the terms of the lease and contrary to the rules of good husbandry. The wording of both para. (d) and para. (e) contemplate that the rules of good husbandry may be broken by an act which is remediable or by an act which is irremediable. I do not think, therefore, that this notice was a good notice for the purposes of sub-s. (2).

G When the tenant received the notice he served the counter-notice contemplated by s. 24 (1). The notice to quit was good in the sense that the length of notice which is laid down by the Act was complied with. It was sent on Sept. 27 in one year to take effect at Michaelmas day the next year. I think one has to regard it as a notice which falls under the provisions* of s. 24 (1) with certain words added to explain the reason why it was served, but that does not affect its legal nature. That being so, the tenant was entitled to serve, as he did, the counter-notice:

H "Now I hereby give you notice that I require that s. 24 (1) of the Agricultural Holdings Act, 1948, shall apply to the said notice and that the said notice shall not have effect unless the Minister of Agriculture and Fisheries consents to its operation."

That counter-notice having been served under regulations to which I shall refer for another purpose in a moment, the landlord could have applied for the Minister's consent within a month of the date of the service. Admittedly he did

not do that, so the notice to quit is invalid, and, if the landlord desires to get rid of the tenant and has grounds for proceeding, he must start again.

Another matter was raised before the county court judge which, on this view of the case, does not arise for decision, but I would like to say a word about it. It was submitted before the learned judge that the notice was sufficiently a notice under s. 24 (2) (e) to come within the words I am about to read. The county court judge held that he had no jurisdiction because it appeared to him that under the regulations made under the Act the only remedy open to a tenant who wished to dispute a notice which fell within the provisions of s. 24 (2) (b) (d) or (e) was to proceed by arbitration. Section 26 (1) of the Act of 1948 provides:

"The Minister may make regulations—(a) for requiring any question arising under sub-s. (2) of s. 24 of this Act to be determined by arbitration under this Act . . ."

Under that power the Agriculture (Control of Notices to Quit) Regulations, 1948, were made. In the form in which we have them the references therein are to the Agriculture Act, 1947, but it is common ground that they are applicable to s. 24 of the Act of 1948. Regulation 4 provides:

"In any case where it is stated in a notice to quit that the notice is given for one or more of the reasons specified in the next following regulation, it shall be open to the tenant, within one month from the giving of the notice to quit, to serve on the landlord a notice in writing requiring any question arising out of the reason stated in the notice to quit to be determined by arbitration under the Act of 1923."

Regulation 5 sets out in substance the provisions of paras. (b), (d) and (e) of s. 24 (2) of the Act of 1948. On this point the learned judge said:

"I am, however, of the opinion that when the Minister, under the powers vested in him under s. 26 (1) of the Act, made regulations . . . he was laying down the procedure to be followed by a tenant who was desirous of contesting, *inter alia*, the landlord's claim to possession under s. 24 (2) (e). It is my opinion, and I come to it with some reluctance, that once the Minister in the exercise of his powers made the regulation, the tenant's only remedy was by way of arbitration."

If I had to decide that matter and had come to the same conclusion as the learned county court judge, I do not think I would have done so with reluctance, because I think that the intention of the Act is that these technical matters with regard to breaches of good husbandry and so on should be decided, and decided rapidly, under a procedure by arbitration, by persons who are familiar with the technical points involved.

Counsel for the tenant submits that the learned county court judge was wrong and that there are no words which expressly state that arbitration is the only procedure and expressly or by necessary implication exclude the jurisdiction of the court. The words "it shall be open to the tenant" are certainly consistent with arbitration being the exclusive remedy, but I do not think the argument that the courts are not open can be based on those words. In my view, there is an absence of any clear provision making arbitration the only procedure, but, as I have said, it is not necessary for us to decide this point, and I desire to express no final conclusion on it. If, as seems to be likely, it was intended—and, perhaps, the majority of the people concerned desire—that matters of this kind should be settled by arbitration, those who are concerned with the making of these regulations and their amendment from time to time might well consider whether it would be desirable to use words which would prevent the argument put forward here being raised in future cases. For the reasons which I have given I think that this appeal must be allowed and the order for possession made by the learned county court judge set aside.

DENNING, L.J.: If the landlord of an agricultural holding wishes to give his tenant notice to quit and to rely on the provisions of s. 24 (*d*) or (*e*), he must state in the notice the reason why he requires possession, and that reason must be one of the reasons prescribed in those paragraphs. I do not think that the notice need be in any particular form, but it must at least make it clear what is the landlord's reason for giving it. In particular, when he complains of a breach of covenant which may, or may not, be capable of remedy, he must make it clear which it is, so that the tenant may know whether the notice is given in reliance on para. (*d*) or para. (*e*) of s. 24 (2) of that Act. The notice of Sept. 27, 1949, does not do that. It does not make it clear under which sub-section it comes. It is, therefore, not a good notice.

On the other point, I agree with what my Lord has said. I can well see that it is desirable that a dispute on the validity of the reason for a notice should be referred to arbitration quickly, so that the parties can know their rights without waiting until the end of the year's notice. The Minister could have made regulations to ensure a speedy determination of the matter. He could have required the question to be determined by arbitration, but, unfortunately, he did not do so. The regulations which he has made seem to make arbitration permissive and not compulsory. If the tenant has it in his option to go to arbitration or not, it may well mean that he can wait till the end of the year's notice and then dispute the validity of the reason for it in the courts. If he is to be deprived of this right, the regulations should make it clear. At present they do not do so. I agree that the appeal should be allowed on the point that the notice was invalid.

BIRKETT, L.J.: I agree. There were two points in this case and I agree that our decision on the first point is conclusive of the appeal. It is not necessary, therefore, to express a concluded view on the second, but, in my view, they are both important points. The first was concerned with the adequacy of a notice to quit under the Act of 1948. It is plain from reading the Act how very important the designers of the legislation thought the notice to quit and its contents were, because at the conclusion of every paragraph of s. 24 (2) one finds words such as "and that fact is stated in the notice." In paras. (*d*) and (*e*), with which we are more particularly concerned, the words are "and it is stated in the notice that it is given by reason of the matter aforesaid." In the Agriculture (Control of Notices to Quit) Regulations, 1948, it is to be observed that reg. 5 provides:

"The preceding regulation [with regard to arbitration] shall apply where it is stated in the notice to quit that it is given for one or more of the following reasons,"

and then para. (*d*), para. (*e*) and para. (*b*) of s. 24 (2) are set out. Therefore, it is a very important matter to see what the notice contains, and I agree that it is essential that, if the notice is to be given in reliance on para. (*d*), that should be plainly indicated in the notice, and, if it is to be given in reliance on para. (*e*), that too must be indicated. I agree that, although it might be desirable, it is not essential for precise and formal language to be used specifying particular sub-sections or matters of that kind so long as the particular matter is made clear in the notice to quit without any ambiguity or dubiety. I am of the opinion, therefore, that the notice with which we are dealing was invalid on the ground that it failed to do what I think the Act of 1948 enjoins.

With regard to the other point, it is impossible to read the Act and the regulations without realising that it was intended that these matters should be dealt with by arbitration, and it is unfortunate that in s. 26 of the Act language is used which is irreconcilable with the regulations themselves. For example, s. 26 provides: "The Minister may make regulations—(*a*) for requiring any question arising . . ." The odd thing is that when the regulations are made that

selfsame word "requiring" is used, but in rather a different context, because reg. 4 provides:

"In any case where it is stated in a notice to quit that the notice is given for one or more of the reasons specified in the next following regulation [*i.e.*, para. (d), para. (e) or para. (b)] it shall be open to the tenant, within one month from the giving of the notice to quit, to serve on the landlord a notice in writing requiring any question arising out of the reason stated in the notice to quit to be determined by arbitration under the Act . . ."

The use of those words, "it shall be open to the tenant," certainly lends colour to the view that the tenant has a permissive power, which he may exercise if he cares to, but that it is not complete and final, and, if he fails to adopt it, he is not, therefore, utterly without remedy. On this second point I do not think it necessary to express any concluded opinion, but I share the view stated by my Lord that it would be well that this ambiguity should be removed.

Appeal allowed.

Solicitors: *Ellis & Fairbairn* (for the tenant); *Gibson & Weldon*, agents for *Peter, Peter & Sons*, Launceston (for the landlord).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

CHELSEA & WALHAM GREEN BUILDING SOCIETY *v.* ARMSTRONG.

[CHANCERY DIVISION (Vaisey, J.), June 12, 1951.]

Deed—Registered transfer of land—Covenant with person not a party—Enforcement of covenant.

By a registered transfer, dated May 19, 1938, B. transferred a dwelling-house to A. with the consent of a building society which held a registered charge on the property. The transfer further provided: "I the said [A.] hereby covenant with the said [B.] that I will duly pay the balance of the principal interest and other monies due under the said charge in accordance therewith and indemnify the said [B.] therefrom. In consideration of the premises I the said [A.] hereby covenant with [the building society] that I shall and will repay to the society the principal sum of £438 2s. now owing on the security of the said registered charge and the interest thereon and all sums of money now due or to become due under or by virtue of such registered charge and also will perform and observe all the other covenants by the said [B.] in and by the said registered charge contained and implied And I the said [B.] apply to H.M. Chief Registrar of Land that a notice of this covenant be registered on the charges register relating to the above title." The transfer contained a testatum in the form usual in deeds, and was signed, sealed, and delivered by B. and A., the building society not being a party to the transfer. The payments to the building society having fallen into arrear, the society sought to enforce the covenant by A. to pay the principal sum and interest.

Held: the registered transfer was a deed, not *inter partes*, but of a nature analogous to a deed-poll, and, therefore, although the society were not a party to the transfer, they were entitled to enforce the covenant against A.

AS TO WHO MAY TAKE A BENEFIT UNDER A DEED, see HALSBURY, Hailsham Edn., Vol. 10, pp. 190-192, paras. 232-234; and FOR CASES, see DIGEST, Vol. 17, pp. 226-228, Nos. 406-424.

Cases referred to:

(1) *Cooker v. Child*, (1673), 2 Lev. 74; 83 E.R. 456; 17 Digest 197, 79.

- (2) *Sunderland Marine Insurance Co. v. Kearney*, (1851), 16 Q.B. 925; 20 L.J.Q.B. 417; 18 L.T.O.S. 33; 117 E.R. 1136; 17 Digest 227, 416.
- (3) *White v. Bijou Mansions, Ltd.*, [1937] 3 All E.R. 269; [1937] Ch. 610; *affd.*, [1938] 1 All E.R. 546; 107 L.J.Ch. 212; 158 L.T. 338; Digest Supp.
- (4) *Re European Assurance Society*, (1876), 3 Ch.D. 391; 12 Digest 599, 4970.
- (5) *Otway v. Braithwaite*, (1679), Cas. temp. Finch, 405; 23 E.R. 221; Digest Supp.
- (6) *Butler v. Powis*, (1845), 2 Coll. 156; 5 L.T.O.S. 303; 63 E.R. 679; 17 Digest 404, 2133.

PROCEDURE SUMMONS.

The plaintiffs, the Chelsea and Walham Green Building Society, claimed that they were entitled to enforce against the defendant a covenant, which purported to have been made with them, contained in a registered transfer of land under seal to which they were not parties. By consent the originating summons was treated as being before the court, and a final order was made.

J. W. Mills for the plaintiffs.

K. J. T. Elphinstone for the defendant.

VAISEY, J. [after referring to the possibility that the case was provided for in s. 56 (1) of the Law of Property Act, 1925]: This is an action brought by the Chelsea and Walham Green Building Society, which I will call the building society, as plaintiffs, against Mr. David Anthony Armstrong, the defendant, to enforce the remedy of the building society under a mortgage dated Dec. 1, 1933, which was also registered as a charge under the Land Registration Act, 1925, on the same day. The property in question is registered land, and is known as No. 33, Pursers Cross Road, Fulham, in the county of London. The action is based on a covenant made, or expressed to be made, by the defendant in a registered transfer dated May 19, 1938. By that registered transfer, a Mrs. Brooks, having obtained the consent of the building society, who were and are the mortgagees, transferred to the defendant the land comprised in the registered title and the transfer proceeds as follows (and I quote the exact words):

"I, the said David Anthony Armstrong hereby covenant with the said Lilian Alice Brooks that I will duly pay the balance of the principal interest and other monies due under the said charge in accordance therewith and indemnify the said Lilian Alice Brooks therefrom."

There follow these words:

"In consideration of the premises I the said David Anthony Armstrong hereby covenant with the society [the building society] that I shall and will repay to the society the principal sum of £438 2s. now owing on the security of the said registered charge and the interest thereon and all sums of money now due or to become due under or by virtue of such registered charge and also will perform and observe all the other covenants by the said Lilian Alice Brooks in and by the said registered charge contained and implied And I the said Lilian Alice Brooks apply to H.M. Chief Registrar of Land that a notice of this covenant be registered on the charges register relating to the above title."

There is a proviso that nothing is to prejudice or affect the power of sale and there is a certificate that the transaction did not form part of a larger transaction so as to limit the amount of the stamp duty. There is the usual testatum:

"In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written."

The deed is signed, sealed and delivered both by Mrs. Brooks and by the defendant, Mr. Armstrong.

This action is brought to enforce the covenant on the part of the defendant expressly with the building society to pay the monies due under the registered charge, and it is to be noticed that the building society was no party to this transfer. The building society is, however, named as consenting to the transfer and as being the person entitled to the benefit of the covenant. The building society did not execute the deed and, although named in it, cannot be described as a party to it for those two purposes. The point which appears to be involved may be thus stated: Is the building society entitled to the benefit of the covenant by the defendant expressed to be made directly with the building society in that instrument of transfer? That appears to depend on the nature of that instrument of transfer, and, in particular, on whether it is analogous to a deed *inter partes* or analogous to a deed-poll. A

The old law, apart from any questions under the Land Registration Act, 1925, is stated thus in NORTON ON DEEDS, 2nd ed., p. 27: B

"The distinction between indentures and deeds poll, which is not (as is commonly supposed) the same as the distinction between deeds *inter partes* and deeds not *inter partes*, is not now of any importance . . ."

There follows a reference to the modern practice which is that deeds are no longer indented. On p. 28 there is this further statement: C

"There does, however, appear to be a distinction which is still of importance between deeds made *inter partes* and deeds not so made, for it is a rule of law that no person can sue on a covenant made with him in a deed made *inter partes*, unless he be a party to such deed, and this is the case even if he execute the deed." D

Finally, on p. 29 it is said:

"The rule [that a man cannot take advantage of a covenant in a deed to which he is not a party] never applied except to deeds *inter partes*; a deed poll could always be sued on by any person with whom the covenant was made, and an indenture not *inter partes* is for this purpose a deed poll." E

For that certain authorities are cited, including, in particular, *Cooker v. Child* (1), which related to a charterparty. It is sufficient, I think, to read from the headnote:

"Indenture of charter-party, not being *inter partes*, covenants to pay to a stranger to the deed. Debt by indenture *per testat. existit*." F

It was held:

"the declaration *per testat. existit*. well enough, though it be in debt and not in covenant, and that the action was well, though brought by him only to whom the debt is due;"

There is a later decision of *Sunderland Marine Insurance Co. v. Kearney* (2) G where the same conclusion was reached under a contract of marine insurance.

The question really is: What is the nature of this instrument of transfer dated May 19, 1938? First, I think it is clear that it is a deed. Then the question arises: If it is a deed, is it a deed-poll, or is it, although not a deed-poll, a deed not *inter partes*, or is it a deed *inter partes*? Normally, a deed *inter partes* is contemplated as a contract, or as carrying out a contract, made, so to speak, round the table by the family as a matter done, not in public, but in private. H On the other hand, a deed-poll is clearly addressed to everybody: "Know all men by these presents," or it is addressed to "all to whom these presents shall come." I incline to the view that there is all the difference between a deed made in private *inter partes*, between parties round the table, on the one hand, and a deed not *inter partes*, which may or may not be a deed-poll, but is something of quasi-public interest addressed to the whole world. This transfer does not begin

with any reference to parties. It is expressed in the first person: "I, Lillian Alice Brooks" transfer the property and then: "I, the said David Anthony Armstrong hereby covenant," first, with Mrs. Brooks for indemnity, and, secondly, with the building society direct for payment. It seems to me that that is much more in form analogous to a deed-poll. It may be more accurately stated to be a deed not *inter partes*, although it is not strictly a deed-poll.

A Like all these Land Registry transactions, it has a quasi-public character. The entry is made in a public register. It is recorded, not for everybody to look at, but as a matter of public record in the sense that everybody concerned has a right to go and inspect what is to be found in the register.

B It may be that this ancient distinction between a deed *inter partes* and a deed not *inter partes* has the solid foundation that the deed *inter partes* is essentially a private arrangement whereas a deed not *inter partes*, and, in particular, a deed-poll, is a matter of public record and is announced, not to the whole world in the sense that everybody is concerned in it, but to those of the world who are concerned or interested in what is being done. I think that the statement which I have read from NORTON ON DEEDS, p. 29, covers the case:

C "... a deed poll could always be sued on by any person with whom the covenant was made, and an indenture not *inter partes* is for this purpose a deed poll."

D I have come to the conclusion that this registered transfer, effecting a transfer of the land from Mrs. Brooks to the defendant, is a deed, but I do not think that it is a deed *inter partes*. If that is right, it seems to me that the society are entitled to bring their action against the defendant. On Nov. 2, 1945, the defendant transferred the land to another, and in that further transfer there were covenants corresponding to those which he himself gave, *i.e.*, covenants by the fresh transferees with him, the defendant, that they would pay the balance of the principal moneys under the registered charge and indemnify and keep indemnified him therefrom, and the new transferees covenanted in their turn with the building society that they would repay to the society the principal sum and duly discharge the obligations under the registered charge. The present defendant, having parted with the land, having taken those covenants, and having obtained that substituted covenant with the building society, now finds that he is regarded as a person more worth suing than those to whom he transferred the land, and he is naturally aggrieved to find under this transfer, which created an interest in him, but which has now ceased, that he should be asked now to carry into effect the covenant which he entered into in 1938. The only defence to this action is that, as the society were not named as parties in the registered transfer of May 19, 1938, they are not entitled to sue under the covenant, apparently made with them by the defendant. I have to overrule that objection. It seems to me, although this is a procedure summons, that the best course to take would be to treat the originating summons itself as before me and grant the relief for which G that summons asks.

Order accordingly.

Solicitors: *T. J. Robinson & Son* (for the plaintiffs); *Parfitt, Cresswell & Williams* (for the defendant).

[*Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.*]

NOTE.

R. v. CHRIST.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Lynskey and Devlin, JJ.),
June 11, 1951.]

Criminal Law—Larceny—Alternative charge of receiving—Case of larceny or nothing—Direction to the jury. A

APPEAL against conviction.

The appellant, Leonard Edward Ernest Christ, was convicted at Hertfordshire Quarter Sessions of receiving and was sentenced to twelve months' imprisonment. He was indicted with another man for stealing lead and there was an alternative count for receiving. Evidence was given for the prosecution that the two men were seen close to a house which had been broken into, pulling a parcel which, it was found later, contained stolen lead. In summing up the chairman told the jury that, if the police evidence was accepted, it was a case in which the men had been caught red-handed in the act of stealing, but, nevertheless, the count for receiving was left to the jury who acquitted both men on the charge of larceny and convicted the appellant of receiving, disagreeing with regard to his co-defendant. The ground of appeal was that the jury had been misdirected as to the charge of receiving. B C

D. Fairbairn for the appellant.

Edward Clarke for the Crown.

DEVLIN, J., delivered the judgment of the court in which he stated the facts and continued: It is impossible to believe that the jury could have accepted the evidence of the police, on which alone they would be justified in convicting the appellant of receiving, and at the same time refused to accept that evidence on the charge of larceny. In the judgment of this court, therefore, the verdict must be regarded as a perverse one, that is to say, at which the jury, if they had correctly appreciated the issues which they had to try, could not reasonably have arrived. Accordingly, the conviction must be quashed. D E

We desire to add this. In many cases, "when a man is found in possession of property or has been seen to be associated with property, it is uncertain whether the evidence for the prosecution will ultimately satisfy the jury that he was guilty of stealing it or of receiving it." Therefore, the indictment charges both counts, though they must necessarily be alternative counts. It may well be, even in such a case as this, desirable that the two counts should be opened to the jury because it is conceivable that the defence may take such a turn as may make the count for receiving one which the jury ought to consider. But, once it becomes apparent at the end of the evidence and after counsel have addressed the jury, as plainly it did in this case, that it is a case of larceny or nothing, we think that in his summing up the judge should put simply to the jury the count of larceny and remove from their consideration the alternative count for receiving. Had that been done in the present case, there would have been no possibility of any confusion. It would much simplify matters for the consideration of a jury in this type of case if, as soon as it becomes apparent what the real charge must be on which they must convict, if they are going to convict at all, that charge alone is left to the jury. F G H

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

H. McL. M.

JARMAN v. LAMBERT AND COOKE (CONTRACTORS), LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Hodson, L.JJ.), June 7, 8, 1951.]

Document—Admissibility in evidence—"Statement made . . . when proceedings . . . anticipated"—Statement by injured man in respect of accident occurring in course of employment—Statement made to approved society, on form supplied by society, for purpose of claiming disablement benefit under Workmen's Compensation Act, 1925—Subsequent proceedings against third party for damages for negligence—Evidence Act, 1938 (c. 28), s. 1 (3).

On Oct. 11, 1947, J. met with an accident during the course of his employment. On Nov. 11, 1947, he filled in a form supplied by an approved society to enable the society to make a claim on his behalf in respect of his disablement under the Workmen's Compensation Act, 1925. In answer to questions on the form he stated (*inter alia*) that the accident was caused by his catching the heel of his boot on the stump of a post, that he blamed no one for the accident, that he had not taken any proceedings to enforce his claim, and that he did not propose to instruct any solicitor to make a claim or to take proceedings on his behalf. The injury deteriorated seriously and in the following week his left leg had to be amputated. In January, 1948, his solicitor informed the employers that J. would no longer accept compensation under the Act of 1925 as it was now thought that his proper claim was at common law for negligence against the defendants who were responsible for leaving the stump in the ground. In June, 1948, proceedings were started against the defendants. On July 25, 1949, J. died, and by an order made in December, 1949, his widow and administratrix was substituted as plaintiff in the action. To enable her to prove how the accident occurred, she applied for an order admitting the form signed by J. on Nov. 11, 1947, as evidence at the trial under the Evidence Act, 1938, s. 1 (1), but her application was resisted by the defendants on the ground that the statement made by J. in that document was made "at a time when proceedings were . . . anticipated involving a dispute as to any fact which the statement might tend to establish," within s. 1 (3) of the Act.

HELD: "proceedings were . . . anticipated" within the meaning of s. 1 (3) of the Act of 1938 when they were regarded as likely, or, at the most, as reasonably probable; in the circumstances and having regard to the nature and contents of the document of Nov. 11, 1947, proceedings were not "anticipated," within the meaning of the sub-section, by anyone when the statement in the document was made; and, therefore, the document was admissible under s. 1 (1).

Robinson v. Stern ([1939] 2 All E.R. 683), distinguished.

FOR THE EVIDENCE ACT, 1938, see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 626.

Cases referred to:

(1) *Robinson v. Stern*, [1939] 2 All E.R. 683; [1939] 2 K.B. 260; 108 L.J.K.B. 665; 161 L.T. 3; Digest Supp.

(2) *Whitlocke v. Baker*, (1807), 13 Ves. 510; 33 E.R. 385; 22 Digest 380, 3889.

APPEAL by the plaintiff from an order of McNAIR, J., made in chambers and dated May 11, 1951, affirming an order of Master HARWOOD, dated Dec. 21, 1950, refusing an application by the plaintiff for an order that a document signed by her deceased husband, being a declaration by him in respect of an accident which he had suffered and which gave rise to the proceedings, be produced at the trial as evidence of the accident under the Evidence Act, 1938, s. 1 (1).

The document was a form supplied by an approved society and completed by the deceased on Nov. 11, 1947, for the purpose of a claim for disablement

benefit under the Workmen's Compensation Act, 1925. Later, the deceased refused to accept further compensation under the Act and commenced proceedings against the defendants (who were not his former employers), to whose negligence he attributed the accident. On his death before the action came to trial, his widow was substituted as plaintiff, and she made the application so as to be able to prove the circumstances of the accident. The defendants contended that the document was not admissible, as it was a statement made when proceedings were anticipated, within s. 1 (3) of the Act of 1938. The facts appear in the judgment of SIR RAYMOND EVERSHED, M.R.

A

Beresford, K.C., and *L. J. Halpern* for the plaintiff.
H. H. Edmunds for the defendants.

SIR RAYMOND EVERSHED, M.R.: This appeal has involved a question of interest and importance regarding the effect of the Evidence Act, 1938. At 11 a.m. on Oct. 11, 1947, Mr. David Henry Jarman, who was a road sweeper in the service of the Middlesex County Council, appears to have met with an accident to his foot by striking, or catching, the heel of his boot on the stump of a post on Stanmore Common while emptying his barrow, and the injury quickly turned somewhat serious. On Nov. 11, 1947, he filled in a form supplied to him by the National Amalgamated Approved Society for the purpose of making a claim, through the society, for disablement benefit under the Workmen's Compensation Act, 1925. The claim was conceded from the start. The injury deteriorated seriously. In the following week his left leg had to be amputated, and in June, 1949, his right leg also had to be amputated. On July 25 he died. In January, 1948, Mr. Kasler, the solicitor representing Mr. Jarman, and after his death his wife in the present proceedings, wrote to the Middlesex County Council saying that he now thought that his client's proper claim was against the defendants in the present proceedings at common law for negligence for having been responsible for leaving the obstruction on the common, and, therefore, his client would no longer accept compensation under the Act. The present proceedings were started against the defendants, who were alleged to have been negligent, in June, 1948, but Mr. Jarman, the plaintiff in the proceedings, died before the matter could come to trial. By an order, dated December, 1949, Mrs. Jarman, the widow and administratrix of the injured man, was substituted as plaintiff, so that the action is now one between Mrs. Jarman and the defendants based on the negligence of the latter in regard to the stump.

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In that state of affairs a question of difficulty confronts the plaintiff, because, if she is to succeed, it is plain that she must somehow prove how the accident occurred, and it is to assist her in that matter that the present application is made. The plaintiff seeks an order admitting, subject to the other terms of the Act of 1938, the form signed by Mr. Jarman on Nov. 11, 1947. It is contended on her behalf that the form is a statement within the scope of s. 1 (1) of the Act and not excluded by s. 1 (3). In particular, it is contended that it is not excluded under the sub-section on the ground that when the statement was made

F

G

"... proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish."

The short question which this court has to determine is whether, in truth, proceedings were "anticipated" of the character named in s. 1 (3) at the time when the statement was made.

H

The Act, by s. 1 (1) provides:

"In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—(i) if the maker of the statement . . . (a) had personal know-

ledge of the matters dealt with by the statement . . . and (ii) if the maker of the statement is called as a witness in the proceedings . . . ”

with the proviso that condition (ii) need not be satisfied if, among other things, the maker of the statement is at the material time dead. The form signed by Mr. Jarman admittedly falls within the language of s. 1 (1), tending, as it does, to prove the fact that the accident in question did occur, and it was obviously made by a person who was qualified by personal knowledge to give evidence of that fact and, if living and available as a witness, could have given such evidence orally. Then comes the qualifying proviso in s. 1 (3):

“ Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.”

Section 2 (1) provides:

“ In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular . . . to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.”

As a general premise to his argument, counsel for the defendants pointed out to us that the Act of 1938 might be regarded as a serious innovation, and that the court, therefore, should be astute to see that only such documents were to be admitted in pursuance of it as were, as he said, “ free, so far as could be possible, from every risk of bias,” and he referred to the language of GODDARD, L.J., in *Robinson v. Stern* (1). In that case GODDARD, L.J., cited ([1939] 2 All E.R. 687) the well-known statement of LORD ELDON, L.C. (13 Ves. 514) in *Whitelocke v. Baker* (2), in regard to the admission of documentary evidence, that such documents

“ . . . are admitted upon the principle, that they are the natural effusions of a party, who must know the truth; and who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth.”

On those grounds counsel for the defendants has asked us to give a somewhat cautious, if not narrow, effect to the enabling provisions of the Act. For myself, I am unable to accept that premise. When income tax was first introduced into this country by statute, it was, no doubt, regarded as a serious innovation, but it does not seem to me to be the duty or the function of this court, on that account, to give the construction of a statute other than the ordinary and proper meaning of the language which the legislature sees fit to use. Section 2 (1) shows that the legislature must clearly have contemplated that under the Act documents might come to be admitted, and might be properly admissible, which did not have that impartiality to which LORD ELDON, L.C., alluded, and, therefore, it was emphatic in stating that admission was one thing, but the weight to be attached to the document when admitted was another. The legislature, no doubt, was content to rely on the experience of the judges not to give to a document, which might in a measure be tendentious, any more weight than it justly deserved. I, therefore, think that this matter must be determined according to the ordinary sense of s. 1 (3), and by asking and answering the question at the time when the form was filled up: Can it be said that proceedings were anticipated involving a dispute as to any fact which the statement might tend to establish?

There has been a number of cases before the court in which a different question arose, *viz.*, whether the maker of the statement should be regarded as interested. No such question arises in this case. Beyond a peradventure, Mr. Jarman was

interested when he made the statement. *Robinson v. Stern* (1) is the only authority which has been brought to our attention where the question was: Were proceedings anticipated within the meaning of s. 1 (3) so as to disqualify the document tendered as evidence?

In the case now before us, the learned judge, affirming the view taken by the master, thought that an affirmative answer should be given to that essential question and, therefore, excluded the document. With all respect to him, I have come to a different conclusion. As an ordinary matter of English, it seems to me, putting it for the moment quite generally and broadly, that, when the form was signed (*i.e.*, when the statement was made by Mr. Jarman), proceedings, either by himself or by anybody else, were not "anticipated involving a dispute as to any fact which the statement might tend to establish." Proceedings in a case of this character might, obviously, be of more than one kind. Proceedings might, in such a case, be anticipated if it was thought that a claim might arise, and be disputed, for liability at common law or under contract. That is one class of case, and those are the proceedings which are now pending in this action. Another and different class of proceedings might be proceedings to enforce the right of the workman under the Workmen's Compensation Act, 1925. No such proceedings in this matter have been instituted, but the form was filled in so as to support a claim for compensation under the Act. Plainly, in all such cases where that essential question is put to the court, the court has to answer at a later date what was the state of mind of the relevant person at the former date, *viz.*, when the statement was made. All that I have just said leads to this observation, which I think is pertinent. I think that the court is entitled to come to its conclusion on the facts on the past date, paying due regard, though not more than due regard, to the facts as they have occurred since—particularly, by way of example, if it appears afterwards that the claim was from the start a perfectly genuine one. In that case, it may throw some light on the problem presented: Were proceedings anticipated when that claim, now known to be genuine, was originally made?

Before I pass from s. 1 (3), I should like to say a word in regard to the meaning of the expression "proceedings were . . . anticipated." The liking which many persons appear to have for the use of words having twice as many syllables as the more natural and proper word to use, has, in fairly recent times, led, undoubtedly, to the use of the word "anticipate" when the correct word is "expect." It is known to all of us that, in ordinary conversation, the word "anticipate" is used when "expect" is meant. For example, a man will say, or will more often write: "I anticipate having the pleasure of meeting you next Tuesday," when he means, more briefly and more appropriately: "I shall see you next Tuesday," or, perhaps a little more fulsomely, "I expect to see you next Tuesday." According to the SHORTER OXFORD ENGLISH DICTIONARY, the modern use of the word "anticipate" (for it can no longer be regarded as misuse of the word) is in the sense, "to look for (an uncertain event) as certain." The example given is: "Those, not in the secret, anticipated an acquittal." If that is the meaning of the word, then, when s. 1 (3) of the Act of 1938 says "proceedings were . . . anticipated," it should mean "proceedings were regarded as certain." I think, however (particularly in view of the observations of this court in *Robinson v. Stern* (1)) that that is now too narrow a meaning to give to this word. I suppose it is the result of misusing, or of giving a new use to, a word that it is a long time before the misuse, or new use, acquires a precise significance. I am prepared to accept the view (for which some authority is found in *Robinson v. Stern* (1)) that by "proceedings were anticipated" is meant "proceedings were regarded as likely," or "as reasonably probable."

Even so, however, and giving so much latitude in favour of counsel for the defendants, I do not think that the test was here satisfied. What was the form? It was a form supplied by the approved society to the injured man, Mr. Jarman,

to enable him to formulate the claim which, if what he was saying was true, he had as of right against his employers. It was a printed form, and it asked the questions which would have to be asked, *viz.*, the nature of the injury, when it occurred, and the place where it occurred. Then comes question No. 4:

“(a) Describe fully the accident, and what you were doing at the time.

(b) Whether the same occurred during your employment. (c) Names and addresses of witnesses. (It is of the utmost importance to give names and addresses of witnesses).”

In answer to those questions Mr. Jarman put: “(a) Caught heel of boot in stump of post while emptying barrow”—I used that actual phrase in describing the accident, because I do not want to prejudice in any way what may be the answer to this action—“(b) Yes [*i.e.*, it occurred during his employment].

(c) Working alone.” Lower on the form is the question:

“Names and addresses of person or persons you blame for the accident . . . and why?”

In answer to that Mr. Jarman wrote: “None.” In view of that answer, as far as I can see on the facts of this particular case, it becomes impossible to say that he, or anyone else, thought proceedings at common law for negligence against some third party likely, or even possible. Under question No. 11 are the following questions and Mr. Jarman’s answers:

“(a) Q.—Have you taken proceedings to enforce your claim? If so, give name and address of solicitor or trade union acting for you. A.—No.

“(b) Q.—If not, please state the name and address of any solicitor you propose to instruct. A.—No [which I take to mean, ‘I do not propose to instruct any solicitor to make a claim, or to take proceedings to enforce the claim’].

“(c) Q.—If none, do you authorise the society to give notice of your accident, and claim compensation on your behalf? If not, give reason for refusal. A.—Yes.”

At the end there is a statement that the society reserves the right to decline to act on any authority given, and there is a declaration signed by Mr. Jarman which thereby made the document his statement:

“I declare that the foregoing particulars are true in every respect, and I have made full disclosure of all material facts.”

Having regard to the contents and the nature of the document, I ask again: Can it be said, using the English language in its ordinary sense, that proceedings were regarded as likely, or reasonably probable, by Mr. Jarman, or by anyone else, involving a dispute as to any fact which the statement might tend to establish at the time that statement was made? Applying the ordinary standards of common sense, I think the answer is: No. Whether the proceedings would have to be “anticipated” by the person making the statement, or by other persons, it is not necessary to consider in this case. If they were not anticipated by Mr. Jarman, it is a little difficult to see by whom else they could have been anticipated, but I state again that, in my judgment, they were not “anticipated” within the meaning of the sub-section by anyone when that statement was made.

Robinson v. Stern (1) deserves a little closer attention. In that case the defendant injured a boy by knocking him down with her motor car. After the accident, she made a statement at the police station at the suggestion, according to her, of a police constable who appeared on the scene. The statement, which is fully set out in the judgment of SCOTT, L.J. ([1939] 2 All E.R. 684), opens, as these statements normally do, with a declaration that she has received a caution which is commonly given, and which includes the phrase

“ . . . whatever you say will be taken down in writing and may be given in evidence.”

At a later stage proceedings were brought against her on the ground that the accident was her responsibility, and the question arose whether that statement could be put in under s. 1 (1) of the Act of 1938. The learned judge admitted it, and since (as he said) the document influenced him in favour of the defendant, he came to a conclusion in the action against the plaintiff's claim. There was an appeal, and the matter which was debated was whether that document, on which the judge admittedly founded himself, ought to have been admitted. This court held that it was inadmissible. But, to my mind, it is plain that on the facts of that case the court, and, particularly, the majority, SCOTT, L.J., and CLAUSON, L.J., came to their conclusion on the ground that, in the language of SCOTT, L.J. (*ibid.*, 685), it was "impossible for the defendant to say that proceedings were not anticipated." SCOTT, L.J., went on to say (*ibid.*):

"I cannot help thinking that necessarily the word 'anticipated' should be construed as including 'likely,' but, even assuming that the word 'anticipated' should be given the interpretation of 'anticipated by the person making the statement,' in my view, it is quite impossible to contend that this defendant did not anticipate proceedings, having regard to the facts of the case and to the further internal evidence of the statement itself, with its initial questions and statements . . ."

CLAUSON, L.J., said (*ibid.*, 686):

"I think her answer [to a question put by the learned judge in the court] that she had not thought about proceedings at that moment [*i.e.*, when the police constable invited her to the police station] was almost certainly entirely true. However, when she gets to the station, and she has time for reflection, she makes a statement which, to my mind, could not possibly have been made by anybody who had not present to her mind the possibility, at least, of proceedings of some character."

CLAUSON, L.J., thought that "anticipate" means having present to your mind the mere possibility. I am not sure that I am prepared, as at present advised, to go as far as he did in that passage, but I think the *ratio decidendi* of that case is plainly this. When a street accident occurs, as all the world knows, proceedings are, to say the least, likely. I put the question to counsel for the defendants, and he answered me that with his experience he would say that in such circumstances anyone today would state that the odds on proceedings of some sort being taken were very long indeed. The reference in the statement itself to the fact that it may be given in evidence emphasises the same point, *viz.*, that it is something which could be used in proceedings, and, indeed, which could, in a sense, serve hardly any other purpose than to be so used.

The present case seems to be essentially of a wholly different character. A claim under the Workmen's Compensation Act, 1925, was in the nature of an insurance claim. I think that the statement in the case now before us is fairly comparable to the sort of form an insured person fills up in the ordinary way when he is going to make a claim on his insurer. A man suffers (say) a loss by burglary, and he fills in a form and sends it to his insurers stating that he has had the loss, specifying it, and making his claim. Particularly where, as is found to be the fact here, it is a genuine claim, it seems to me beyond reason to suggest that everyone who puts forward such a claim must be taken to be "anticipating" proceedings of the character specified when he makes the statement. Therefore, treating this case, as all cases in this court must be treated, as falling to be determined according to its particular facts and paying regard to the particular form of the notice, I think that it is wholly distinct on its facts from *Robinson v. Stern* (1). I do not forget the passages in the parts of the form which refer to addresses of witnesses and to the instructing of solicitors, but, reading the document as a whole with all the answers as they were given, I cannot myself conclude from the fact that those questions were asked, and still less from the answers which were given to them, that Mr. Jarman, or the society, or anyone else, could

possibly be said to have "anticipated" proceedings when the statement was made. For these reasons, and with all respect to McNAIR, J., I think that this appeal should be allowed, and that this document is, subject, of course, to the other conditions of the Act, admissible.

DENNING, L.J.: I agree. To exclude this document, it is not sufficient for the defendants to say that proceedings might have been, or ought to have been, anticipated. They must go further and show that proceedings were, in fact, anticipated. Anticipation is a state of mind whereby someone considers that something is likely to happen. There must be a likelihood of the thing happening. Someone must consider it likely that proceedings will take place, and that someone must ordinarily be the person who makes the statement, for it is his state of mind which is material. His statement is to be excluded if he is a person interested and makes it with a view to proceedings. If his state of mind is such that he says to himself: "It looks to me as if this will end up in court. I must be careful what I say," then proceedings are anticipated and the statement is inadmissible. If, however, his state of mind is such that he only says to himself: "I do not know whether this will end up in court or not. It may or may not do so, but I am not going to anticipate it will. I will give my version for what it is worth," then proceedings are not anticipated, and the statement is admissible. In support of this view, I would mention that the words "pending" or "anticipated" are the words habitually used in connection with legal professional privilege. That privilege only obtains if litigation is "pending or anticipated," and in that connection it is well settled that a mere vague apprehension of litigation generally is not sufficient: see the *ANNUAL PRACTICE*, 1950, p. 499. *Robinson v. Stern* (1) is clearly distinguishable, because, once a person has been cautioned by the police, he must be taken to know that the matter may end up in court. The caution tells him so.

Counsel for the defendants urged that we should give a restrictive interpretation to the Act of 1938. I agree with SIR RAYMOND EVERSHED, M.R., that that would be a wrong approach. I think that it should be given a liberal interpretation. The admission of signed statements can effect a great saving of costs, especially in cases where there is no reason to doubt the truth of what they contain, and there is no need for cross-examination. Even in cases where one party or the other disputes the accuracy of a signed statement, it can be of great value, because it may enable justice to be done which might otherwise fail for want of evidence, as when the person who made the statement is dead. Signed statements are also very valuable in accident cases when they are taken shortly after the accident, because they form a contemporary record made while the facts were still in the mind of the witness and enable the court to check his subsequent recollection. I agree that the appeal should be allowed.

HODSON, L.J.: The question is whether the statement in this case was made by a person interested at the time when proceedings were anticipated. There is no dispute that the statement was made by a person interested, and the difficulty is to decide exactly what is meant by the word "anticipated." I think it is right to accept the meaning put on that word by SCOTT, L.J., in *Robinson v. Stern* (1), when he said ([1939] 2 All E.R. 685) that he thought that the word "anticipated" should be construed as including "likely." Translating the word "anticipated" into "likely," I think, for the reasons which have already been given, that this statement is admissible on the footing that proceedings were not likely at the time when the statement came into existence, which is the time to which attention must be directed. In my judgment, the appeal should be allowed.

Appeal allowed.

Solicitors: *Leonard Kasler* (for the plaintiff); *Hewitt, Woollacott & Chown* (for the defendants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

TIGER AND ANOTHER v. BARCLAYS BANK, LTD.

[KING'S BENCH DIVISION (Finnemore, J.), June 7, 8, 1951.]

Executors and Administrators—Renunciation of probate—Release from liability in respect of estate.

In an action in the Probate Division for the revocation of the grant of probate of a will a compromise was reached whereby the defendants, the executors of the will, renounced probate and the plaintiffs, two of the residuary legatees, undertook to apply for letters of administration with the will annexed. In the present action the plaintiffs sought an order for the delivery to them by the defendants of all documents relating to the estate in their possession, but the defendants claimed that they were first entitled to a formal release from all liability in respect of the estate.

HELD: the defendants were not entitled to a release.

AS TO THE RIGHT OF A TRUSTEE TO A RELEASE, see HALSBURY, Hailsham Edn., Vol. 33, p. 214, para. 397; and FOR CASES, see DIGEST, Vol. 43, pp. 758, 759, Nos. 2016-2027.

Cases referred to:

(1) *Re Cater's Trusts* (No. 2), (1858), 25 Beav. 366; 53 E.R. 676; 43 Digest 759, 2022.

(2) *Cobbett v. Clutton*, (1826), 2 C. & P. 471; 172 E.R. 213; 43 Digest 491, 304.

ACTION for the delivery up of all documents in the possession or power of the defendants relating to the administration of the estate of a testator.

The testator executed two wills, one on June 2, 1933, and the other on Oct. 14, 1942, in both of which the defendants were named as executors. In November, 1942, the testator executed a codicil to the will of 1942. On Sept. 6, 1943, the testator died, and in November, 1949, proceedings in the Probate Division of the High Court between the plaintiffs, Dr. Tiger and Mrs. Haider, residuary legatees under the will of 1942, and the defendants, in which the plaintiffs claimed an order for the revocation of the grant to the defendants of probate of the will, were compromised on terms, *inter alia*, that the defendants should renounce probate and that the plaintiffs should apply for letters of administration with the will and codicil of 1942 annexed. The defendants renounced probate, and, on Jan. 26, 1950, letters of administration were granted to the plaintiffs. The plaintiffs contended that the defendants were under an obligation to hand over to them all documents connected with the administration of the estate, either as an implied term of the compromise agreement or on the ground that, having renounced probate, they had no right to retain possession of them as against the administrators. The defendants were prepared to hand over the documents, but they claimed that they were entitled to a formal release and discharge from all liability in connection with the estate.

Platts-Mills for the plaintiffs.

Lindner for the defendants.

FINNEMORE, J., stated the facts, found as a fact that it was an implied term of the compromise agreement that the defendants should deliver up the documents connected with the administration of the estate to the plaintiffs and that there was no implied term for the granting by the plaintiffs of a formal release, and continued: Counsel for the plaintiffs contends that, quite apart from any agreement, the defendants have no answer to this claim. He says that the defendants are in possession of documents which belong to the administrators of the estate, that they are no longer executors because they renounced probate, and that they have no right as against the administrators to make any terms as to handing over the documents. Counsel referred to the Administration of Estates Act, 1925, s. 5 and s. 7, in support of this view. Section 5 provides that, where a person appointed executor by a will renounces probate of the will,

"... his rights in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his real and personal estate shall devolve and be committed in like manner as if that person had not been appointed executor."

By s. 7 (4) it is provided:

A "Every person in the chain of representation to a testator—(a) has the same rights ... as the original executor would have had if living; and (b) is, to the extent to which the estate ... has come to his hands, answerable as if he were an original executor."

Counsel contends that the defendants, having renounced probate, are complete strangers to the administration of the estate and must hand over the property which belongs to the estate. The defendants, on the other hand, say: "We are entitled to be protected. You have accepted us and before we hand over to other administrators we are entitled to formal release."

B Reference has been made to LEWIN ON TRUSTS, UNDERHILL'S LAW OF TRUSTS AND TRUSTEES and HALSBURY'S LAWS OF ENGLAND, and I do not think that counsel for the defendants disagrees with the proposition that where a trustee hands over to another trustee he is not entitled to a formal release from the trusteeship. C Counsel for the plaintiffs considers it doubtful whether in the circumstances a trustee would be entitled to a release even if the estate were being wound-up altogether, but, in any event, the only person who can give, or is called on to give, a formal release to a trustee is a beneficiary when the whole trust is brought to an end. The plaintiffs act not only for themselves, but for any beneficiary under the will. If, therefore, they were to give the defendants a complete and formal release from any responsibility that they may have incurred while they were executors and it turns out that something illegal has been done, the plaintiffs might be in a very difficult position if a beneficiary claimed that this had interfered with his right.

D *Re Cater's Trusts* (No. 2) (1) and *Cobbett v. Clutton* (2) show as a general principle that the courts are slow to say that a formal release can be insisted on. E Counsel for the defendants agreed that he had to show that there was an end of the trust under which the defendants acted and that a new trust had been created. Having shown that, he submitted that the defendants were entitled to say: "We have completed our trust under the will and a new one has come into existence under the compromise agreement, and as ours is completely finished we are entitled to the release for which we are asking." He said that the trusts of the defendants F had been brought to an end by the act of the beneficiaries in making the agreement, and, therefore, the release which is demanded is as though it was from the beneficiaries on the completion of the trust. Counsel admitted that there was no direct authority for that proposition and I do not accept it. It cannot possibly be said that, because of these terms of compromise, the trust under the will had come to an end and some kind of new trust under the terms of the compromise G had come into existence. It is plain that the plaintiffs are acting under the will, in accordance with the terms of the compromise. They received letters of administration with the will and codicil annexed, part of the compromise being that they would undertake to obtain that grant. It is true that in the compromise various terms were agreed as among the beneficiaries and other parties to the agreement and the result may be that some of the terms of the will have been H modified, but the trust is still the trust under the will and it is unreal to say that at the time this compromise was made the original trust had come to an end and a new trust had come into being. That being so, the defendants are not entitled to demand a release from the plaintiffs as a condition of handing over the documents relating to the estate.

Judgment for the plaintiffs.

Solicitors: *Kennedy Genese & Co.* (for the plaintiffs); *Reed & Reed* (for the defendants). [Reported by F. A. AMIES, Esq., Barrister-at-Law.]

NAPIER v. NATIONAL BUSINESS AGENCY, LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Hodson, L.J.J.), June 7, 1951.]

Contract—Legality—Provision calculated to deceive revenue authorities—Service agreement—Provision for expenses at excessive figure—Enforcement of provision as to salary.

The defendants engaged the plaintiff to act as their secretary and accountant at a salary of £13 a week together with £6 a week for expenses. Both parties were aware that the plaintiff's expenses could never amount to £6 a week, and, in fact, they did not exceed £1 a week. Each week the defendants deducted from the salary of £13 a week the amount of income tax appropriate to that sum, and the payment of £6 a week was represented as a re-imbursement of expenses on the returns made to the Inland Revenue Commissioners. The plaintiff was summarily dismissed, and claimed payment from the defendants, in lieu of notice, of £13 a week for a certain period.

HELD: (i) the provisions of the service agreement relating to expenses were intended to mislead the taxation authorities and evade tax, and, therefore, the agreement was contrary to public policy.

(ii) although the plaintiff sought only to enforce the provisions of the agreement relating to salary, those provisions were not severable from the rest of the agreement and were equally unenforceable.

AS TO AGREEMENTS CONTRARY TO PUBLIC POLICY, see HALSBURY, Hailsham Edn., Vol. 7, pp. 153-159, paras. 216-227; and FOR CASES, see DIGEST, Vol. 12, pp. 240-244, 248, Nos. 1970-1991, 2025.

APPEAL by the plaintiff from an order of His Honour JUDGE A. R. THOMAS, made at the Mayor's and City of London Court and dated Apr. 9, 1951. The plaintiff claimed damages for wrongful dismissal, and the issue between the parties was confined to the length of notice which the plaintiff ought to have received. At the hearing, however, the learned judge formed the view that the agreement for service was contrary to public policy as being intended to evade taxation, and he, therefore, held that the plaintiff was unable to enforce any part of the agreement.

A. H. Bray for the plaintiff.

F. Whitworth and *P. G. Hawkins* for the defendants.

SIR RAYMOND EVERSLED, M.R.: The agreement sued on was one whereby the plaintiff was engaged by the defendants to act as secretary and accountant. The issue which was disclosed by the pleadings concerned the length of notice to which the plaintiff was entitled under that agreement, for, having served some ten months or so, he was summarily dismissed. In fairness to him it should be said that there is no evidence, and, indeed, no plea on the part of the defendants, that he had committed any disgraceful or wrongful act, and the defendants did not attempt to justify his dismissal without notice. After his dismissal they paid him a certain sum, calculated on the basis that he should have had one month's notice. It was the claim of the plaintiff that he was entitled to six months' notice, or, alternatively, to four months' notice.

Witnesses were called for the purpose of dealing with that aspect of the matter, but when the learned judge began his investigation of the case another and very important question began to emerge. It was no part of the defendants' case that the agreement was tainted in the way in which I use that word, and, therefore, the burden fell on the judge to carry out an investigation into the truth of this matter as best he could without the assistance that he would naturally have had from the other party had this matter been an issue in the action. The terms of the bargain, so far as relevant, were that the plaintiff should be paid for his services in the two capacities which I have mentioned, £13 a

week for salary and £6 a week for expenses. The learned judge discerned at an early stage, as the matter developed, the possibility that the figure of £6 a week for expenses was not genuine in the sense that it could be taken as a fair representation on the part of either party of the expenses that the plaintiff would in fact incur.

The plaintiff was paid his salary subject to deduction for income tax by means commonly known as "P.A.Y.E." and the defendants made the appropriate deductions in respect of the £13 a week. They disclosed by indorsement on the appropriate forms that the plaintiff also received £6 a week for expenses. It has been urged forcibly by counsel for the plaintiff that the plaintiff has not attempted any concealment from the revenue authorities. He has been to see them about this matter, and has attempted to obtain a solution of the problem between himself and the revenue as to the amount that could fairly be allowed to him for expenses; but he has conceded that, of the £6 a week, not more than £1 a week could have been treated as fairly representing expenses. The result of the plaintiff's candour *vis-a-vis* the revenue authorities may well be that they will eventually recover from him any tax which ought to have been paid before, but, even assuming that, it is not to be forgotten that in the meantime the defendants will not have accounted, as they ought to have done under the income tax regulations, for the full amount of tax for which they were accountable.

On this aspect of the matter, the learned judge said: "Both parties knew perfectly well that, except on very exceptional occasions, the plaintiff would not incur any expenses," and he then refers to some matters of evidence to support that finding. I venture to make one addition. Before the service began, there was sent in the course of correspondence between the plaintiff and one Hidden, on behalf of the defendant company, a statement of the duties of a secretary plus accountant, and an inspection of that statement discloses that he would not be in the least likely to incur substantial, if, indeed, any, expenses. The case is wholly different from that, say, of a commercial traveller, who has necessarily to be constantly spending money in the way of expenses. The learned judge continued:

"This contract to pay the plaintiff what was undoubtedly, to my mind, part of his salary as expenses I must find was illegal, even if only to the extent that he was receiving money which, or a very large part of which, was liable to tax, and which, or a very large part of which, was not included as salary for the purposes of the returns to the Inland Revenue under the pay-as-you-earn scheme."

Counsel for the plaintiff has observed that the payment by the defendants to the plaintiff of £6 a week expenses was disclosed on the P.A.Y.E. return, but the disclosure, in the form that it took, in itself, as I think, constituted or may be treated fairly as constituting a misrepresentation, for, by stating on the form that £6 a week was paid to the plaintiff for expenses, the defendants were, I should have thought, representing to the revenue that £6 a week or thereabouts was the amount of the expenses which the plaintiff incurred in the course of, and as incidental to, his employment, which was not the fact. The learned judge concludes:

"I cannot help thinking, and I must find as a fact, that when the contract was made the plaintiff intended to allow this to go on, and to avoid paying income tax on it if he possibly could. I think that that was the main attraction of this particular job over the employment he had before he came to the defendant company."

Counsel for the plaintiff has said that the finding is unjust to the plaintiff and is unsupported by evidence, but in all the circumstances I think it impossible for this court to say that the judge was disentitled to find, as he did, that the plaintiff and the defendants together made this bargain knowing well that this

was a sham figure which bore no relation to the expenses which, in fact, would be incurred.

If those were the facts, what is the inference? It must surely be that, by making an agreement in that form the parties to it were doing that which they must be taken to know would be liable to defeat the proper claims of the Inland Revenue and to avoid altogether, or at least to postpone, the proper payment of income tax. If that is the right conclusion, it seems to me equally clear (subject to one point which I will mention in a moment) that the agreement must be regarded as contrary to public policy. There is a strong legal obligation placed on all citizens to make true and faithful returns for tax purposes, and, if parties make an agreement which is designed to do the contrary, *i.e.*, to mislead and to delay, it seems to me impossible for this court to enforce that contract at the suit of one party to it.

That being so, the further point arises whether the terms of the agreement relating to the two branches of the plaintiff's reward can be severed, *i.e.*, whether the plaintiff can reject the tainted part of the contract relating to the £6 a week for expenses, and sue only, as he has done, in respect of the £13 a week for remuneration simply so called. I think the answer to that point is in the negative. The contract is, to my mind, not severable. It cannot properly be treated as consisting of two separate and distinct bargains, and, therefore, although it is true that the plaintiff sues only in respect of £13 a week, he is really seeking to enforce a contract which is tainted to the extent I have mentioned. It being so tainted, I think that the court will not enforce it at his suit. I think that this appeal fails and should be dismissed.

DENNING, L.J.: I agree. In these days of high income tax there is a great temptation for employers and servants to describe remuneration as being in part salary and in part expenses. This is done in the hope of evading tax on the part described as expenses, and the temptation must be resisted. In order that an expense allowance should be valid, it must be a genuine estimate of the expenses to be incurred. The insertion of a fictitious figure for expenses in order to defraud the revenue is illegal. It vitiates the whole remuneration and disentitles the servant from recovering any part of it. He cannot recover either the part described as expenses or even the part described as salary. I think that the decision of the judge was quite right. It will have a very salutary effect if it stops people putting in fictitious figures for expenses.

HODSON, L.J.: I agree that the appeal must be dismissed and have nothing to add on the main question. It seems to me impossible to sever the part of this agreement which deals with expenses from the part which deals with salary. The plaintiff entered into this agreement in consideration of receiving both sums, *viz.*, the £13 a week and the £6 a week for expenses, and, on the basis that those two cannot be split, the appeal fails.

Appeal dismissed.

Solicitors: *William Charles Crocker* (for the plaintiff); *Bartlett & Gluckstein* (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

BERNARD & SHAW, LTD. v. SHAW (RUBIN THIRD PARTY).

[KING'S BENCH DIVISION (Lynskey, J.), June 7, 1951.]

Income Tax—P.A.Y.E. ("Pay-as-you-earn") system—Employers' failure to deduct tax from gross salary—Tax claimed from, but not paid by, employers—Tax not recoverable by employers from employee as money paid to the use of employer or from employee as trustee for employers—Income Tax (Employments) Act, 1943 (c. 45), s. 1 (1), (2) (as extended by Income Tax (Offices and Employments) Act, 1944 (c. 12), s. 1 (1)), s. 2—Income Tax (Employments) Regulations, 1950 (S.I., 1950, No. 453), reg. 52 (2).

A company paid to one of its directors certain sums as remuneration for his services without deducting income tax as required by the Income Tax (Employments) Act, 1943, s. 1 (1) and (2) (as substituted by s. 1 (1) of the Income Tax (Offices and Employments) Act, 1944), and the Income Tax (Employments) Regulations, 1950. On receipt of a claim by the revenue authorities against the company for the payment of income tax on the sums so paid, the company sought to recover from the director the amount of tax which should have been deducted.

HELD: (i) plaintiffs could not recover the amount in question as money had and received by the defendant to their use since the tax had not, in fact, been paid by the company, nor as money paid under a mistake of fact since the failure to deduct tax was not due to any mistake of fact in paying the remuneration to the director, but to a breach, by the company, of their statutory obligations as employers to make deductions.

(ii) the director was not a trustee of the money so as to enable the company to recover it from him as money to which they were legally entitled.

Denby v. Moore (1817) 1 B. & Ald. 123, applied.

Semble: The sole remedy given the company by the Act of 1943 and the regulations of 1950 was to deduct the amount from subsequent payments of remuneration to the director.

FOR THE INCOME TAX (EMPLOYMENTS) ACT, 1943, s. 1 (1), (2), s. 2, see HALSBURY'S STATUTES, Second Edn., Vol. 12, pp. 577, 578, and FOR THE INCOME TAX (OFFICES AND EMPLOYMENTS) ACT, 1944, s. 1 (1), see *ibid.*, p. 584. FOR THE INCOME TAX (EMPLOYMENTS) REGULATIONS, 1950 (S.I., 1950, No. 453), reg. 52 (2), see BUTTERWORTHS EMERGENCY LEGISLATION SERVICE, Third Binder Title, Income Tax, [18], p. 76.

Case referred to:

(1) *Denby v. Moore*, (1817), 1 B. & Ald. 123; 106 E.R. 46; 31 Digest 291, 4366.

ACTION for money alleged to have been lent to, or paid to the use of, the defendant.

From 1946 to Apr. 14, 1947, the defendant was a director of the plaintiff company. On Apr. 14, 1947, the defendant entered into an agreement with his co-director, Mr. Rubin, to sell his interest in the company to Mr. Rubin on the terms that Mr. Rubin would procure the company to discharge any income tax for which the defendant might be liable in respect of the remuneration he received from the company and of dividends paid to the defendant by the company up to Apr. 21, 1947, the defendant, in turn, releasing any claim he might have against the company. The company claimed that sums totalling £1,682 0s. 3d., which had been paid to the defendant in respect of the period during which he had been a director of the company, were made by way of loan, or, alternatively, that, if they represented remuneration for his services, they included the sum of £709 10s., being income tax which should have been deducted from that remuneration by the company under the "pay-as-you-earn" system, which sum the Inland Revenue had subsequently claimed from the company. The

company claimed to be entitled to recover the amount of the tax from the defendant on the ground that this sum was due to them as money had and received by the defendant to the use of the company; that, there being a legal liability on the company to pay the tax to the Inland Revenue, the company were entitled to recover it from the defendant; and that, as the defendant was a director of the company, he must have been a party to the payment of the money to himself, and, therefore, held the sum as trustee for the company.

Lester for the plaintiffs.

Caplan for the defendant.

LYNSKEY, J., stated the facts, found that the plaintiff company had paid to the defendant the sum claimed, and that the payment had been, not by way of loan, but in respect of his salary, and continued: I now come to the alternative claim, which is framed in the statement of claim as follows:

“Alternatively, if the said sum represented salary, it includes the sum of £709 10s. being income tax (P.A.Y.E.) for which tax the Inland Revenue now makes claim against the plaintiffs. The plaintiffs are entitled to recover such tax against the defendant, but the defendant has failed, neglected and refused to pay the same.”

There is an alternative claim for that sum of £709 10s. as tax due on the salary paid to the defendant.

I have first to find whether the facts alleged give any cause of action to the plaintiffs at the present time or whether the plaintiffs had any cause of action in respect of that sum at the date of the issue of the writ. In the present case it does not matter, however, which date I take. The plaintiffs say that this sum was due to them as money had and received by the defendant to the use of the plaintiffs. They say that the defendant was under liability to pay tax to the Inland Revenue in respect of the remuneration which he received, that they (the plaintiffs) did not deduct the tax from his remuneration as they were entitled to do and ought to have done, and, therefore, that the defendant has been overpaid his remuneration by the amount which represents the tax which was not deducted. It is said that in those circumstances the plaintiffs are entitled to recover from the defendant that sum as money had and received at the time of receipt to the use of the plaintiffs.

I have been referred to the Income Tax (Employments) Regulations, 1950, made on Mar. 25, 1950, by the Commissioners of Inland Revenue under the Income Tax (Employments) Act, 1943, s. 2, and the Finance Act, 1946, s. 30. Under s. 1 (1) and (2) of the Act of 1943, as extended by the Income Tax (Offices and Employments) Act, 1944, s. 1 (1) and s. 2, and under reg. 13 of the regulations of 1950 an obligation is imposed on employers to ascertain the total emoluments which each of their employees is earning or is likely to earn or has earned in any particular year and then to deduct from the remuneration or emolument payable to the employee the appropriate tax, notwithstanding that when the payment is made no assessment has been made in respect of the emoluments. Where there has been an assessment, then a certificate or card is issued which bears on it a code number which directs the employer as to the proper amount to be deducted weekly, monthly or quarterly, as the case may be, from the employee's remuneration. In respect of the collection of tax a statutory duty is, therefore, imposed on the employer, and, if he fails to deduct tax, he is in breach of that duty and is liable to pay the tax to the revenue authorities whether he has deducted it or not.

In the present case the plaintiffs did not carry out their statutory obligations by deducting tax. They paid all the remuneration without any deduction. It is said on their behalf that in any event the effect is that the defendant would escape liability for that tax as they have not deducted it, and, therefore, he has received money to their use. I am not satisfied that the defendant would

escape liability for the tax due from him in respect of his remuneration. The contrary view is, apparently, held by Mr. Passer, a chartered accountant, who gave evidence before me. In a letter written on Mar. 24, 1950, to the solicitors for the defendant he says:

A "With reference to your letter of Feb. 1, and the previous correspondence, would you please note that I have been authorised by the Inland Revenue authorities to amend the liability of your client for P.A.Y.E. by reference to the actual dates on which Mr. Shaw [the defendant] drew sums from the company. The amended liability is as follows: 1946-47 £480 13s., 1947-48 £228 17s. Total £709 10s. I will be calling a meeting of my committee of inspection in about two weeks' time to obtain the necessary authority to take proceedings against your client. I understand that the inspector of taxes, in protection of the interests of the Inland Revenue, has raised an assessment direct on your client. In the event—which I consider to be unlikely—of my failing to obtain judgment against your client, they would proceed themselves against your client and I cannot, therefore, see the point of your client contesting my claim."

B
C Whether that is a correct statement of the law or not, I do not think it necessary to decide, although, in my view, the provisions of reg. 52 (2) of the regulations of 1950 would appear, on the face of them, to authorise the inspector to raise an assessment and to recover the tax where the tax has not been deducted. Regulation 52 (2) provides:

D "If the tax payable under the assessment exceeds the total net tax deducted from the employee's emoluments during the year, the inspector may require the employee to pay the excess to the collector instead of taking it into account in determining the appropriate code for a subsequent year, and where the inspector so requires the employee shall pay the excess accordingly."

E I do not, however, think it necessary that I should decide this point in the present case, because it seems to me that this money was paid to and received by the defendant as remuneration. It was remuneration to which he was entitled, and the plaintiffs knew that they were paying it in full. In no circumstances could it be said that in the making of that payment there was any mistake of fact. What happened was that, instead of exercising their right, and, indeed, carrying out their statutory obligation, to make deductions, the plaintiffs failed to do so.

F That being so, I should have thought without any authority that it could not be said that the defendant received this money to the use of the plaintiffs. Any doubt that I might have is resolved by the decision as long ago as 1817 in *Denby v. Moore* (1). The headnote reads:

G "An occupier of lands having, during a course of twelve years, paid to the collector of taxes the landlord's property tax, and the full rent as it became due to the landlord, without claiming any deduction on account of the tax so paid: Held that the occupier could not recover back from the landlord any part of the property tax so paid."

H From the point of view of principle, the facts are extremely similar, and the judgments proceed on the assumption that, the payment not having been deducted at the proper time, it could not afterwards be claimed in an action of assumpsit for money had and received. BAYLEY, J., put it in this way (1 B. & Ald. 128):

"On the discussion I am satisfied that this action cannot be maintained. The payment was made at a time when it was in the tenant's power to have deducted the sum in question. He must have known that he had a right so to deduct it. Knowing this, he chooses nevertheless to make this payment. Then that is a voluntary payment which he cannot recover back by this action."

There is no suggestion of any mistake there. HOLROYD, J., said (*ibid.*, 130):

"The statute directs that the tenant shall deduct the money from his next rent. Then that money is as so much rent already paid to the landlord. If the tenant afterwards chooses to pay the whole rent, it must be a voluntary payment on his part as to the portion paid by him before. I therefore think that being a voluntary payment he cannot recover it back by this form of action."

I am satisfied that the basis on which the present case was put forward primarily was as for money had and received by the defendant to the use of the plaintiffs, and that is a form of action which must fail. It is next suggested that, because there is a legal liability to pay the tax to the Inland Revenue authorities, the plaintiffs are entitled to recover it from the defendant. I know of no such form of action. If the money had in fact been paid by the plaintiffs in discharge of the tax liability, it might well be that there would be a cause of action for money paid by the plaintiffs to the use of the defendant, on the basis that they were compelled by process of law to pay money which was due in respect of his remuneration as to which he would ultimately be responsible for taxation. In those circumstances, the money might be recovered, but in the present case the money has not been paid, and, until the money is paid, it seems to me that there can be no action for money paid to the use of the defendant.

Finally, it is suggested that the money can be recovered on the basis of some form of trusteeship—that, as the defendant was a director of the plaintiff company and must have been a party to the payment of these sums to himself, therefore, some equity arises on his having received the money and he must hold it as trustee for the plaintiffs. I have asked for authority to enable me to say that such a cause of action would lie. These are matters of taxation; they are not misfeasance proceedings. This is a common law action, and I know of no principle either at common law or equity which would enable me to say that when a company (although it be a legal entity and not an individual) voluntarily pays money to a person without deduction when there should have been deduction that makes the recipient of the voluntary payment a trustee for the company in the absence of some other equity arising, and I see no other equity arising. In my view, unless the plaintiffs can point to some provision in the Finance Act, 1943, or the regulations made thereunder which entitles them to claim from an employee money which they have failed to deduct at the time of prior payment, their action must fail. So far as I can see from the regulations of 1950, an employer who fails to deduct tax from remuneration in respect of one period can deduct it at a later period from remuneration to the employee, but the sole remedy given to the employer by the Acts and regulations is a method by deduction. No power is given to the employer to recover from his employee sums which he ought to have deducted and did not. In the present case a right is given to the plaintiffs to deduct, but no right is given to them to claim back, and, unless such a right is given, then the plaintiffs are left without remedy against the defendant except by way of deduction from his remuneration, either present or future. The result, in my judgment, is that the claim fails.

Judgment for the defendant.

Solicitors: *Conway & Conway* (for the plaintiffs); *Kaufman & Seigal* (for the defendant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

MARCROFT WAGONS, LTD. v. SMITH.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning, L.J., and Roxburgh, J.), May 22, 23, 1951.]

Landlord and Tenant—Lease—Implied grant—Death of second statutory tenant—Permission to member of family to remain in occupation—Payment of rent—Occupation continuing for six months.

A From 1901 until his death in 1938 A. occupied a dwelling-house within the Rent Acts which belonged to the plaintiffs, and (as the court found) at his death was a statutory tenant thereof. His widow and daughter continued to occupy the house until the widow's death on Mar. 16, 1950. On Mar. 27, 1950, the daughter called on the plaintiffs' representative, B., and asked that her name should be put in the rent book, and that the tenancy should be transferred to her. B. refused, and said that the house was required for an employee of the plaintiffs. He said, however, that he did not wish to disturb her, and he accepted two weeks' rent. The daughter remained in possession, paying rent, for about six months.

HELD: no tenancy had been created between the plaintiffs and the daughter.

C *Per* SIR RAYMOND EVERSHERD, M.R.: Until the Rent Restrictions Acts came into force in the present century the law inferred, when exclusive possession was granted to one of the property of another at a rent payable to that other, that a tenancy had been created. The law did not recognise that those conditions were compatible with any other kind of relationship. But consideration of similar facts today must be against the background of the conception of the statutory tenancy, the conception that a person may have such a right to exclusive possession of property as to enable him to bring an action of trespass against the owner of that property, but yet that such right would not confer any interest whatever on the occupier.

E AS TO HOW THE RELATIONSHIP OF LANDLORD AND TENANT IS CREATED, see HALSBURY, Hailsham Edn., Vol. 20, pp. 5-13, paras. 1-8; and FOR CASES, see DIGEST, Vol. 30, pp. 343-347, Nos. 16-62.

Cases referred to:

- (1) *Ministry of Agriculture and Fisheries v. Matthews*, [1949] 2 All E.R. 724; [1950] 1 K.B. 148; 2nd Digest Supp.
- (2) *Remon v. City of London Real Property Co.*, [1921] 1 K.B. 49; 89 L.J.K.B. 1105; 123 L.T. 617; 31 Digest 556, 7032.
- (3) *Steel (M. & H.) v. Cockcroft*, p. 175, *ante*.
- (4) *Brock v. Wollams*, [1949] 1 All E.R. 715; [1949] 2 K.B. 388; 2nd Digest Supp.
- (5) *Buck v. Howarth*, [1947] 1 All E.R. 342; 176 L.T. 320; 111 J.P. 178; 2nd Digest Supp.
- (6) *Chamberlain v. Farr*, [1942] 2 All E.R. 567; 112 L.J.K.B. 206; 2nd Digest Supp.
- (7) *Doe d. Cheney v. Batten*, (1775), 1 Cowp. 243; 98 E.R. 1066; 31 Digest 457, 6042.
- (8) *Clarke v. Grant*, [1949] 1 All E.R. 768; [1949] L.J.R. 1450; 2nd Digest Supp.
- (9) *Minister of Health v. Bellotti*, [1944] 1 All E.R. 238; [1944] K.B. 298; 113 L.J.K.B. 436; 170 L.T. 146; 2nd Digest Supp.
- (10) *Southgate Borough Council v. Watson*, [1944] 1 All E.R. 603; [1944] K.B. 541; 113 L.J.K.B. 337; 171 L.T. 26; 108 J.P. 207; 2nd Digest Supp.
- (11) *Foster v. Robinson*, [1950] 2 All E.R. 342; [1951] 1 K.B. 149.

APPEAL by the defendant from an order of His Honour JUDGE WRANGHAM, made at Ashby-de-la-Zouch County Court on Mar. 15, 1951.

The learned judge held that the defendant was not entitled to occupy a dwelling-house as statutory tenant thereof by virtue of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g), nor had she been granted a new tenancy, although she had been in exclusive possession and had paid rent for six months.

Mrs. Y. Frazer for the defendant.

Grieves for the plaintiffs.

SIR RAYMOND EVERSLED, M.R.: Marcroft Wagons, Ltd., the plaintiffs, sought possession from the defendant, Mrs. Dorothy May Smith, of a dwelling-house known as 6, Mantle Lane, Coalville, in the county of Leicester. From a date early in the century, Mr. Sidney Aris, who was the defendant's father, was occupying the premises as the tenant of the plaintiffs or their predecessors in title. I use the word "tenant" advisedly, meaning thereby a person having an estate in the property, *i.e.*, being a lessee or having such estate as is conferred by a contractual tenancy. Whether he remained in that capacity until his death is a point to which I will presently return. He died on Mar. 8, 1938, leaving his widow, Mrs. Aris, him surviving. She remained in the same house, living there until her own death twelve years later on Mar. 16, 1950. When she died, the defendant, now Mrs. Smith but then Miss Aris, was living in the house, and it is in evidence that she had in fact lived there ever since her birth in 1901. Shortly after her mother's death, the defendant met and had a conversation with a representative of the plaintiffs, and much will be seen to turn on what occurred during that conversation. But no move was made by the plaintiffs to recover possession of the house until September, 1950, when, following certain letters between the solicitors to the two parties, the present proceedings were begun.

I have in my brief narrative tried to avoid any points which are in controversy and tried to use language which shall in no way prejudice them. It is plain that the position of the defendant may vary according to whether her father, Mr. Aris, at his death in 1938 was or was not a contractual tenant. If he was a contractual tenant, then his wife (who, as I have said, remained on after her husband's death) was at first also a contractual tenant, but it is conceded that, if she was a contractual tenant at the beginning of her widowhood, she undoubtedly became later during her life a statutory tenant, and, if on her death in March, 1950, she was a statutory tenant and was the first of this family to qualify as a statutory tenant, then it would follow (and this much is conceded by the plaintiffs) by virtue of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g), that the defendant has qualified as a person entitled to remain in occupation, for she was a member of the statutory tenant's family who had resided with the statutory tenant for the requisite length of time before the latter's death. If, on the other hand, Mr. Aris before his death had ceased to be a contractual tenant and had become a statutory tenant, then (and again this is conceded) Mrs. Aris would acquire the benefits conferred on members of the tenant's family by s. 12 (1) (g) above-mentioned, but with her own death the scope of that sub-section would be exhausted so that the defendant would not be able to pray it in aid to protect her continued occupation. Although the points have been argued in the converse order in this court, it will, I think, be convenient to deal immediately with the question I have already adumbrated, *viz.*, whether Mr. Sidney Aris ceased to be a contractual tenant during his life. [His LORDSHIP considered the evidence, held that it could not be said that there was no evidence on which the learned judge could have held that Mr. Aris was a statutory tenant, and continued:] If that conclusion, then, be right, it follows that the defendant cannot rely on s. 12 (1) (g) of the Act of 1920. Her case must depend (and this has been the main point put forward to this court) on the submission that at this meeting on Mar. 27, 1950, and as a result of what took place then and thereafter, the court should infer that there came into existence a new contractual tenancy

between the plaintiffs and the defendant. I confess I find that this is a difficult matter. The court is in a sense hedged around with difficulties of this kind, because, it is suggested, whichever way the court decides this matter, our decision may lead in other cases to results not entirely satisfactory. I am, however, undeterred by those matters.

A It is a trite saying that each case in our courts depends on its own particular facts, and what we decide in this case should, therefore, by no means form any guide to what proper inference should be drawn from different facts in different cases. Having referred to the evidence given as to what transpired on Mar. 27, 1950, and having referred to the arguments put forward by counsel for both parties, the learned judge said:

B "I think both of the arguments are extremely attractive and at first I was convinced provisionally that anyone who was allowed to live in a house and deemed to have exclusive occupation of it must be a tenant, but I have come to the conclusion that on this branch of the case I ought to hold that the true interpretation of what took place on Mar. 27, 1950, is that the plaintiffs did not agree to grant an estate in land, *i.e.*, that the plaintiffs did not create a tenancy, that what was done was solely to grant a licence for C an undefined time in consideration of her paying a sum equal to that paid by her mother by way of rent. I think it really follows from the decision of CASSELS, J., in *Ministry of Agriculture and Fisheries v. Matthews* (1), in which he held that occupants of requisitioned premises were licensees, that persons who inhabit premises with exclusive possession can be mere licensees, and that the proper interpretation is that the defendant was offered and accepted D that kind of licence."

Counsel for the defendant says, first, that that contains, on the face of it, a misstatement of the law, for she says that if in point of fact two parties agree that one of them is to have the exclusive possession of premises belonging to the other, paying a rent for it, the result must be to bring into existence a tenancy of some kind—either a tenancy from week to week or a tenancy at will, but a tenancy—E and so far as this case is concerned it does not matter what the terms of the tenancy were if a tenancy was created. Secondly, she says that the learned judge misled himself by his citation of *Ministry of Agriculture and Fisheries v. Matthews* (1). That was a case which related to premises which had been requisitioned by a Minister of State, and the Minister, having requisitioned the property, let persons into occupation of the premises on terms which on the face of them bore F all the marks of tenancy, but, as a Minister requisitioning property has no estate whatever, it followed that he could not grant to others an estate which he himself had not got. That case illustrates one of the features of modern times, *viz.*, the creation of rights of occupation having in most respects the attributes of a tenancy but lacking the estate in land which is a necessary incident of a tenancy. But illustrating, as it does, that modern conception, it is, as counsel G points out, not quite an analogy to the present case, for the case really turned on the circumstance that the Minister could not grant something which he himself had not.

It is clear that there is much force in the argument of the defendant, and, having regard to the facts as I shall presently more fully refer to them, I could well understand that a judge trying this case might have come to the conclusion H that there was a tenancy and that that was the right inference as to the intention of the parties. I might have so decided it myself. But, whatever be the significance attached to the reference to the decision of CASSELS, J., and however open, as I think, with all deference, the words of the learned judge's judgment are to criticism in some respects, it is plain that the learned judge, having seen the witnesses and heard their evidence and having also referred to the correspondence in September, 1950, came to a conclusion of fact that there was here no intention on the part of either the plaintiffs' representative, on the one hand, or of the

defendant, on the other, to create a tenancy—no intention, indeed, to do other than allow the existing state of affairs (whatever in law it was) to continue for some limited time.

[HIS LORDSHIP said that the evidence showed that on Mar. 27, 1950, the defendant called on the plaintiffs' representative, B., and asked that her name should be put in the rent book, and that the tenancy should be transferred to her. B. said that he was not prepared to put the defendant in that position and that the property was required for an employee of the plaintiffs. B. said, however, that he did not wish to disturb her and accepted two weeks' rent. The defendant continued to live in the house with the consent of the plaintiffs and to pay rent for about six months. HIS LORDSHIP continued:] The most troublesome matter, speaking for myself, has been the length of time that elapsed between March and September, 1950, before the plaintiffs took any further step. There is no doubt that the intricacies of modern life, as reflected in the rent restrictions legislation, have made, in many respects, the relationship between landlords and tenants assume an artificial, and, indeed, unfriendly, character which is somewhat to be deplored. In particular, landlords, who may have ordinary human instincts of kindness and courtesy, may often be afraid to allow to a tenant the benefit of those natural instincts in case it may afterwards turn out that a tenant has thereby acquired a position from which he cannot subsequently be dislodged. In the general interest it may be necessary that the relationship should have to assume a much more formal character than would otherwise be necessary. Nevertheless, I should be extremely sorry if anything which fell from this court were to have the result that a landlord could never grant to a person in the position of the defendant any kind of indulgence, particularly in circumstances such as existed in March, 1950, when the defendant lost her mother. It seems to me that it would be quite shocking if, because a landlord allowed a condition of affairs to remain undisturbed for some short period of time, the law would have to infer therefrom that a relationship had arisen which made it impossible thereafter for the landlord to recover possession of the property when, admittedly, by taking proper measures from the start he could have got possession.

There is another very important matter to be borne in mind in considering what inference should be drawn in cases of this kind. Until, in the present century, the Rent Restrictions Acts came into force, the law, broadly speaking, necessarily inferred, when exclusive possession was granted to one of the property of another at a rent payable to that other, that a tenancy had been created. The law did not recognise that those conditions were compatible with any other kind of relationship. That, I think, sufficiently appears from the passage in HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 20, p. 8, to which counsel for the defendant referred. But it is now quite clear that, to use the formula which before has been applied, a new *monstrum horrendum, informe, ingens* has come into our ken—the conception of a statutory tenancy, the conception that a person may have such a right of exclusive possession of property as to entitle him to bring an action for trespass against the owner of that property, but yet that such right would not confer any interest whatever in the land on the occupier who would not be able to dispose of it by grant or by testamentary disposition. It is, as has been said, a statutory right of irremovability. Many illustrations have been before the court, and if I read a few sentences from the judgment of BANKES, L.J., in *Remon v. City of London Real Property Co.* (2) I shall, I think, as well as possible illustrate the strangeness, at any rate as it would have appeared to a pedantic lawyer of the nineteenth century, of this conception that I have mentioned. Referring in that case to the person claiming to retain possession of the premises, BANKES, L.J., said ([1921] 1 K.B. 54):

“In no ordinary sense of the word was the respondent a tenant of the premises on July 2. His term had expired. His landlords had endeavoured to

get him to go out. He was not even a tenant at sufferance. It is however clear that in all the Rent Restrictions Acts the expression 'tenant' has been used in a special, a peculiar sense, and as including a person who might be described as an ex-tenant, some one whose occupation had commenced as tenant and who had continued in occupation without any legal right to do so except possibly such as the Acts themselves conferred upon him."

- A Every owner of property today appreciates that the effect of the Rent Restrictions Acts is such that in all human probability if the owner claims to get or desires to get possession of the property he will have to go to the county court and get an order for possession. In other words, the landlord's right to recover possession is now a right to go to the county court and get an order for possession; and, in judging the inference to be drawn from such events as took place here, it
- B seems to me vital to bear in mind that that is the background against which people must now discuss and regulate their affairs. [HIS LORDSHIP considered the circumstances in which the defendant was permitted to remain in the house and continued:] If three, four, five or six weeks had elapsed, and then the plaintiffs had said "Well, now, we have given you a reasonable time: we are afraid we must ask you to go," it seems to me that the defendant's case would
- C have been almost unarguable. But, as I have already said, the plaintiffs allowed the occupation to continue for six months, and that length of time, in view of the evidence given, would, I think, have been an important matter to any judge considering what, at the end of that period, was the proper inference to be drawn. In all the circumstances, however, I cannot think that six months is necessarily so long a period that we must treat as untenable the judge's conclusion
- D that there was no change of intention on the part of either party between March and September, 1950—in other words, that at the end of that six months' period, as at the beginning, the real inference was that, the plaintiffs' representative and the defendant having met, it was agreed between them that the *status quo* should be allowed for the present to continue. Although I agree with counsel for the defendant that *Ministry of Agriculture v. Matthews* (1) is of a different
- E character, nevertheless, for the reasons that I have tried to state, I think that in existing circumstances such a permission given to the defendant does not in the eyes of the law necessarily involve the inference of a tenancy. It is compatible with the conception which is to be found in the statutory tenant under the Rent Acts, and that to be found in other examples of a right to occupy premises with many of the attributes of a tenancy but without the essential qualification of
- F having any interest in land. I think that the learned judge had evidence here which entitled him so to find, and I, on the whole, have come to the conclusion that we ought not to disturb that finding of fact.

Counsel for the defendant suggested that by such a decision we should be inviting all landlords to evade the Act by never granting a tenancy but merely permitting occupants to become such as licensees. I have already said that I

G am not sufficiently frightened by that argument. I think that where the question arises out of a new relationship between an owner of property and an occupant, the inference to be drawn when the occupant is first allowed to go into exclusive possession is *prima facie* very different from the inference proper to be drawn, though not necessarily to be drawn, in a case such as this, where the person in occupation has lived on the premises, as this defendant has, for a long period of

H time and has in effect succeeded to the occupational privileges (to use a somewhat colourless phrase) possessed by her parent on that parent's death.

Our attention was drawn to *Steel (M. & H.) v. Cockcroft* (3). That case has on the face of it some little similarity to the present, for the person against whom possession was sought was a child of parents both of whom had successively lived in the house, as had the parents of the present defendant. The other facts were not by any means identical. I mention the case because at least it does seem to show that the circumstances which I think so important, *viz.*, the existence of this conception

of an occupational right without an estate in the land, may alter or affect the inference to be drawn from facts which, in other days, would have been held to amount to a tenancy. That circumstance was considered in *Steel (M. & H.) v. Cockcroft* (3) and was relevant to the conclusion in that case, which is at least not inconsistent with the conclusion at which I arrive in the present case.

For the reasons I have stated, I have on the whole, therefore, come to the conclusion that this appeal fails and ought to be dismissed.

DENNING, L.J.: I agree. The original tenant, Mr. Aris, had been in the house ever since 1901 and he had died in 1938. The first question is whether he became a statutory tenant. The only evidence on that point was that his daughter said:

"I think the rent had been increased. I can remember it being put up a time or two. I think we had to pay when the rates went up."

I think that was sufficient evidence on which the judge could infer that valid notices of increase had been given and that Mr. Aris had become a statutory tenant. As I pointed out in *Brock v. Wollams* (4), when a tenant has been in occupation for many years, the court may have to act on very slight indications in determining whether or not a statutory tenancy has arisen. I think this evidence was sufficient. After Mr. Aris died in 1938, his widow became entitled to remain on under s. 12 (1) (g) of the Act of 1920 as what is called the "shadow" of a statutory tenant, and she remained there by virtue of the statute until her death in 1950. But when the widow died, all statutory rights came to an end. The daughter, although she had been living there for fifty years, had no statutory right. It so happened, however, that after the mother died in 1950, the landlords let the daughter stay on for six months. She paid rent and the landlords accepted it; but they refused to change the rent book into her name. They refused to let her have the tenancy. What is the result of that?

According to the common law as it stood before the Rent Acts, when the daughter stayed on with the consent of the landlords, she would have become a tenant at will, and when she afterwards paid a weekly rent which was accepted by them, she would become a weekly tenant. That would be the result at common law, notwithstanding the refusal of the landlords to change the rent book into her name. Starting from that position, counsel for the defendant contended that, inasmuch as the daughter would at common law be a tenant at a rackrent, she is entitled to the protection of the Rent Acts; and she cited *Buck v. Howarth* (5) and *Chamberlain v. Farr* (6) in support of her contentions. In my opinion, however, it is not correct to consider the common law position separately from the new position created by the Rent Acts. It must be remembered that when the mother died, the daughter might well be thought to have a statutory right to remain. Suppose that the father at his death in 1938 had been a contractual tenant, and the mother at her death in 1950 had been a statutory tenant, the daughter would have been entitled to remain in occupation under s. 12 (1) (g) of the Act of 1920. That, indeed, was the contention put forward by her solicitors as soon as they were instructed on her behalf, and they have sought to maintain it in the courts. It is true they have not succeeded, but it was an arguable point. This removes the case from the common law altogether.

It must be remembered that at common law the landlords would have had a clear, indisputable right to turn the daughter out, and, even if they did allow her to stay on and accepted rent from her, the consequences would not be serious because the landlords could always get rid of her by giving her a week's notice to quit. In that state of affairs, it was very proper to infer a tenancy at will, or a weekly tenancy, as the case may be, from the acceptance of rent, but it is very different when the rights of the landlords are obscured by the Rent Restrictions Acts. Seeing that the house was within the Acts, the landlords had no clear right to turn the daughter out. They could not have done so except by proving to the

county court that she was not protected by the Acts. The consequences of granting her a contractual tenancy would be very far-reaching, because she would then be clothed with the valuable status of irremovability conferred by the Rent Acts. In these circumstances it is no longer proper for the courts to infer a tenancy at will, or a weekly tenancy, as they would previously have done from the mere acceptance of rent. They should only infer a new tenancy when the facts truly warrant it. The test to be applied in Rent Act cases is the same test as that laid down in *Doe d. Cheney v. Batten* (7) by LORD MANSFIELD in cases of holding over (1 Cowp. 245):

“ The question therefore is, *quo animo* the rent was received, and what the real intention of both parties was? ”

Doe d. Cheney v. Batten (7) was followed by this court very recently in *Clarke v. Grant* (8). If the acceptance of rent can be explained on some other footing than a contractual tenancy, as, for instance, by reason of an existing or possible statutory right to remain, then a new tenancy should not be inferred.

It may well be asked: If the daughter was not a tenant, what was she? She was, I think, a licensee in this sense, that she did not acquire any interest in the land. That is the sense in which the word “ licensee ” has often been used of late.

It is used to denote a permissive occupation falling short of a tenancy. For instance, when a requisitioning authority allows a person to occupy a house at a rent, the occupant is said to be a licensee because he has no interest in the land: see *Minister of Health v. Bellotti* (9); *Southgate Borough Council v. Watson* (10). Where a tenant was allowed to occupy a house rent free for the rest of his days, he was held to be a licensee: see *Foster v. Robinson* (11). So also, in cases like the present, I think it may be quite proper to call the occupant a licensee, even though a sum is paid for use and occupation and even though the sum is called rent. The real reason for using the word “ licensee ” is to denote the fact that the occupant has no legal interest in the land, but only a permissive occupation short of a tenancy.

Nothing that I have said must be taken to apply to new occupants let in by a landlord. I confine myself to a person who is in the house and who has some colourable ground for saying that he or she is protected by the Rent Acts. In such cases I think that the landlord can give such a person permission to occupy and can receive a weekly payment from him without necessarily creating a tenancy; but the longer that goes on, the more likely it is that the court will infer that a new tenancy in fact has been created. In this case there was ample evidence to justify the court in refusing to infer a tenancy in the daughter. The landlords expressly refused to put her name on the rent book, and she knew it. That is shown by the letter which her solicitors wrote six months later in which they said:

“ Our client quite understands that the landlords are unwilling to transfer the tenancy to her as they require it for their own workmen.”

I think the judge was right in saying that she had merely a permissive occupation to which did not attach any statutory rights under the Rent Acts. I agree, therefore, that the appeal should be dismissed.

ROXBURGH, J.: I agree. Generally speaking, when a person, having a sufficient estate in land, lets another into exclusive possession, a tenancy results, and there is no question of a licence. But the inference of a tenancy is not necessarily to be drawn where a person succeeds on a death to occupation of rent-controlled premises and a landlord accepts some rent while he or the occupant, or both of them, is or are considering his or their position. If this is all that happened in this case, then no tenancy would result. How the interest of the occupant ought, in those circumstances, to be described I do not know. It would, I think, be a pity to call it a licence, because that word has, in connection with landlord and tenant, already been appropriated to quite different situations.

It must, I think, be left to jurists to invent a new name for what the Master of the Rolls has so aptly called "*monstrum informe*." But if, on the other hand, the plaintiffs intended to let the defendant remain in occupation until they actually required the premises for their own employee, then I should have thought that a tenancy would result. However, it must always be a question of fact and degree.

The county court judge has found quite plainly as a fact that no new tenancy was created. I am not satisfied that he has misdirected himself in law by reason of his reference to the decision of CASSELS, J., in *Ministry of Agriculture and Fisheries v. Matthews* (1). That was quite a different case. Presumably the grantor in that case had himself no estate or interest in the land, and, if that be so, he could not have created a tenancy. Here the landlord could quite easily have created a tenancy and the question is, as I think, whether he was merely leaving the defendant in occupation while he and she considered their respective positions or whether he agreed to leave her in occupation until he should actually require the premises for use for an employee. I think, on the whole, that that is the question to which the county court judge directed his mind and that what he has really found is that the plaintiffs intended the defendant to remain for the time being in occupation of the premises for a consideration, but without becoming a tenant. Such a conclusion, which is one of fact, was, in my view, permissible in law in a Rent Acts case, and it is one at which, I think, he could properly arrive; but the case was very near the line and it would have been easy to reach a different conclusion.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*, agents for *G. Stevenson & Son, Ltd.*, Leicester (for the defendant); *Sharpe, Pritchard & Co.*, agents for *Hale & Mander*, Coalville (for the plaintiffs).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

HOWELL v. FALMOUTH BOAT CONSTRUCTION, LTD.

[HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord Oaksey, Lord Radcliffe and Lord Tucker), April 3, 4, June 20, 1951.]

Ship—Repairs—Licence—Need to be in writing—Retrospective effect—Oral permission given by Admiralty licensing officer—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927), reg. 55 (1)—Restriction of Repairs of Ships Order, 1940 (S.R. & O., 1940, No. 142), art. 1.

By the Restriction of Repairs of Ships Order, 1940, art. 1, the Admiralty, in pursuance of powers conferred on them by reg. 55 (1) of the Defence (General) Regulations, 1939, ordered that no ship repairer was to carry out any repairs or alterations to ships "except under the authority of a licence granted by the Admiralty." On June 22, 1942, the Director of Merchant Shipbuilding and Repairs at the Admiralty sent a circular letter to all licensing officers as follows: "I understand that it has been made clear to you that where you are dealing with reliable ship repairers and owners with a good record you ought not to delay the putting in hand of obvious repairs, merely pending the actual issue of a licence."

In December, 1946, the appellant entered into a contract with a firm of ship repairers, for the conversion of a naval vessel into a passenger carrying vessel. The firm applied to the licensing officer of the Admiralty for a licence to carry out the work. This was refused on the ground of shortage of timber, but oral permission was given by the licensing officer to the firm to proceed with the work using their own materials. On Mar. 15, 1947, before any work had begun, the respondents were incorporated and, with the appellant's

consent, took over the contract. Work began in May, 1947, with the licensing officer's knowledge and permission, and he thereafter regularly inspected its progress and gave directions how it should be carried out. In October, 1947, the respondents, requiring more timber, applied to the licensing officer for a licence and on Oct. 11, 1947, a written licence was granted. On being presented with an account for work done, the appellant refused to pay on the ground that the work was illegal, it being alleged that the order of 1940 required a written licence to be given and that this had not been obtained until Oct. 11, 1947.

HELD: (i) on the true construction of reg. 55 (1) of the Defence (General) Regulations, 1939, and of the order of 1940, "licence" meant a licence in writing, but it was capable of having a retrospective effect so as to cover work carried out before Oct. 11, under the oral permission of the licensing officer;

(ii) even if the licence was not retrospective, the order of 1940 was ambiguous, and, being of a penal nature, it must be construed in favour of the respondents, who were, therefore, entitled to payment for the work carried out.

Decision of the COURT OF APPEAL ([1950] 1 All E.R. 538), affirmed on different grounds.

FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, reg. 55 (1), see HALSBURY'S STATUTES, Vol. 40, p. 1377.

Cases referred to:

- (1) *Langton v. Hughes*, (1813), 1 M. & S. 593; 105 E.R. 222; 12 Digest, Replacement, 302, 2327.
- (2) *Robertson v. Minister of Pensions*, [1948] 2 All E.R. 767; [1949] 1 K.B. 227; [1949] L.J.R. 323; 2nd Digest Supp.
- (3) *London & North Eastern Ry. Co. v. Berriman*, [1946] 1 All E.R. 255; [1946] A.C. 278; 115 L.J.K.B. 124; 174 L.T. 151; 38 B.W.C.C. 109; 2nd Digest Supp.
- (4) *Jackson Stansfield & Sons v. Butterworth*, [1948] 2 All E.R. 558; 112 J.P. 377; 2nd Digest Supp.

APPEAL by the defendant from a decision of the Court of Appeal, dated Feb. 10, 1950, and reported [1950] 1 All E.R. 538, allowing an appeal of the respondents (the plaintiffs in the action) from an order of His Honour SIR TOM EASTHAM, K.C., official referee, made on July 18, 1949, on a preliminary point.

The official referee found that certain work in connection with a ship, the property of the appellant, had been carried out by the respondents without the written licence of the Admiralty and so was illegal, and, therefore, that the respondents could recover nothing from the appellant in respect of the work. The Court of Appeal reversed this decision, holding that an oral licence was sufficient.

Havers, K.C., and *C. H. Duveen* for the appellant. 
Ryder Richardson and *S. H. Noakes* for the respondents.

The House took time for consideration.

June 20. The following opinions were read.

LORD SIMONDS: My Lords, I have had the privilege of reading the opinion of my noble and learned friend, LORD NORMAND, which is about to be read, and I propose only to make some observations on the law applicable to the facts as stated by him.

The substantial question is whether the plea raised by the appellant—that the work in respect of which the respondents' claim was made was illegal in

that they had no licence from the Admiralty to carry it out—is a valid plea. The plea is founded on the general proposition that

“... what is done in contravention of the provisions of an Act of Parliament, cannot be made the subject-matter of an action.”

These are the words used by LORD ELLENBOROUGH, C.J. (1 M. & S. 596) in *Langton v. Hughes* (1) and they have been cited with approval by the highest authority. I have no doubt that they are equally applicable to what is done in contravention of a regulation lawfully made under the authority of an Act of Parliament and of an order lawfully made under the authority of such a regulation. That which is prohibited cannot lawfully be done whether the prohibition is contained in Act or regulation or order, and if it cannot lawfully be done it cannot be the subject of a claim enforceable at law.

How, then, is this plea met by the respondents? They say, in the first place, that the assumption of illegality is not well founded and that the appellant is wrong in his contention that on the true construction of the relevant Act, regulation and order it was necessary that a licence in writing should be granted by the competent authority before they began or completed the work. This question I will examine later, for I would first deal with the reasons why, in the opinion of DENNING, L.J., the plea fails. The learned lord justice gave two reasons. He was prepared to assume that the original order of 1940 postulated a licence in writing, but, nevertheless, thought that in the circumstances the court should presume (applying the maxim *omnia praesumuntur rite esse acta*), that it had been varied so as to enable oral permission to be given. Your Lordships were told that this contention had not been debated at the Bar and that the appellant's counsel had no opportunity of dealing with it. He was able, given the opportunity, to satisfy the House that no such varying order had in fact been made, citing in particular the Restriction of Repairs of Ships Revocation Order, 1949 (S.I., 1949, No. 1766) which would in its terms be inconsistent with such an order. In the circumstances the respondents' counsel did not rely on this reason. The second reason given by the learned lord justice was based on the same assumption as the first and on the further assumption that a varying order ought not to be presumed. He described the principle that he invoked as of particular importance in these days when the officers of government departments are given much authority by orders and circulars which are not available to the public. I will state this principle in his own words ([1950] 1 All E.R. 542):

“Whenever government officers, in their dealings with a subject, take on themselves to assume authority in a matter with which the subject is concerned, he is entitled to rely on their having the authority which they assume. He does not know, and cannot be expected to know, the limits of their authority and he ought not to suffer if they exceed it. That was the principle which I applied in *Robertson v. Minister of Pensions* (2) and it is applicable in the present case also.”

My Lords, I know of no such principle in our law nor was any authority for it cited. The illegality of an act is the same whether or not the actor has been misled by an assumption of authority on the part of a government officer however high or low in the hierarchy. I do not doubt that in criminal proceedings it would be a material factor that the actor had been thus misled if knowledge was a necessary element of the offence, and in any case it would have a bearing on the sentence to be imposed, but that is not the question. The question is whether the character of an act done in face of a statutory prohibition is affected by the fact that it has been induced by a misleading assumption of authority. In my opinion, the answer is clearly: No. Such an answer may make more difficult the task of the citizen who is anxious to walk in the narrow way, but that does not justify a different answer being given. I am, therefore, of opinion that the order of the Court of Appeal cannot be sustained for the reasons given by DENNING, L.J., but

I am, nevertheless, of opinion that this appeal should be dismissed for the reasons to be given by the noble and learned Lord who follows me, with which I am in full agreement, and I will add only a few words.

A I have come to the conclusion that on the true construction of the relevant order the word "licence" means "licence in writing." If, having given the matter the best consideration I could, I remained in doubt, I should think it proper to apply to this case also the principle applied in *London & North Eastern Ry. Co. v. Berriman* (3). In that case LORD PORTER ([1946] 1 All E.R. 268) re-asserted the rule (I use his own words) that

B "... where a statute imposes a penalty ... and the obligation in respect of which the penalty is imposed is expressed in ambiguous terms, the more lenient construction of the section should be adopted so that the penalty may not be incurred in a doubtful case."

LORD MACMILLAN said (*ibid.*, 260) that:

"Where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however beneficent its intention, beyond the fair and ordinary meaning of its language."

C I ventured to sum up the rule in the phrase that a man should not be put in peril on an ambiguity. I regard it as of particular importance that this rule should be observed, whether the statutory prescription refers to the invasion of copyright, or to the system of working in a factory, or, as here, to the repair of ships in a shipyard. Perhaps it is of peculiar importance where the prescription is contained, not in Acts of Parliament or even in regulations, but in orders D which are not easily accessible to the public, but in order that this principle may be invoked there must be an ambiguity, and, as I have said, though I have felt the force of the argument to the contrary, I have come to the clear conclusion that the licence which the order postulates is a licence in writing. That, however, does not conclude the matter. For I see no reason why in the circumstances of this case the licence in writing should not cover work already done under the oral E sanction of the proper authority as well as work to be done in the future. On this part of the case I do not wish to add anything to what my noble and learned friend will say. In my opinion, the appeal should be dismissed with costs.

LORD NORMAND (read by LORD SIMONDS): My Lords, the action was brought by the respondents to recover the sum of £4,371 11s. 7d., the balance F alleged to be due for work done and materials supplied for the repair and alteration of the appellant's vessel M.L. 229. In his original defence and counterclaim the appellant alleged that the sum sued for was excessive and he also claimed damages for alleged failure to complete the repairs and alterations by the contract date. By an amended defence and counterclaim he raised a new issue of law, with which alone this appeal is concerned. He alleged that until Oct. 11, G 1947, the respondents had no written licence from the Admiralty authorising them to carry out the alterations and repairs, and that so much of the claim as related to alterations and repairs carried out before that date was illegal and irrecoverable by virtue of the Restriction of Repairs of Ships Order, 1940, art. 1, made under reg. 55 (1) of the Defence (General) Regulations, 1939. He also pleaded that although a written licence was granted by the Admiralty on Oct. 11, H 1947, it was a condition of the licence that it should automatically determine if any work not authorised by it was done, and that the respondents, in fact, carried out unauthorised work on the vessel after Oct. 11, 1947, with the consequence that the licence was determined and that so much of the claim as related to repairs and alterations carried out after Oct. 11, 1947, was illegal and irrecoverable. The official referee dealt with the questions raised by the amended defence as a preliminary issue and after hearing evidence he, in effect, sustained the defence and rejected the respondents' claim except certain charges about which

he desired to have further information before deciding whether a licence was needed for them. The Court of Appeal has reversed the decision of the official referee.

Regulation 55 (1) of the Defence (General) Regulations, 1939, empowers the competent authority, *inter alia*, to provide by order for regulating or prohibiting the use of articles of any description and for incidental and supplementary matters. An order made under the regulation may prohibit the doing of anything regulated by the order except under the authority of a licence granted by such authority or person as may be specified in the order. Under this regulation an order was made by the Board of Trade, called the Restriction of Repairs of Ships Order, 1939, dated Sept. 4, 1939, but the responsibility for dealing with ships' repairs was subsequently transferred to the Minister of Shipping and, still later, from him to the Admiralty. The order of 1939 (S.R. & O., 1939, No. 1086) was, accordingly, superseded by an order of the Admiralty of Jan. 31, 1940 (S.R. & O., 1940, No. 142) substituting the Admiralty for the Board of Trade but not otherwise altering the substance of the earlier order. Article 1 of the order of 1940 provides:

"No person whose business . . . is the repair alteration or dry-docking of ships shall carry out or cause or permit to be carried out in the United Kingdom repairs or alterations to or the dry-docking of ships otherwise than to the order of any department of His Majesty's government in the United Kingdom except under the authority of a licence granted by the Admiralty."

This order was revoked by the Restriction of Repairs of Ships Revocation Order, 1949 (S.I., 1949, No. 1766) which came into operation on Oct. 1, 1949. The Minister of Shipping on Nov. 17, 1939, authorised surveyors of ships appointed under s. 724 (1) of the Merchant Shipping Act, 1894, to sign on his behalf any licence under the order of 1940 restricting repairs of ships, and the Admiralty on Apr. 26, 1942, granted them the same authority. On June 22, 1942, the Director of Merchant Shipbuilding and Repairs at the Admiralty sent a letter to all licensing officers giving them directions on the policy they were to follow. It contained the following paragraph for their guidance in dealing with applications for licences to execute repairs:

"I understand that it has been made clear to you that where you are dealing with reliable ship repairers and owners with a good record you ought not to delay the putting in hand of obvious repairs, merely pending the actual issue of a licence."

This letter is of administrative effect only and has not the authority of an order made under the Defence Regulations.

The appellant's contract for the repair and alteration of M.L. 229 was originally made in December, 1946, with Boat Construction Ltd. The alterations contemplated were to render the vessel suitable for use, in conformity with Board of Trade requirements, as a passenger carrying vessel. The repairs and alterations were to be carried out, and so far as completed have been carried out, at Falmouth where Mr. Thompson was the Board of Trade surveyor and the licensing officer for the purpose of the order of 1940. The managing director of Boat Construction Ltd., after informing the appellant that a licence would be required, wrote to Mr. Thompson on Feb. 3, 1947, applying for a licence. In his application he detailed the repairs proposed in these terms:

"Remove existing petrol engines and fit two Diesel engines. Carry out necessary repairs and alterations to comply with Board of Trade requirements for st. 3 certificate for 150 passengers."

Mr. Thompson refused to grant a licence at that time because, as he explained, he was short of timber. The ship repairers had, however, sufficient materials in stock to carry on for a time and Mr. Thompson orally authorised them to do so. The respondents were incorporated on Mar. 15, 1947, before the work was begun,

and thereafter took over, with the appellant's consent, the contract for the repair and alteration of his vessel. Work began in May, 1947, with Mr. Thompson's knowledge and permission and he or his assistant thereafter frequently and regularly inspected its progress and gave directions how it should be carried on. In October, 1947, the respondents needed to obtain timber for the work and on Oct. 7 they sent to Mr. Thompson a written form of application for a licence "to **A** complete B.O.T. requirements for modified steam 3 certificate." The estimated cost was stated in the application at £2,500. On Oct. 11, 1947, a licence was granted for "the carrying out . . . of the repairs and alterations and dry-docking of the ship as set out in the . . . form of application." This licence was subject to the condition that it should automatically determine if any unauthorised repairs, alterations or dry-docking were carried out. Thereafter, the respondents **B** carried out further work under Mr. Thompson's directions, and some of that work (a cocktail bar was mentioned) was suitable for a passenger ship, but was not within the Board of Trade "requirements." Mr. Thompson knew all that was done and he deponed that no unauthorised work was carried out. He also said that the licence of Oct. 11, 1947, was the only licence granted by him, that in his view it had retrospective effect, and that it was not limited to repairs of **C** the value of £2,500.

My Lords, in the Court of Appeal, BUCKNILL, L.J., and SINGLETON, L.J., held that a licence under the order of 1940 might competently be an oral permission and that it need not be in writing. If that is the true meaning of the order there is no shadow of doubt that all the work done by the respondents was licensed by Mr. Thompson. Even if it is left in doubt whether the licence must be in **D** writing, the doubt should, especially in a penal order, be resolved in a sense favourable to the freedom of the subject. But I find no ambiguity and I feel myself constrained to differ from BUCKNILL and SINGLETON, L.J.J. In the Emergency Powers (Defence) Act, 1939, s. 2 (5) (a), a licence is referred to along with a "permit, certificate or other document," and the necessary implication is that a licence within the meaning of this section of the Act is a written docu- **E** ment, and it should follow that the word is used with the same meaning in orders made under the Act. It is further true that in legislation generally "licence" is the word used for a written authorisation, and that it has come to have the significance of a written document unless there is something to indicate that it may include an oral authorisation. In the Defence (General) Regulations, 1939, I think that when "licence" is used it bears the meaning "written licence" and **F** excludes oral licence. That appears most clearly in reg. 87 (1) where it is associated with "certificate or written permission," and in reg. 88 (1) where "licence . . . or other document" is mentioned. On the other hand, words like "permission" and "leave" are used where the authority may be expressed either orally or in writing. These considerations seem to me to lead to the conclusion that a licence under reg. 55 (1) must be a written licence.

G The next question is whether a licence under the order can be retrospective. This, again, is a question of construction. Counsel for the respondents naturally took the point that retrospective authority is a familiar conception in our law. That is true and not unimportant for this case. But it needs more than this to justify the construing of a licence to carry on an activity otherwise prohibited by statutory order as including a licence with retrospective effect. It would be **H** a dangerous power to place in the hands of ministers and their subordinate officials to allow them, whenever they had power to license, to grant the licence *ex post facto*, and a statutory power to license should not be construed as a power to authorise or ratify what has been done unless the special terms of the statutory provisions clearly warrant the construction. There are, however, in my opinion, sufficient indications that reg. 55 (1) is a warrant for an order making provision for licences having retrospective effect. The terms of regulation 55 and the terms of reg. 56A present a somewhat peculiar contrast. Both these regulations are

concerned with repair work which may be of the highest urgency in the crises of war, reg. 55, as we have seen, dealing with the repair of ships and reg. 56A with the repair of buildings. Regulation 56A (2) differs from reg. 55 (1) in two important particulars. Under reg. 56A (2) repairs cannot be carried on unless there is a licence "in force" which authorises them. That plainly excludes a licence with retrospective effect. But, then, in order to avoid the possibly disastrous delays which might take place if no work could be done on, for example, a bomb-damaged building till a written licence was obtained, reg. 56A (6) (b) provides a defence if the acts done without authorisation or licence were urgently necessary and were done in circumstances of emergency which rendered it impracticable to obtain an authorisation or licence. It is difficult to resist the inference that the defence of emergency or some equivalent provision was not inserted in reg. 55 or in the orders made under it because it was contemplated that repairs of ships might be undertaken under official supervision subject to a licence to be afterwards granted. A decision in this case that the licence might be retrospective is in no way inconsistent with the contrary decision on the effect of reg. 56A in *Jackson Stansfield & Sons v. Butterworth* (4). That brings me to the question whether the licence of Oct. 11, 1947, is retrospective in its effect so as to cover the work done previously. It is not a legal document, it is elliptically expressed and some freedom of construction is justified. It is a licence to complete work begun, and I think that the reasonable construction is that work already done was impliedly covered. There is more difficulty about the cocktail bar which I shall assume was not within the terms of the application and, therefore, not within the terms of the written licence. I think, however, that when the officer authorised to grant licences with retrospective effect comes forward to depone that all the work done in fact had his authority, any defect in the licence which he had power to cure and which ought to have been cured should be disregarded. In such a case, too, I would decline to apply the rule that money cannot be recovered for services given or materials supplied in breach of a statutory prohibition. To do so would be to stretch the precedents beyond reason and to pass from reality into formalism and make-believe.

It would not be respectful to the judgment of DENNING, L.J., to part from the case without referring to the grounds on which he decided in favour of the respondents. The learned lord justice did not decide whether a licence made under the order had to be in writing, nor whether it might be of retrospective effect. He assumed that on a true construction of the order the licence must be a written licence granted before any repair work was begun and that without such a licence the repairers would have been prohibited by the order of 1940 from performing any work on the vessel. But, he said ([1950] 1 All E.R. 542) the order might have been varied without any formality or publicity, and the court should presume from the terms of the letter of June 22, 1942, above referred to, that it had been so varied as to enable oral permission to be given instead of a written licence. With the utmost respect I cannot assent to the argument. There is no ground for thinking that a copy of an order modifying the order of 1940 would have been any more difficult to obtain than the copy of the order of 1940 itself. Such evidence as there is appears to demonstrate that the order of 1940 was the only order in force till it was revoked by the order of 1949. If there had been another order in force it also would have been revoked. Mr. Thompson's evidence, I think, implies that the order of 1940, requiring a written licence, was in force during the execution of the repairs. The appellant in his pleadings expressly relied on that order as the only order in force and there was no repudiation of this in the respondents' pleadings. It is not for the court to presume the existence of orders which are neither pleaded nor proved. The other ground (*ibid.*) on which the learned lord justice proceeded is that:

"Whenever government officers, in their dealings with a subject, take on themselves to assume authority in a matter with which the subject is

concerned, he is entitled to rely on their having the authority which they assume. He does not know, and cannot be expected to know, the limits of their authority, and he ought not to suffer if they exceed it."

A As I understand this statement, the respondents were, in the opinion of the learned lord justice, entitled to say that the Crown was barred by representations made by Mr. Thompson and acted on by them from alleging against them a breach of the statutory order, and, further, that the respondents were equally entitled to say in a question with the appellant that there had been no breach. But it is certain that neither a minister nor any subordinate officer of the Crown can by any conduct or representation bar the Crown from enforcing a statutory prohibition or from prosecuting for its breach. It is, therefore, with regret that I feel unable to accept a short way to a decision which avoids the necessity of construing the order of 1940 and of arriving at the meaning of the word "licence."

B Nevertheless, for the reasons I have given, I would dismiss the appeal.

C **LORD OAKSEY** (read by LORD RADCLIFFE): My Lords, I agree with the opinions expressed by the noble Lord on the Woolsack and by my noble friend LORD NORMAND, and I only desire to add that I agree also with the rule of interpretation summed up by the noble Lord on the Woolsack in the phrase that a man should not be put in peril on an ambiguity. This rule appears to me to be in accord with the fundamental principle of the criminal law that a man ought not to be convicted of an offence unless it is proved beyond any reasonable doubt that he committed that offence.

D **LORD RADCLIFFE**: My Lords, I have had the advantage of reading in advance the opinions which have been delivered by my noble and learned friends LORD SIMONDS and LORD NORMAND. I am in full agreement with all that they had said both as to the facts of this case and as to the only principles of law which can properly be brought to bear on them. I do not think it necessary to add anything except that I agree that the appeal should be dismissed.

E **LORD TUCKER**: My Lords, I concur.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co.* (for the appellant); *Layton & Co.* (for the respondents).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

BRIDGMONT v. ASSOCIATED NEWSPAPERS, LTD. AND OTHERS.

(COURT OF APPEAL (Somervell, Denning and Hodson, L.J.J.), June 11, 12, 13, 1951.)

G *Libel—Slander—Severance of causes of action—Statement that plaintiff was person referred to in libel—Relevance of statement on question of damages for libel.*

H In an action for libel and slander the defendants applied for a severance of the two causes of action on the ground that statements by the author of the alleged libel and another defendant (which statements were pleaded as slanders) that the person referred to in the libel was the plaintiff were irrelevant and inadmissible on the issue of libel.

HELD: the statements were admissible on the issue of libel on the question of damages, and, therefore, there was no ground for severance.

Pearson v. Lemaitre (1843) (5 Man. & G. 700), applied.

Cases referred to:

(1) *Spiers & Pond, Ltd. v. John Bull, Ltd.*, (1916), 85 L.J.K.B. 992; 114 L.T. 641; 18 Digest 204, 1523.

(2) *Pearson v. Lemaitre*, (1843), 5 Man. & G. 700; 12 L.J.C.P. 253; 1 L.T.O.S. 170; 7 J.P. 336; 134 E.R. 742; 32 Digest 162, 1957.

INTERLOCUTORY APPEAL by the plaintiff from an order of SLADE, J., made on May 11, 1951, whereby he ordered that the plaintiff's claim for damages for libel should be tried separately from his claim for slander in the same action.

The alleged libel was contained in an issue of the first defendants' newspaper and consisted of an article written by the second defendant, one Walker, a reporter employed by the first defendants. With regard to the slander, in an interview between the second defendant and the plaintiff, the second defendant was alleged to have spoken words identifying the plaintiff with the person referred to in the article. Two further statements, one made by Walker and the other by the third defendant, in which also the plaintiff was identified with the person referred to in the alleged libel were also pleaded as slanders. For the plaintiff it was contended that the alleged slanders were relevant on the issue of damages for libel, and, therefore, that the two causes of action could properly be tried together. SLADE, J., held that it would be wrong to allow damages for the libel to be increased by reason of the slanders which were also the subject of a claim, because to do so would be to allow damages to be recovered twice over, and, therefore, that the issue of slander was irrelevant to the libel issue and should be tried separately.

Scott Cairns, K.C., and *Dennis Lloyd* for the plaintiff.

Milmo for the first and second defendants.

John Thompson for the third defendant Wilson.

SOMERVELL, L.J.: This is an appeal from a decision of SLADE, J., in a case where damages are sought for libel and slander. In his statement of claim the plaintiff claims damages for a libel which appeared in the "Daily Mail," and he also claims damages in respect of three slanders. It is not suggested that there was anything contrary to the rules or improper in the plaintiff joining those claims in his statement of claim as delivered. The application with which we are concerned was that the cause of action for slander should be severed from the cause of action for libel. The master refused to make that order, but, on appeal to the learned judge, he ordered

"that the causes of action for slander be tried separately from and immediately after the causes of action for libel (by consent before the same judge) and that the plaintiff have leave to deliver two new statements of claim pleading the causes of action for libel and slander respectively. Existing pleadings to be entirely superseded, and it is further ordered that there be leave to appeal."

The learned judge stated that, although he had exercised his discretion in arriving at the conclusion expressed in the above order, the matter was of some importance on which no authority has been cited apart from R.S.C., Ord. 18, rr. 1, 8 and 9, and a question of principle might be involved. From that order the plaintiff appeals.

The alleged libel is contained in the following paragraph of the statement of claim:

"The first summons in connection with the B.B.C. bribery allegations was served yesterday on Mr. Roy Speer, 38, a senior producer. I understand that three more summonses are due to be issued. One of these affects a television producer; another concerns one of the most famous sound-variety producers now working for the B.B.C.' (meaning the plaintiff)."

There were three defendants, Associated Newspapers, Ltd., the proprietors and publishers of the "Daily Mail", Mr. Walker and Mr. Wilson. Admittedly Mr.

Walker was a reporter employed by the "Daily Mail" and the writer of the article. Mr. Wilson was also a reporter. The first slander alleged is that

A "the defendant Walker, in the course of his employment by the defendant company, falsely and maliciously spoke and published of the plaintiff . . . the words following or words to the like effect: 'It's you' (meaning the plaintiff) 'we want to see'; 'Have you got anything to say about the news this morning?'; 'We're not really talking about Roy Speer. Didn't you see the announcement in the "Mail" that another radio producer' (meaning the plaintiff) 'and a television producer were also to be issued with summonses?'; 'Well, you' (meaning the plaintiff) 'are the person referred to'."

B The learned judge took the view that what is alleged to have been said on that occasion, though it is denied, was not only wholly irrelevant to any issue which would arise on the libel, but that it would be embarrassing for the jury to have it in their minds, though, no doubt, the learned judge had in mind the fact (with which he is, undoubtedly, very familiar) that cases frequently arise in criminal and civil courts where the jury have to be directed to disregard certain of the evidence which they have heard.

C Counsel for the plaintiff advanced two propositions and, broadly speaking, counsel for the defendants agreed that, if either of those two propositions were established, the appeal must succeed. Counsel for the plaintiff submitted that the learned judge was wrong in law in holding that the principal facts as they would emerge in relation to the first and third slanders were irrelevant to the issue on the libel, or, put in another way, if the plaintiff had not added these
D claims in slander he would be entitled to prove the facts on which they are based as relevant to the issue of libel. That was his main point and he put it under two heads. He submitted that the learned judge was wrong in holding that the statement by the writer of the alleged libel that he intended the plaintiff was irrelevant on the issue whether the words in the libel were spoken of and concerned the plaintiff. He admitted that the plaintiff would first have to establish
E that the words as read by the public, or a sufficient section of the public, were to be taken as decisive. I do not want to express any concluded view on that point because, in my view, it is not necessary for the decision of this appeal, and, if it arises, it is a matter which will be open for argument before the learned judge who tries the case. The second head was that the learned judge was wrong in coming to the conclusion that the evidence was irrelevant and inadmissible on
F the question of damages. The learned judge said this:

"Some argument was put forward on the basis that it would be proper to introduce the matters complained of in the slander in any event, irrespective of whether the causes of action for slander were left in the libel action or not, and it was suggested that that was a proper ground, indeed, for increasing the damages. I agree that in so far as the publication of other libels or
G slanders is evidence of malice, malice is always a ground for aggravating the damages, but it would be quite wrong in this case to allow the damages for the alleged libel to be increased on the basis that three slanders had been published whilst there was an action proceeding for damages in respect of the very publication of those three slanders, because to do that would be to allow damages to be recovered twice over for the same alleged wrong.
H Secondly, I emphasise that there is no defence raised on the part of any of these defendants in this action which of itself involves proof of an issue of malice, and, therefore, the only possible relevance of malice in this action could be for the purpose of aggravating the damages, not for destroying any defence such as privilege or fair comment."

In *Spiers & Pond, Ltd. v. John Bull, Ltd.* (1), on which counsel for the plaintiff relied, the plaintiffs were owners and managers of hotels and the defendants were

proprietors of the newspaper "John Bull" in which the alleged libel appeared. The alleged libel referred to certain incidents and went on:

"... there are certainly no good or sufficient reasons why the Masonic craft should not protect themselves against being placed in a false position by the employment of Germhun waiters or managers in hotels where they hold their lodge meetings and other 'functions'."

Earlier the newspaper had said:

"Though there may be good and sufficient official reasons for suppressing the name of the hotel—which we know..."

The original interrogatory drafted which was held to be too wide was in these words:

"Do not the words complained of in para. 3 of the statement of claim or some and which of them refer to the plaintiffs?"

The interrogatory allowed was:

"Is not the name of the hotel there referred to, and which you say you know, the Holborn Viaduct Hotel?"

Though SWINFEN EADY, L.J., may have put it more widely, BANKES, L.J., said (85 L.J.K.B. 996):

"The interrogatory in its original form is undoubtedly too wide... A party cannot interrogate his opponent merely as to the meaning of words. In some cases... an interrogatory may be admissible... as to the question of damages."

Counsel for the plaintiff also relied on *Pearson v. Lemaitre* (2). The rule there laid down by TINDAL, C.J., as stated in GATLEY ON LIBEL AND SLANDER, 3rd ed., p. 626, is this:

"... either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; but that if the evidence given for that purpose establishes another cause of action the jury should be cautioned against giving any damages in respect of it. And if such evidence is offered for the purpose of obtaining damages for such subsequent injury it will be properly rejected... upon principle, we think that the spirit and intention of the party publishing a libel are fit to be considered by a jury, in estimating the injury done to the plaintiff; and that evidence tending to prove it cannot be excluded simply because it may disclose another and different cause of action."

Counsel for the defendants did not dispute that in certain circumstances a defendant, in reduction of damages, is entitled to give evidence as to his intention, evidence, as it were, of a kind contrary to that which the plaintiff seeks to bring forward in the present action. He based his submission on the fact that on the pleadings as they are he could not give a notice mitigating damages and he did not intend to do so. He submitted that that being so, the plaintiff ought not to be allowed to lead evidence with regard to damages of the kind indicated. I cannot think that that is right, and that the defendant, by not mitigating, can affect the right of the plaintiff, if he has such a right, to lead evidence relevant to damages which might lead to their increase.

The learned judge appears to have based his conclusion that evidence of this kind could not be allowed on the fact that there were these separate counts of slander, but I think the principle laid down in *Pearson v. Lemaitre* (2) points to a different conclusion. The evidence should not be excluded, but the fact that it has been called may have its repercussion on the damages in respect of the claims for slander. On the other hand, injustice might be done if the mere fact that a slander action had been added precluded the calling of evidence of this

kind which would otherwise be material. The plaintiff may primarily want to succeed on his claim for libel, and he ought to be able to call all relevant evidence with regard to that. I agree with the learned judge that there is no issue of malice in the ordinary sense on these pleadings, but that is not necessary on the authorities in order to make this kind of evidence relevant to damages. That being so, there seems to me to be no circumstances which would justify a severance as provided for by the learned judge, and I would allow the appeal and restore the order made by the learned master.

DENNING, L.J.: I agree. If it is admissible for a defendant in a libel action to give evidence that he did not intend to refer to the plaintiff, then it must also be admissible for a plaintiff to give evidence that the defendant did intend to refer to him. Such evidence is clearly admissible on damages. It is also admissible on liability where fair comment or privilege is pleaded. I say nothing as to whether it would be admissible on liability where the only issue was whether the words were published of and concerning the plaintiff. It may be so, but for present purposes it is sufficient to say that in nearly every libel action there is the additional issue of damages. It is admissible on that issue in any event. That means that in this case if the libel action were tried separately, evidence of the alleged slanders could be given in that action. The better course, therefore, is to let the whole matter, both the alleged libels and the alleged slanders, be tried in one action.

HODSON, L.J.: I agree. The plaintiff puts the case in two ways. He says, taking his second submission first, that, even if the evidence in relation to the slanders is inadmissible in relation to the libel, there ought not to be a severance. If he succeeded in that contention, I should have been unwilling to reverse the learned judge in the exercise of his discretion. He has also argued, however, that the evidence relating to the slanders is admissible in relation to the libel. That comes under two heads. First, he says the evidence of the slander is admissible to prove subjective intention. Although, as my Lord has pointed out, it is not necessary to give a ruling on this subject, I do not dissent from the opinion of the learned judge that the objective intention of the person who published the words or caused them to be published is wholly immaterial on the question of liability. Under the second head, namely, damages, again I do not dissent from the way in which the learned judge put the matter to the extent that he deals with it on general principles when he says that "in so far as the publication of other libels or slanders is evidence of malice, malice is always a ground for aggravating the damages," but he went on to say that, in his opinion, it would be quite wrong to allow the damages for the alleged libel to be increased on the basis that three slanders had been published while there was an action proceeding for damages in respect of the publication of those very three slanders, because to do that would be to allow damages to be recovered twice over for the same alleged wrong. With all respect to him, I think in making this exception the learned judge is going against the statement of the law as given by *TINDAL, C.J.*, in *Pearson v. Lemaitre* (2) which seems to me to contemplate exactly that state of affairs. For these reasons, as well as those which have been given by my Lords, I agree that the appeal should be allowed and the order of the master restored.

Appeal allowed.

Solicitors: *Rubinstein, Nash & Co.* (for the plaintiff); *Lewis & Lewis and Gisborne & Co.* (for the first and second defendants); *Blount, Petre & Co.* (for the third defendant).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

R. v. GUNewardENE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Lynskey and Devlin, J.J.), June 4, 13, 1951.]

Criminal Law—Evidence—Admissibility—Impeaching credit of witness—Evidence of belief that witness not worthy of credit—Reasons for belief not admissible in examination in chief. A

Criminal Law—Evidence—Admissibility—Joint trial—Statement by one prisoner against another—Direction to jury.

The appellant was convicted of the manslaughter of a woman who died after an operation had been performed on her to procure an abortion. The operation was performed by one Mrs. H., who was charged with the appellant and was also convicted. The case for the Crown was that the appellant was an accessory before the fact because after the deceased woman had visited his surgery he had driven her to the house where Mrs. H. carried out the illegal operation. In his defence the appellant denied the charge and pleaded an alibi. It was proposed to call for the defence a doctor to prove that a brother of Mrs. H., who had given evidence for the prosecution which was highly prejudicial to the appellant, ought not to be believed on his oath because he was suffering from a particular mental state, but HILBERY, J., refused to admit this evidence. During the proceedings a statement made by Mrs. H. incriminating the appellant to a considerable extent was read, and it was contended that only such part of the statement as affected Mrs. H. should have been read. B

HELD: (i) the credit of any witness may be impeached by the opposite party by the evidence of persons who swear that, from their knowledge of the witness, they believe him to be unworthy of credit on his oath, but in their examination in chief such persons may not give reasons for their belief, and, therefore, the evidence of the doctor was not admissible. C

(ii) the statement made by Mrs. H. was clearly admissible against her; HILBERY, J., warned the jury that it was not evidence against the appellant; and in the circumstances it was rightly admitted. D

AS TO THE CREDIBILITY OF WITNESSES, see HALSBURY, Hailsham Edn., Vol. 9, p. 191, para. 275; and FOR CASES, see DIGEST, Vol. 22, p. 490, Nos. 5174-5179. E

Cases referred to:

- (1) *R. v. Rowton*, (1865), Le. & Ca. 520; 34 L.J.M.C. 57; 11 L.T. 745; 29 J.P. 149; 14 Digest 289, 3051. F
- (2) *R. v. Brown & Hedley*, (1867), L.R. 1 C.C.R. 70; 36 L.J.M.C. 59; 16 L.T. 364; 31 J.P. 500; 22 Digest 490, 5178.
- (3) *Mawson v. Hartsink*, (1802), 4 Esp. 102; 170 E.R. 656; 22 Digest 490, 5174.
- (4) *R. v. De la Motte*, (1781), 21 State Tr. 687; *sub nom. De la Motte's Case*, O.B.S.P.; 2 Digest 163, 336; Digest Supp. G
- (5) *Carlos v. Brook*, (1804), 10 Ves. 49; 32 E.R. 761.
- (6) *R. v. Watson*, (1817), 2 Stark. 116; 171 E.R. 591; 22 Digest 396, 4035.

APPEAL against conviction.

The appellant, Sumatapalage Reginald Gunewardene, a registered medical practitioner, was convicted, together with a Mrs. Alice Louisa Hanson, at the Central Criminal Court, of manslaughter, and was sentenced to three years' imprisonment. The grounds of his appeal were that at the trial HILBERY, J., wrongly refused to admit the evidence of a doctor which was directed to discredit a witness for the prosecution, and that a statement made by Mrs. Hanson which purported to describe the appellant's part in the transaction ought not to have been read except in so far as it affected her. H

Pritt, K.C., Dodwell Gunewardene and H. E. Myers for the appellant.

T. C. Humphreys for the Crown.

June 13. **LORD GODDARD, C.J.**, read the following judgment of the court. The appellant was convicted at the Central Criminal Court, together with Alice Louisa Hanson, who does not appeal, of the manslaughter of a girl named Grace McLean, and was sentenced to three years' imprisonment. In outline the case for the prosecution was that the dead girl came from Scotland, when she was pregnant, to stay with a Mrs. McKissack, who was a panel patient of and known to the appellant. On Nov. 13 she went to Hanson's house and the latter admitted that she performed an operation on her for the purpose of procuring an abortion, and did procure it by means of a syringe, though this, of course, was not evidence against the appellant. In consequence of the operation a wound was caused in the uterus by the syringe and the wound became septic, with the result that the girl died of general septicaemia. So far as Hanson was concerned, the only question was whether death was the result of the abortion, which we have said she admitted having performed. So far as the appellant was concerned, the case for the Crown was that he was an accessory before the fact, and, therefore, a principal in the second degree. The case made was that he drove the girl, who had visited his surgery, to Hanson's house in order that the operation might be performed on her, and that after the operation he drove her back to Mrs. McKissack's house. The girl was accompanied by a woman referred to as Ann, who went with her into Mrs. McKissack's house, and the appellant followed them a few minutes afterwards. He does not appear to have given any advice or directions that evening, but Mrs. McKissack put the girl to bed and the appellant then left with Ann. The next morning the appellant telephoned to Mrs. McKissack and told her to give the girl a warm bath. He visited her in the afternoon and told Mrs. McKissack to call him back if she wanted him. The girl seemed to get ill during the day, and, as a result of telephone messages, the appellant called between 10 and 11 p.m. and was in the bedroom for some little time. He left and came back about an hour later and stayed till about 1 a.m., when he left saying that he had given her a drug so that she would sleep. In the early morning following the girl was in obvious pain and Mrs. McKissack again telephoned to the appellant. By this time it was clear that the girl was very seriously ill, and, according to the medical evidence, must have been so when the appellant was there at 1 a.m., when she should have been sent to hospital. It was not till about 7 a.m. that the appellant caused her to be taken to hospital, sending a note with her to say that she had had an incomplete miscarriage and retained placenta. In fact, at this time the girl was *in extremis* and was dead by the time the ambulance reached the hospital.

The police evidence was that at their first interview with the appellant he made a written statement describing how he had been, as he said, called by Mrs. McKissack to the girl just after midnight on Nov. 14-15, and that during that interview and from what he saw the girl had a miscarriage that had appeared to be a normal miscarriage, and he treated her and gave some advice to Mrs. McKissack, but he was sent for the next morning. He came to the conclusion that it was a case of a retained placenta and that she should go to hospital, where he sent her with the note already mentioned. At a subsequent interview, when the police told him that they had ascertained that he had driven the girl to Hanson's house, he admitted it by saying: "On that night I was only fulfilling an obligation by taking them there. I got nothing out of it and certainly did not hand Mrs. Hanson any money." This last observation was because the police told him that it was alleged that the dead girl had paid his secretary £50, of which he had handed £20 to Hanson. He also admitted that he had taken the girl and Ann in his car from Hanson's house back to Mrs. McKissack's flat. The defence was a complete denial of the case made by the prosecution except so far as the appellant admitted attending the girl at Mrs. McKissack's flat, having

been sent for by the latter on account of the girl's condition. He denied that he had ever told the police that he had driven the girl to or from Hanson's house, and he called evidence which, had it been believed, was to the effect that he was elsewhere at the time when he was supposed to have been on these journeys. In other words, his real defence was one of *alibi* at the all-important times. It was not contended that there was no evidence on which a jury could convict, but the two questions which formed the main argument for the appellant were (i) that the judge wrongly refused to admit the evidence of a doctor with a view to discrediting a witness named Davies who had given highly prejudicial evidence against the appellant, and (ii) that the whole of Hanson's statement, which not only admitted her part in the crime, but also set out in detail the appellant's part in it, ought not to have been read so far as concerned those parts which affected the appellant. Some points were taken as to misdirection which, counsel for the appellant frankly admitted, were only minor points, and it is sufficient to say with regard to them that the court is of opinion that not only was there no misdirection but that the learned judge's summing-up was fair and adequate and not open to criticism in any respect.

Dealing now with the first of the main questions argued, the man Davies, who was the brother of Hanson, was called to prove that the appellant had bribed, or attempted to bribe, Hanson to withdraw the statement she had made to the police and to say that she had made it in a moment of panic and that it was untrue. There is no doubt that the evidence of this witness was highly prejudicial to the appellant. He was severely and properly cross-examined with a view to showing that he was not a witness of truth, and he admitted that he had lied on many occasions. His evidence was wholly denied by the appellant, and after his evidence counsel for the appellant desired to call Dr. Leigh to give evidence, as he put it, as to the reliability of Davies as a witness. On counsel for the Crown objecting to this evidence, counsel for the appellant said: "I submit it is admissible on the ground of general reputation for truthfulness and honesty." He had previously told the judge that he intended calling this doctor to give some evidence about the condition of Davies' mind. When HILBERY, J., said that the evidence would not be that of general reputation, counsel for the appellant said: "With respect, reputation. I drop the word 'general'." Later, he said: "I am going to call the doctor to prove whether or not he is suffering from a particular mental state. I propose to ask what that mental state is, what the effect of it is, and the question whether his evidence is to be rejected thereafter is a matter of inference for the jury." HILBERY, J., held that this evidence would be inadmissible, and, accordingly, the witness was not called.

The question raised is of some importance as to the extent to which evidence may be given to discredit witnesses called by the opposing party. That witnesses can be called to say that they would not believe a particular witness called by the other side, whether for the prosecution in a criminal case or for a party in a civil case, is, we think, undoubted, but the nature of the discrediting evidence and how far the witness can go in stating the grounds for his belief are the matters which we have to determine. It does not seem open to doubt that the true rule with regard to the character of a prisoner is that a witness must speak of the prisoner's general reputation and not of particular facts known to the witness on which he bases his opinion. If, for instance, a witness said that he knows nothing of the general character of the prisoner, but that he had had abundant opportunity of forming an individual opinion as to his honesty, such evidence would be inadmissible. That was expressly decided in *R. v. Rowton* (1), though *COCKBURN, C.J.* (34 L.J.M.C. 64) there did hold that it is open to a witness to say: "I never heard anything against the character of the person of whose character I come to speak," because the fact that a prisoner's character has never come into issue or discussion may be the most cogent evidence that his reputation is good. The case principally relied on by counsel for the appellant was *R. v.*

Brown & Hedley (2) where counsel for the defendants proposed to call witnesses to prove that they would not believe the witnesses for the prosecution on their oaths. Counsel for the prisoner cited *Mawson v. Hartsink* (3) and was then stopped by the court. Counsel for the Crown submitted that to allow such a question would be contrary to *R. v. Rowton* (1), but the report states (L.R. 1 C.C.R. 71):

A "The court, however, declined to hear any further argument on the subject, observing that all the text-writers were agreed that the evidence could be given, and that the practice was so ancient, and hitherto so undoubted, that it could not be altered now unless by the authority of the legislature."

B That case, therefore, appears to be a direct authority that a witness called to impeach the credibility of previous witnesses can express an individual opinion and is not confined to giving evidence of the latter's general reputation. It is to be observed that in *R. v. Rowton* (1) counsel for the prosecution is reported as arguing (34 L.J.M.C. 59):

C "There is no distinction in principle between evidence as to the character of a witness and of a prisoner,"

to which observation COCKBURN, C.J., replied (*ibid.*):

D "The cases are essentially different. In the case of the character of a witness as to his credibility on oath, the individual opinion of another is what is sought. In such case the witness could not say the general opinion is that the man ought not to be believed on his oath. But in case of a prisoner what is the general opinion of his character is what is to be proved."

E We asked for re-argument in this case with a view to examining other and earlier authorities on the matter and to see if the witness called is confined to stating his individual opinion or whether he may go into any reasons which led him to form that opinion. We need not deal with all the cases to which our attention has been called by counsel on either side. The first case to which we think it necessary to refer is *R. v. De la Motte* (4), a trial for high treason at which BULLER, J., presided. In his charge to the jury, BULLER, J., said (21 State Tr. 811):

F "These are the three witnesses called to impeach the credit of Lutterloh. The witness Lappel said he rather doubted whether he would trust or believe him. The counsel for the defendant did not put the question in the manner the question always is, and ought to be put, if they mean to impeach the veracity of a witness; and every day's experience teaches the gentlemen at the Bar how they ought to put the question, if they think the answer will serve their purpose; for the question was never asked of any witness, whether he thought this man from his general character, deserved to be believed upon his oath. The only question at all like that was put to Lappel, with this addition, whether he would trust or believe him."

H It would, therefore, seem that the judge's opinion was that a witness called to impeach testimony was confined to giving evidence as to general reputation and could not state his individual opinion. Later cases show that the rule has, at any rate, been relaxed, though LORD ELLENBOROUGH, C.J., seems to have taken much the same view in *Mawson v. Hartsink* (3), where, after some discussion, he allowed the question to be put in this way (4 Esp. 103):

"Have you the means of knowing what the general character of this witness was? and from such knowledge of his general character, would you believe him on his oath?"

That case was decided in 1802, and two years afterwards, in *Carlos v. Brook* (5), LORD ELDON, L.C., said that a witness may be asked whether he would believe

a man on his oath, but it is not competent to ask him the ground of his opinion. This question was again much discussed in *R. v. Watson* (6). The main question seems to have been whether, for the purpose of discrediting a witness, it could be asked if he had been convicted of an offence without producing a record of the conviction. That question can no longer arise as the matter is dealt with by s. 6 of the Criminal Procedure Act, 1865, usually referred to as Denman's Act. The judgments in *R. v. Watson* (6) clearly show that all the judges were of opinion that, while a witness can be called to say that he would not believe a previous witness on his oath, he cannot in chief give evidence of particular facts as justifying his opinion. There is certainly nothing inconsistent with this view in *R. v. Brown & Hedley* (2), and, in our opinion, the effect of the cases is correctly stated in art. 146 of STEPHEN'S DIGEST OF THE LAW OF EVIDENCE, 12th ed., p. 168:

"The credit of any witness may be impeached by the opposite party, by the evidence of persons who swear that they, from their knowledge of the witness, believe him to be unworthy of credit upon his oath. Such persons may not upon their examination in chief give reasons for their belief, but they may be asked their reasons in cross-examination, and their answers cannot be contradicted."

The reason for this rule, or rather, for the limitation which is imposed on the evidence that the witness can give, is obvious. Were it otherwise an issue would at once arise whether the facts on which the witness stated he based his opinion were true or otherwise. The issue before the court in a criminal trial is simply whether or not the prisoner has committed the offence with which he is charged. The court cannot at the same time have to try the question whether or not certain facts spoken to with regard to a witness are true or not, nor would there be any means of obtaining the opinion of the jury on that question.

In the present case, had counsel for the appellant called Dr. Leigh, the most that he could have asked him in chief was: "From your knowledge of the witness Davies would you believe him on his oath?" That was not what counsel for the appellant desired to do. He was perfectly frank and told HILBERY, J., that he wished to call Dr. Leigh to say that he, as a medical man, had examined the witness and had come to the conclusion that the man was suffering from a disease of the mind, and that, therefore, he regarded his testimony as unreliable. In our opinion, that is exactly what the cases show cannot be done. A witness can state his individual opinion, but not the facts on which it is founded, and this case is a good illustration for the reason of the limitation placed on this class of evidence. In common fairness to the witness, if that evidence were given, he might have wished evidence called to prove that he was not suffering from any disease of the mind, and the case against the appellant could not be complicated by having a trial of this wholly irrelevant issue as to the sanity or insanity of a particular witness. Perhaps this case does illustrate the desirability of adhering strictly to the rule that a ruling should not be given on the admissibility or otherwise of evidence until the particular question is asked, but, bearing in mind the avowed reason which counsel for the appellant gave for desiring to call the witness we do not, in this particular case, wish to be thought to be making any unfavourable comment on the course adopted. It is abundantly clear that, if the witness had been called, the only object in calling him was to have evidence by a medical man as to the result of an examination he had made of a witness and the opinion he had formed thereon, which, as we have already said, was inadmissible. In our opinion, both on principle and authority, such evidence was inadmissible.

We now turn to the second of the main questions argued on behalf of the appellant. As we have said, there is no doubt that the statement made by the prisoner Hanson incriminated the appellant in a high degree. This is a matter of very frequent occurrence where two or more prisoners are charged with complicity in the same offence. This state of affairs is, no doubt, a ground on which

the judge can be asked to exercise his discretion and order a separate trial, but no such application was made in the present case. If no separate trial is ordered it is the duty of the judge to impress on the jury that the statement of one prisoner not made on oath in the course of the trial is not evidence against the other and must be entirely disregarded, and that warning was emphatically given by HILBERY, J., in the present case. It would be impossible to lay down that where two prisoners are being tried together counsel for the prosecution is bound, in putting in the statement of one prisoner, to select certain passages and leave out others. Hanson having pleaded Not Guilty, the prosecution were bound to prove the case against her, and, so far as she was concerned, the evidence mainly consisted in the statement she had made. HILBERY, J., not only warned the jury that they must not regard her statement as evidence against the appellant, but in his summing-up he was at pains not to read the whole of the statement which she had made, confining himself to those parts which bore on her guilt and not on that of the appellant, though he did read one passage which implicated the appellant, again warning the jury that it was not evidence against him. He went so far as to advise the jury not to ask for the woman's statement when they retired, so that they should not have before them matter prejudicial to the appellant. If we were to lay down that the statement of one co-prisoner could never be read in full because it might implicate, or did implicate, the other, it is obvious that very difficult and inconvenient situations might arise. Not infrequently it happens that a prisoner, in making a statement, though admitting guilt up to a certain extent, puts greater blame on a co-prisoner, or asserts that certain of his actions were really innocent and it was the conduct of the co-prisoner that gave them a sinister appearance or led to the belief that the prisoner making the statement was implicated in the crime. In such a case that prisoner would have a right to have the whole statement read, and could, with good reason, complain if the prosecution picked out certain passages and left out others. In this case the statement was clearly admissible against Hanson and was read against her, and, although in many cases counsel for the prosecution do refrain from reading passages which implicate another prisoner and have no real bearing on the case against the prisoner making the statement, we cannot say that anything has been admitted in this case which was not admissible, and HILBERY, J., gave adequate and emphatic directions to the jury on the subject. For these reasons we have come to the conclusion, on both grounds, that the appeal fails and must be dismissed, but in the circumstances the sentence will date from conviction.

Appeal dismissed.

Solicitors: *Darracotts* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

BIRMINGHAM SMALL ARMS CO., LTD. v. INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord Oaksey, Lord Radcliffe and Lord Tucker), April 11, 12, 16, 17, June 20, 1951.]

Excess Profits Tax—Capital—Computation—“Capital employed in a trade or business”—War damage claim for destroyed machine tools and plant—Finance (No. 2) Act, 1939 (c. 109), sched. VII, Part II, para. 1 (1) (c). A

On several occasions the factory of a company was severely damaged by enemy action, and it was agreed with the Board of Trade for the purpose of the War Damage Act, 1941, s. 62 (1), that Nov. 22, 1940, should be taken as the date from which interest should accrue in respect of any claim under the Act for compensation for the destruction of machine tools and plant. On Nov. 12, 1945, the amount of the claim was finally agreed by the Board of Trade at £647,012. Payment was made in one sum in March, 1947. In the assessment of the company to excess profits tax for the chargeable accounting period beginning Aug. 1, 1940, and ending July 31, 1941, in computing the amount of capital employed in their trade or business, no account was taken of the right of claim to compensation. B

HELD: the claim to compensation was not an asset acquired otherwise than by purchase, the value of which, during the chargeable accounting period in question, formed part of the capital employed in the trade or business of the company, within the meaning of the Finance (No. 2) Act, 1939, sched. VII, Part II, para. 1 (1) (c), and, therefore, it was properly excluded from the computation. C

Inland Revenue Comrs. v. Terence Byron, Ltd. ([1945] 1 All E.R. 636) and *Inland Revenue Comrs. v. Northern Aluminium Co., Ltd.* ([1947] 1 All E.R. 608), explained and distinguished. D

FOR THE FINANCE (No. 2) ACT, 1939, sched. VII, Part II, para. 1 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 458. E

Cases referred to:

- (1) *Inland Revenue Comrs. v. Terence Byron, Ltd.*, [1944] 1 All E.R. 608; 170 L.T. 415; *affd.* H.L., [1945] 1 All E.R. 636; 114 L.J.K.B. 345; 172 L.T. 389; 2nd Digest Supp.
- (2) *Northern Aluminium Co., Ltd. v. Inland Revenue Comrs.*, [1946] 1 All E.R. 546; 175 L.T. 237; *affd.* H.L., *Inland Revenue Comrs. v. Northern Aluminium Co., Ltd.*, [1947] 1 All E.R. 608; [1947] L.J.R. 685; 176 L.T. 486; 2nd Digest Supp. F
- (3) *Bourne & Hollingsworth v. Inland Revenue Comrs.*, (1921), 12 Tax Cas. 483.
- (4) *Lincoln Wagon & Engine Co., Ltd. v. Inland Revenue Comrs.*, (1921), 12 Tax Cas. 494.
- (5) *Inland Revenue Comrs. v. Gas Lighting Improvement Co., Ltd.*, (1923), 12 Tax Cas. 503. G
- (6) *Liberty & Co., Ltd. v. Inland Revenue Comrs.*, (1924), 12 Tax Cas. 630.
- (7) *Gliksten (J.) & Son v. Green*, [1929] A.C. 381; 98 L.J.K.B. 363; 140 L.T. 625; 14 Tax Cas. 364; Digest Supp.
- (8) *Rownson, Drew and Clydesdale, Ltd. v. Inland Revenue Comrs.*, (1931), 16 Tax Cas. 595. H

APPEAL by the Birmingham Small Arms Co., Ltd., from an order of the Court of Appeal, affirming an order of CROOM-JOHNSON, J., dated Nov. 2, 1949, dismissing an appeal by way of Case Stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts.

The company claimed that, in computing for the purposes of their assessment to excess profits tax for the year 1940-41 the amount of capital employed in their trade or business, account ought to be taken of an outstanding claim for

compensation for loss of machine tools and plant destroyed by enemy action on or before Nov. 22, 1940.

Tucker, K.C., Grant, K.C., and M. L. Lyell for the company.

The Attorney-General (Sir Frank Soskice, K.C.) and R. P. Hills for the Crown.

The House took time for consideration.

A June 20. The following opinions were read.

LORD SIMONDS: My Lords, this appeal makes it necessary once more to examine the provisions of that part of the Finance (No. 2) Act, 1939, which imposes excess profits tax and in particular to try to give a satisfactory meaning to the words which occur in Part II of sched. VII to that Act "the amount of the capital employed in a trade or business."

B The facts, which I extract from the Case stated by the Commissioners for the Special Purposes of the Income Tax Acts, are simple. The appellants owned premises in the Midlands which during the late war were on four occasions bombed by enemy aircraft with the result that a quantity of movable plant and machine tools was completely destroyed. The severest of those raids took place on Nov. 22, 1940, and it was agreed between the appellants and the Board of
C Trade that for the purpose of the War Damage Act, 1941, s. 62 (1), to which I shall refer later, this date should be taken as that from which interest should accrue in respect of any claim established under that Act. Shortly after the loss had occurred, the appellants lodged a formal claim in the prescribed form which was then being accepted in contemplation of the passing of the Act. Difficulties and delays arising out of war-time necessities hindered the formulation and
D agreement of the claim, but it was finally agreed on behalf of the Board of Trade on Nov. 12, 1945. So far as is relevant to the present appeal the agreed claim was (i) for machine tools completely destroyed £498,186, and (ii) for plant completely destroyed £148,826, a total of £647,012. The total cost of the machine tools and plant so destroyed less wear and tear written off was £53,573. Early in 1947 the appellants applied to the Board of Trade for payment of its claim on grounds
E of its business requirements and it was paid in one sum in March, 1947. These are the facts giving rise to the question now to be determined.

In the assessment of the appellants to excess profits tax for the chargeable accounting period beginning Aug. 1, 1940, and ending July 31, 1941, no account for the purpose of computing the amount of capital employed in their trade or business was taken of the right of claim to compensation in respect of the war
F damage to which I have referred. For this reason, the appellants appealed against the assessment. They contended in the first place that the sum of £647,012 became a debt due to them within the meaning of para. 1 (1) (b) of Part II of sched. VII to the Finance (No. 2) Act, 1939, as from one or other of several dates, and, alternatively, in the second place, that the right of claim to compensation was an asset acquired otherwise than by purchase within the meaning of
G para. 1 (1) (c) of the same schedule as from one of several dates, and that the value of such asset when it became an asset of the business was £647,012, and that accordingly the said sum should from the appropriate date be included in a computation of the capital employed in the trade or business of the appellants. The Special Commissioners rejected the contention. They held that the claim in question did not assume the character of a debt due to the appellants during the
H period in question; that it remained a claim; and that, regarded as an asset, it did not appear to them to be employed in the trade. From their determination an appeal by way of Case Stated was taken to the King's Bench Division and on Nov. 2, 1949, CROOM-JOHNSON, J., dismissed the appeal. Thence an appeal was taken to the Court of Appeal which was duly dismissed, and now an appeal is brought to this House. It is, however, somewhat narrowed down, for the appellants now contend only that the right of claim to compensation falls within sub-para. (1) (c), abandoning the contention that the sum in question was a

debt within sub-para. (1) (b), and they contend that the right of claim became an asset of the trade or business on May 31, 1941, the date on which the War Damage to Goods (General) Regulations, 1941 (S.R. & O., 1941, No. 787), were made under the War Damage Act, 1941.

My Lords, it is provided by s. 68 (b) of that Act that the Board of Trade acting in accordance with regulations made by the Treasury may make payments to a person in respect of

“war damage occurring to goods which, when the damage occurred, were, or, if the scheme in question had then been in force, would have been insurable in relation to him under either of the schemes, being damage occurring before such date as may be prescribed as the date on which the scheme in question will come into full operation . . .”

The scheme referred to is one under which insurance against war damage was provided for persons carrying on business. There was at first some discussion whether the word “may,” where it occurs in the section, was mandatory or discretionary, but your Lordships were unanimous in thinking that in view of the course which had been taken in the courts below it was not open to the Attorney-General in this case, whatever he might do in other cases, here to argue that the provision was not mandatory. I proceed, therefore (but without deciding it), on the footing that the appellants had a right enforceable in appropriate proceedings to such relief as the section gives. The nature of that relief is clear from the terms of this section. Without its aid, the appellants could claim no relief, for the War Damage Act, 1941, though apparently long in contemplation, was not passed until Mar. 26, 1941, some months after the appellants had suffered damage. In regard to the relief to which the appellants became entitled, it is only necessary to say that it consisted of a right, subject to proof which might be difficult, to an indeterminate sum payable at a future and uncertain date. That was the position during the two months of the relevant accounting period with which alone this appeal is concerned. I will only add one other fact before I turn to the examination of the Finance (No. 2) Act, 1939, *viz.*, that there was no evidence before the Special Commissioners that the right in question had in fact been used (to employ a neutral word) by the appellants.

My Lords, the scope and effect of the excess profits tax which was imposed by the Finance (No. 2) Act, 1939, have been expounded by VISCOUNT SIMON, L.C., in *Inland Revenue Comrs. v. Terence Byron, Ltd.* (1), in words on which I cannot improve. He said ([1945] 1 All E.R. 638):

“The excess profits tax is charged upon the excess of profits arising in the chargeable accounting period over the standard profits, and standard profits are computed in accordance with s. 13 of the Act. Generally speaking, therefore, once the standard profits have been correctly computed, all that remains to be done in a case where the profits in an accounting period have risen beyond this figure is to charge the prescribed rate of tax on the excess; and thus, in an ordinary case, no question of calculating the capital employed in the trade or business arises. If, however, the average amount of the capital employed in the trade or business in the accounting period is greater, or less, than the average amount of the capital employed therein in the standard period, an adjustment has to be made. If the average amount of such capital is greater than in the standard period, the standard profits are increased in relation to that chargeable accounting period, and if the average amount of such capital has decreased, the standard profits are, in relation to that chargeable accounting period, decreased by the appropriate statutory percentage.”

The question, then, is what was the average amount of capital employed by the trade or business of the appellants during the accounting period, or, more precisely, was it right, in order to bring up that average, to include at any, and

what, figure the value of the right to which I have referred for the last two months of the period? The answer to this question turns on the meaning to be ascribed to para. 1 of Part II of sched. VII to the Act. That paragraph provides:

A “(1) Subject to the provisions of this Part of this schedule, the amount of the capital employed in a trade or business (so far as it does not consist of money) shall be taken to be—(a) so far as it consists of assets acquired by purchase on or after the commencement of the trade or business, the price at which those assets were acquired, subject to the deductions hereafter specified; (b) so far as it consists of assets being debts due to the person carrying on the trade or business, the nominal amount of those debts, subject to the said deductions; (c) so far as it consists of any other assets which have been acquired otherwise than by purchase as aforesaid, the value of the assets when they became assets of the trade or business, subject to the said deductions.”

B As I have already said, it is now only contended that the amount of the capital employed in the appellants’ business should be enhanced by the value of the right to compensation on the footing that it fell under para. 1 (1) (c) as an asset acquired otherwise than by purchase.

C My Lords, it is plain on the face of this sub-para. (1) that “capital employed” means assets employed. For the capital is something which “consists” of money or “consists” of assets of various kinds. Then by a slight twist the “value” of the assets becomes the “amount” of the capital. It is necessary then to determine what are the assets employed in the trade or business of the person, firm or corporation which carries it on. The case of the appellants, as I understand it, rests mainly, if not entirely, on the contention that in the case of a company carrying on a business all its assets are “employed” in that business unless expressly excluded by the Act—a contention succinctly stated by saying that the capital employed in a business is the same thing as the assets of a business. It was, I think, essential to the appellants’ case to maintain this argument, for the Special Commissioners had found that the right (or “claim” as they called it) regarded as an asset was not employed in the trade. It had, therefore, to be shown either that they were wrong in law because they had misinterpreted the word “employed,” or that there were no facts to support their finding. Thus it was that the appellants formulated the second reason in their formal Case in these words:

F “Because every asset of a trade or business is part of the capital employed in the trade or business unless expressly excepted by statute.”

G My Lords, I see no valid reason for disregarding and giving no meaning to the word “employed.” It was suggested that, inasmuch as the section had to cover the case of an individual or firm as well as that of an incorporated company, it was necessary to use language which would distinguish between the property of the individual or the partners in the firm which was embarked on the trade and that which remained their private concern. This contention appears to me far-fetched and unconvincing. There is no more difficulty in ascertaining what are the capital or assets “of” a trade carried on by an individual or a partnership than “of” a trade carried on by a company; there is just the same difficulty in ascertaining what for the purpose of the excess profits tax is the capital or are the assets “employed” in it. In either case some meaning must be given to the word “employed.” That at least is a cardinal rule of construction. It falls then to the commissioners to determine as a fact whether a right, which I will assume to be an asset belonging to a limited company, is an asset employed in its trade. It cannot be capital employed in its trade unless it is an asset so employed. In the present case, they have held that the right in question was not so employed, and I see no reason for disturbing their findings.

It was urged on behalf of the appellants that the decision of this House in *Terence Byron's* case (1), to which I have already referred, is inconsistent with this conclusion, and on behalf of the respondents that *Northern Aluminium Co., Ltd. v. Inland Revenue Comrs.* (2) supports it. I do not think that the exact point was decided in either case; if it was, that would be the end of a troublesome question. But in the latter case, though LORD GREENE, M.R., used language suggesting a distinction between assets of a company and assets actually employed in its trade, he was in fact dealing with a very different subject-matter. For during the relevant period there was no legal claim either by or against the company and the contention that an obligation which afterwards came into existence could be written back to an earlier period appeared to LORD GREENE, as it did to this House, to be ill-founded. In the former case, too, the question was a wholly different one. There in the Court of Appeal *DU PARCQ, L.J.*, stated the issue to be whether the facts found in the Case stated by the commissioners justified their conclusion that a damaged theatre, which belonged to the respondent-company, was an asset which had to be included in the amount of capital employed in its trade. It was an asset which had been acquired by purchase and it had been employed in the trade of the company. The commissioners held as a fact that during the relevant period it was still so employed. The decision of the Court of Appeal and of this House was that that finding could not be upset. LORD SIMON observed that an asset might be still employed in the trade though at any moment it might not be actively or productively employed, and on this observation learned counsel for the appellants relied, seeking to deduce from it a general proposition that every asset of the company during the relevant period must necessarily be regarded as an asset employed in its trade whether "actively" or "productively" employed or not. But this is not what LORD SIMON said, nor does it follow from what he said. On the contrary, he appears clearly to have contemplated that different considerations might arise if the company decided to abandon the use of the site instead of re-building the theatre on it. If the case lays down any principle, it is that it is open to the commissioners to find as a fact whether an asset of the company is employed in its trade so that its value must be included in its capital so employed. This appears to me clearly to have been the view taken of similar words in the earlier Act (Finance (No. 2) Act, 1915, sched. IV, Part III) by *SANKEY, J.*, in *Bourne & Hollingsworth v. Inland Revenue Comrs.* (3) and *Lincoln Wagon & Engine Co., Ltd. v. Inland Revenue Comrs.* (4), and I do not find anything in *Inland Revenue Comrs. v. Gas Lighting Improvement Co., Ltd.* (5), which is in conflict with this view. In *Liberty & Co., Ltd. v. Inland Revenue Comrs.* (6) *ROWLATT, J.*, too, used language consistent only with the possibility of there being assets of a business which yet are not employed in its business for the purpose of computing its capital. I do not think that these cases can be ignored in the consideration of the later Act in which the same language is used.

Finally, my Lords, it was urged on behalf of the appellants that light is cast on the meaning of the words "capital employed in a trade" by the provisions of a later Act, *viz.*, the Finance Act, 1940, s. 27 and s. 34, which, it was said, would be superfluous if it were possible for assets of a company to be otherwise than employed in its trade. Even assuming that this is a case in which it is legitimate to call in aid a later statute for the construction of an earlier one, I cannot accept this contention. Forming the opinion, as I do, that the language of the earlier Act is clear, I cannot be deflected from it unless the later Act unequivocally compels me to do so. But that is by no means the case, for I accept and respectfully adopt the reasoning of *SOMERVELL, L.J.*, and *JENKINS, L.J.*, on this point which shows that on any construction of the earlier Act the provisions of its successor might not be superfluous. I am of opinion for these reasons that this appeal should be dismissed with costs.

LORD NORMAND (read by **LORD TUCKER**): My Lords, I agree with the result at which the Court of Appeal arrived. But I have difficulty in agreeing with the reasoning, for I am respectfully of opinion that para. 1 (1) of Part II of sched. VII to the Finance (No. 2) Act, 1939, does not call for an inquiry whether an asset (within the meaning of the paragraph) was "actively" employed in the company's trade or business in the relevant year. That was, it humbly appears to me, settled by this House in *Inland Revenue Comrs. v. Terence Byron, Ltd.* (1). In that case the asset had previously been "actively employed" and would in some future year again be "actively employed" in earning profits for the company, but it had been so damaged by fire as to be incapable of use in the accounting year. Yet this is a question of construction, and if it is irrelevant to inquire whether a pre-existing asset, not abandoned, but unusable in the accounting year, was "actively" employed in the company's business in that year, it must equally be irrelevant to inquire about an asset which came into being in the accounting year whether it was "actively" employed. It is said that **SANKEY, J.**, and **ROWLATT, J.**, in three cases under similar provisions of the legislation of 1915 (*Bourne & Hollingsworth v. Inland Revenue Comrs.* (3), *Lincoln Wagon & Engine Co., Ltd. v. Inland Revenue Comrs.* (4) and *Liberty & Co., Ltd. v. Inland Revenue Comrs.* (6)) took the view that the words "employed in" meant "actively employed in." If it be so, I cannot reconcile this view with the reasoning of **LORD SIMON** in *Terence Byron, Ltd.* (1). But it is more than doubtful if **SANKEY, J.**, or **ROWLATT, J.**, held the view attributed to them, and I refer to the explanation of the cases which will be given by my noble and learned friend **LORD RADCLIFFE**, whose opinion I have had the advantage of reading in print. The Attorney-General, however, argued that the language of **LORD GREENE, M.R.**, in *Northern Aluminium Co., Ltd. v. Inland Revenue Comrs.* (2), showed that, notwithstanding the earlier decision of this House there was still room for an inquiry whether the asset was "actually" employed. In that case the question was whether a sum paid by the company to the Ministry of Aircraft Production in 1943 was "a sum in respect of accruing liabilities" and deductible under the Finance Act, 1940, s. 34 (4), in computing the capital of the company for the chargeable accounting period ended on Dec. 31, 1941. The sum in question was paid under an agreement, made in 1942, which provided that part of the price charged by the company for its products in 1941 should be repaid to the Ministry. It was held that it was not deductible. It was not a sum paid in respect of a debt in existence in the accounting year, but a sum originating in a subsequent arrangement and falling to be artificially attributed to the accounting year and written back into the accounts. The language used by the Master of the Rolls points the contrast between a real debt existing in the accounting year and a debt artificially referable to it, and is not directed to or concerned with a contrast between an existing asset actively employed in the business and an existing asset lying inactive in the relevant period.

I think, nevertheless, that the appeal must fail. The purpose of the provisions of para. 1 (1) of Part II of sched. VII to the Finance (No. 2) Act, 1939, is to prescribe a measure of

"the amount of the capital employed in a trade or business (so far as it does not consist of money)"

in the relevant year. It applies to capital employed, not only by incorporated companies whether carrying on one or more trades or businesses, but also by partnerships and by individuals. The words "employed in" are not otiose, for it might be necessary to determine what capital was employed in one of two trades or businesses carried on by the company, or what part of the capital of a partner was employed in the partnership business, or what part of the individual's capital was employed in his trade or business. The provisions of the paragraph deal with the assets of which the capital employed in the trade or business consists, and it deals with them exhaustively. Apart from money, these

assets are divided into (a) assets acquired by purchase, (b) assets being debts due to the person carrying on the trade or business, and (c) any other assets acquired otherwise than by purchase. The appellants' contention is that "assets" include every item of property of every kind which may be made available to satisfy the debts of the owner of the assets, and that (apart from money) every item of property, including every chose in action belonging to the company, which does not fall under heads (a) or (b) of the sub-paragraph, necessarily falls under head (c). In this case we are asked to treat as capital employed in the trade or business an asset consisting of a claim to money which is not a debt and which, therefore, does not fall within head (b). It is a claim that might and later did ripen into a debt, and it is capable of being valued, though the amount which would become payable and the date at which it would become payable were in the accounting year unknown and uncertain. It is also a very unusual sort of asset because it is not a money claim arising from the business activities of the company or from the employment of its other assets, but a claim created by the gratuitous grant of Parliament. I think it is not an asset of the kind contemplated by the provisions under consideration. Money claims, if they are debts, fall under head (b), and I am not satisfied that a claim to money, not being a debt, has any place among the assets of which "the capital employed in the trade or business" consists. In the course of the debate the company's power to call up uncalled capital was referred to. That is a chose in action and it is an asset in the sense that it is available for the satisfaction of the company's debts, but it is difficult to think that it is among the "assets" falling under head (c) and part of the capital employed in the business. Similarly, a contested claim to damages, even if it is capable of being valued, seems not to fall under head (c), and not to be part of the capital employed in the business. Those and the present claim have a common character as claims to money which are not debts and they do not appear to be within any of the heads of the sub-paragraph. On that ground, I would dismiss the appeal.

LORD OAKSEY (read by **LORD RADCLIFFE**): My Lords, I have felt much difficulty in this case. Unfortunately, two cases which appear to me to have a possible bearing on the decision were not cited, *viz.*, *Gliksten (J.) & Son v. Green* (7) and *Rownson, Drew and Clydesdale, Ltd. v. Inland Revenue Comrs.* (8). It might, I think, have been argued that the sum which the Crown must be assumed to have undertaken to pay to the appellant company for the stores and tools destroyed represented those tools, and that the payment, when made, was referable to the accounting period during which the tools were destroyed, but, on the whole, I am not prepared to dissent from the conclusions at which your Lordships have arrived.

LORD RADCLIFFE: My Lords, the decision of the Special Commissioners was that the appellants' claim did not assume the character of a debt during the accounting period, and that, regarded as an asset, it did not appear to be employed in their trade. As it is not now contended that this claim can be called a debt within the meaning of Part II of sched. VII to the Finance (No. 2) Act, 1939, the sole question that remains is whether the commissioners' decision to reject the company's appeal ought to be reversed by the court on the ground that there is something impugnable in law in their finding that the claim did not appear to be employed in the company's trade during the relevant period. Your Lordships were invited to dispose of this appeal on the basis that a question whether a particular asset is or is not employed in a trade is a question of fact, and that there was in this case evidence before the commissioners which permitted them to find as they did. More than one reason prevents me from proposing that we should dismiss the appeal on this ground. The first objection is that the meaning of the word "employed" as found in the Act must be a question of law depending on the construction of the Act of Parliament. On one view of its

meaning, there was evidence before the commissioners which would support their decision, but on another view, not. But, apart from this, I feel bound to point out that the commissioners' decision does not apply the true statutory test. The test in computing capital is not whether an asset belonging to the proprietor of a business is employed in his business or not, but whether there is capital employed in his business consisting of this or that asset. In many cases, there is

- A no difference at all between the two questions: in a few cases the difference may be important. But to treat them as the same question does tend to lead to a confusion that has not been absent from the arguments in this case, for, whereas once capital has been introduced into a business it may naturally be regarded as still employed in it until such capital is lost or withdrawn, I have not been able to bring to my mind any clear conception of what is meant by an asset
- B being employed in a business if it means something different from merely belonging to it. Your Lordships have been, in effect, invited to say that there is some pregnant meaning that should be attached to the word "employed" in this connection. I do not think that I am being unfair to the argument of the respondents if I say that we were not presented with any set of words which were capable of defining what that pregnant meaning might be, apart from the
- C suggested interpretation of the word "employed" as meaning "actively or productively employed during the accounting period" which has already been rejected by this House in the *Terence Byron* case (1). In those circumstances, I think it too large an assumption that the commissioners placed some construction on the word "employed" which both imported something different from the mere word "of" and also was supported by the bare statement of facts that was
- D before them. It seems to me that the more satisfactory course is to treat this question as one that is open to your Lordships. In doing so, we should be following the same course as that which was taken by all the members of the Court of Appeal.

My Lords, I do not think that the words "capital employed in a trade or business" bear any significant difference of meaning from the words "capital of a trade or business." I stress, of course, that we are dealing with the capital of a trade or business and not the capital of its proprietor. He, or, in the case of a company, it, may, obviously, own capital or assets that are not the capital or assets of his or its trade or business. But, with that out of the way, I do not see what other distinction remains. After all, the word "employed" is no novelty in this connection. It was first used, in reference to excess profits duty, in the Finance (No. 2) Act, 1915, s. 41, and it was there introduced for the purpose of computing increases or decreases of capital where capital had been introduced in the course of an accounting period. But the conception of the capital of a trade or business itself had already been formed by the preceding section, s. 40, where the legislature had spoken of "... the statutory percentage on the capital of the trade or business as existing at the end of the last pre-war trade year" (sub-s. (2)) and had directed that the provisions contained in Part III of sched. IV to the Act should have effect "with respect to the ascertainment of capital for the purposes of this Part of this Act." Part III of that schedule, when referred to, is the counterpart, though not the exact equivalent, of Part II of the schedule now before us. It begins "The amount of the capital of a trade or business shall, so far as it does not consist of money, be taken to be

H ... " The word "employed," as I have said, comes in in s. 41. It is introduced in this way:

"(1) Where capital has been increased during the accounting period, a deduction shall be made from the profits of the accounting period at the statutory percentage per annum on the amount by which the capital has been increased, for the whole accounting period if the increased capital has been employed for the whole accounting period ..."

There follow provisions for decrease of capital (sub-s. (2)), for explaining what is meant by increase or decrease of capital (sub-s. (3)), and for the special case of capital which is not immediately remunerative (sub-s. (4)). Throughout this section the word "employed" is used in reference to capital, but I take it to be clear that it is not introduced with the purpose of drawing any distinction between the various kinds or measures of use to which assets may be put once capital of the business has come to consist of them. They themselves may be money, or debts, or real or personal property, but, if they represent a form in which capital of the business has clothed itself for the time being, no further question needs to be asked as to the nature of their contribution at any particular period to the conduct of the business. Perhaps I may add that the legislature by s. 42 even sharpened the point by making special provision for a

"... class of trade or business in which the amount of capital actually employed in the trade or business is, owing to the nature of the trade or business, small compared with the capital necessarily at stake for that trade or business ..."

I can see some difficulties in the working out of that distinction and in the determination of what is "actual" employment, but at least I think that it is fair to say that a reading of the old Act gives no support for the view that the legislative scheme envisaged any distinction between the conception of capital of a trade or business and capital employed in a trade or business.

Your Lordships were referred during the course of the argument to a group of decisions which were given with reference to the old Act. These decisions were the *Bourne & Hollingsworth* case (3), the *Lincoln Wagon & Engine Co., Ltd.* case (4), the *Gas Lighting Improvement Co., Ltd.* case (5), and the *Liberty & Co., Ltd.* case (6). The first three were decisions of SANKEY, J.: the last a decision of ROWLATT, J. I do not myself find any assistance at all in those cases. The only real issue in all of them was whether the court should upset or uphold findings by the commissioners that certain assets were "investments" within the meaning of the Act. That does not bear on our present problem. It is true that, in his cases, SANKEY, J., directed himself to considering the question whether the assets were capital employed in the business and thought in two out of three cases that they were not. It is not necessary to say whether his conclusions on the facts would commend themselves if they were re-argued. The only thing that matters is that in none of his judgments does he appear to be drawing any distinction between what is capital of a business and what is capital employed in a business. I do not think that he regarded the two phrases as having any difference of meaning, for he uses them as if they were interchangeable with each other. The *Liberty & Co., Ltd.* case (6), which ROWLATT, J., decided, offers, I think, no more assistance than the others. The learned judge was directing himself to the question whether certain investments reserved for future building represented capital that had ever been put into the business at all. He thought that they did not, because they had never been, as it were, devoted to the purposes of the business: the fund was "not tied up in any sort of way." Here, again, I can find no hint of a distinction between what was capital of the business and what was capital employed in the business. He did not, apparently, regard the investments as a form of either.

Excess profits tax was imposed by the Finance (No. 2) Act, 1939. Certainly there are differences in the wording of the new enactment and the scheme is not in all respects the same as the old. But I think that it would take a good deal of argument to demonstrate that "capital employed in a trade or business" in sched. VII to this Act has some meaning ascertainably distinct from "capital of a trade or business," if the two phrases were, as I think, interchangeable under the former Act. In the body of this Act "capital employed" has become what I may call the standard phrase, though "capital" is occasionally referred to without more. Also in Part II of sched. VII the computation provision now

starts "Subject to the provisions of this Part of this schedule, the amount of the capital employed in a trade or business . . ." It seems to me very unlikely that the change is significant. There are, at any rate, some indications as to the range of meaning which the words "capital employed" permit. Such capital may consist in part of moneys not required for the purposes of the trade or business (para. 3 of Part II of sched. VII), since such moneys are to be left out of account in the computation of capital, and there would be no need to provide that they are to be left out of account if they were not in themselves within the meaning of the words. This form of construction is that already applied by your Lordships' House in the *Gas Lighting Improvement Co., Ltd.* case (5). Secondly, capital employed may consist of assets that are "inherently unproductive" (the Finance Act, 1940, s. 34 (1)) or of assets the whole of the value of which has been permanently lost (s. 27 (5) of the same Act). I think that this Act, which is part of the same legislative scheme and was passed in the following year, may properly be referred to in order to aid the construction of the Act of 1939. Even without the advantage of authority, I should have concluded from these indications and the legislative history of the words "capital employed" that they were used in the present Act without any reference to the actual use made of particular assets during a particular period, once it could be said of them that they were a form of capital which had been put into the business. But to say that is, as I see it, only to repeat what has already been decided by your Lordships' House in the *Terence Byron* case (1), in which it was held that the capital expended in acquiring a site with a theatre on it was not the less employed in the business because the site had become during the period in question a vacant piece of land with nothing but the ruins of a theatre to encumber it. The essential difference between that case and this lies in the fact that there it was never in doubt that the capital had been put into the business. What was in doubt was whether it was still there.

The only other decision that I need notice is that given by the Court of Appeal in the *Northern Aluminium Co.'s* case (2), and later approved by this House. The language of the Master of the Rolls was much canvassed before us. I do not think that it has any bearing on the true problem in this case. Phrases occur such as "actually earning profits", "actually employed", but, throughout, the Master of the Rolls is concerned to insist on the difference between an actual liability and a notional liability, between an asset that really exists and an asset that has only an artificial or notional attribution to a particular period. All that would be very relevant if we were being invited to treat the £647,012 paid in 1947 as if it were part of the capital in 1941. But that is not what we are asked to do. We are asked to treat the claim as part of the capital in 1941, whatever its value as a claim might be. That claim was no notional or artificial entity in 1941. It existed as a statutory recognition of the company's right to indemnity, and, on the basis that this appeal is argued before us, that right was capable of legal enforcement. I do not think that LORD GREENE's language is applicable to this state of affairs.

What, then, are we to make of the appeal? My Lords, I do not think that the answer depends on any special meaning of the word "employed." It seems to me that the appeal fails because the appellants' argument really amounts to the assertion that the mere fact that the company owns an asset involves the consequence that there is some capital of its business consisting of that asset. And that I regard as a fallacy. No doubt this claim is in a sense an asset, but that does not conclude the matter. For the purpose that we are dealing with, "capital" is an abstraction and an "asset" is a form in which it consists from time to time. Normally, an asset only belongs to a business because capital has been expended in acquiring it or creating it. That is as true of trade debts as of other kinds of asset. Of course capital may be put into a business in kind in the shape of an asset which is directly contributed, but, if that is to be the way in

which capital of a business is to be increased, I do not think that it can possibly be said to have happened until some actual form of property has been placed within the control of the business. But lest I go too far, I will content myself with saying that no part of the capital employed in this business in the accounting period consisted of this claim, which was at that date uncertain as to the amount that it would produce or the year in which it would be paid. A case of this sort is quite exceptional. The asset is, as it were, voted by Parliament, but it remains a vote until the claim is recognised and paid. We treat it as a chose in action for the purposes of this case, but I would think it very unsafe to suppose that every chose in action which belongs to the proprietor of a business in connection with it is a form of capital employed in his business. Is uncalled share capital capital employed in a company's business? I should have thought not. Yet it is a chose in action and money can be raised on it. If money is so raised, I should have thought that it is that money that forms the capital employed in the business rather than the chose in action; but I do not think it necessary to try to solve these difficult points for the purposes of this case. I wish merely to guard myself against the assumption that the question whether there is capital employed in a business can be solved by ascertaining that its proprietor has become possessed of a chose in action in connection with it, or by describing that chose in action as an asset. Indeed, an asset is an elusive word in business or company matters. For the purposes of a balance sheet it is often no more than a record of expenditure, such as "development expenditure" or even "deficit on profit and loss account." Both of these items may properly take their place on the "assets" side of a company's balance sheet, yet I do not think that anyone would argue that they are forms of "capital employed" for the purposes of excess profits tax. For these reasons, which I am afraid that I have expressed at undue length, I agree that this appeal must fail. I believe that my reasons are, in substance, those that prevailed with the Court of Appeal, but, in view of the possibilities of confusion which are contained in the finding of the Special Commissioners, I have thought it well to set out my reasons at length.

LORD TUCKER: My Lords, I agree with those of your Lordships who consider that authority, as well as the legislative history of the words "capital employed," point to the conclusion that in their present context they do not refer to the actual use made of a particular asset in the relevant accounting period once it is shown to have been a form of capital put into the business and still there. I also agree for the reasons which have been stated by my noble and learned friend LORD NORMAND that a money claim, such as the present, not being a debt does not come within any of the heads of para. 1 (1) of Part II of sched. VII to the Finance (No. 2) Act, 1939, and that for this reason this appeal should be dismissed.

Appeal dismissed.

Solicitors: *R. A. Rotherham & Co.* (for the company); *Solicitor of Inland Revenue* (for the Crown).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

R. v. JUDGE PUGH. *Ex parte* GRAHAM.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Devlin, JJ.), June 14, 1951.]

Rent Restriction—Standard rent—Apportionment—Refusal to determine application—Building comprising two flats—Letting after Sept. 1, 1939—Standard rent fixed by rent tribunal—Alleged prior letting as one house before Sept. 1, 1939—Subsequent application for apportionment—Duty to hear and determine application—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (3)—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 1 (1).

The tenants of two flats in one building applied under the Landlord and Tenant (Rent Control) Act, 1949, s. 1 (1), to a rent tribunal to reduce their rents, alleging that the flats were separate dwelling-houses first let after Sept. 1, 1939, and they obtained reductions in the rents from £200 to £125 each. Subsequently, one of the tenants applied to the county court to fix the rent of his flat by apportioning the rent of the whole building which he now alleged had been let as a single dwelling-house before Sept. 1, 1939. The county court judge held that he had no jurisdiction to entertain the application on the ground that to do so would involve his acting as a court of appeal from the rent tribunal, or, if he held the tribunal had no jurisdiction, abrogating the prerogative rights of the divisional court to supervise inferior tribunals.

HELD: the claim before the county court that the tribunal had fixed the rent was matter, not of jurisdiction, but of defence; the county court judge should have investigated whether or not the house fell to be dealt with by the tribunal, and, if not, should have apportioned the rent; and, therefore, an order of *mandamus* would issue directing him so to do.

FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 12 (3), and THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 1011, 1094.

Cases referred to:

- (1) *London Corpn. v. Cox*, (1867), L.R. 2 H.L. 239; 36 L.J.Ex. 225; 16 Digest 101, 23.
- (2) *R. v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Zerek*, [1951] 1 All E.R. 482; [1951] 2 K.B. 1; 115 J.P. 132.
- (3) *Briscoe v. Stephens*, (1824), 2 Bing. 213; 3 L.J.O.S.C.P. 257; 130 E.R. 288; 21 Digest 232, 629.

MOTION for *mandamus*.

The applicant was the tenant of one of two flats contained in one building. The rent of the flat having been fixed by a rent tribunal on the tenant's application, he applied to the county court to fix the rent by apportioning the rent of the whole building which he alleged to have been let as a whole before Sept. 1, 1939. The county court judge refused to hear the application on the ground that he had no jurisdiction to entertain it as the rent had been fixed by the rent tribunal. The applicant contended that that was a matter, not of jurisdiction, but of defence, and that the county court judge should have investigated whether the rent tribunal had had jurisdiction to fix the rent, and, if not, he should have fixed it himself by making the apportionment.

Lawson for the tenant.

Finlay for the landlord.

LORD GODDARD, C.J.: This is an application for an order of *mandamus* directed to the judge of the Bloomsbury County Court directing him to hear and

determine an application made under s. 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provides for the apportionment of the rent of a dwelling-house.

In September, 1950, there were two separate tenants of flats known as 20a and 20b, Buckland Crescent, Hampstead, and those tenants took proceedings before the local rent tribunal, claiming that the rents were excessive and ought to be reduced. Those proceedings were under the Landlord and Tenant (Rent Control) Act, 1949, s. 1 (1), under which the tribunal has jurisdiction, where the standard rent of a dwelling-house is the rent at which it was first let after Sept. 1, 1939. The case was put to the tribunal by the present applicant and the tenant of the other flat on the footing that these were two separate dwelling-houses, and that they were first let after Sept. 1, 1939. On those facts, the tribunal had jurisdiction and they reduced the rent of the applicant's flat from £200 to £125. Since then the applicant thinks he has discovered facts—whether he is right or wrong will have to be determined hereafter—which show that before Sept. 1, 1939, these two separate flats were let as one. He alleges that nothing has been done structurally to alter the building which comprises the flats, and so, for the purpose of the Rent Restrictions Acts, they are still one dwelling. If that were the case, the applicant would be entitled to apply to the county court for an apportionment of the rent of the whole premises. That is what he did, in the hope, no doubt, of obtaining a further reduction of rent.

When the matter came before the county court judge, he was informed of the proceedings before the rent tribunal, and he refused to hear the case, taking the view that he was being asked to act as a court of appeal from the rent tribunal or to hold that the rent tribunal had no jurisdiction. He also said that, if he gave a decision apportioning the rent, there would be two standard rents, the first depending on his decision and the second depending on that of the tribunal. Accordingly, he declined jurisdiction. I feel bound to say that I think he was wrong. I think the fundamental error which underlies this case is that matters were treated as going to jurisdiction which were really matters of defence. When the case comes to be heard it will be open to the landlord to say, if he can, that there always were two dwellings, and, therefore, there is no rent of a single dwelling to apportion between the two flats. The county court judge will then have to decide whether before Sept. 1, 1939, or before this letting there were two dwellings or only one. If there was only one, *prima facie* there has to be an apportionment of the rent. If the judge is met with the objection that this matter has been adjudicated on by the Hampstead rent tribunal, the question will have to be litigated whether the tribunal had jurisdiction, because such a tribunal can only give a valid decision if it has jurisdiction to enter on the inquiry. The parties, by their action, cannot give jurisdiction to a tribunal, and, as WILLES, J., said in his speech advising the House of Lords in *London Corp'n. v. Cox* (1) (L.R. 2 H.L. 262):

“If the decision were in favour of the plaintiff it is still not conclusive because ‘the rule, that in inferior courts and proceedings by magistrates the maxim *omnia praesumuntur rite esse acta* does not apply to give jurisdiction, never has been questioned’.”

Therefore, it seems to be clear that where the decision of an inferior court is relied on as conclusive it must be shown by the person who relies on that decision that the court giving it had jurisdiction. A case which has recently been dealt with, more particularly in the judgment of DEVLIN, J., in *R. v. Fulham, Hammer-smith & Kensington Rent Tribunal. Ex p. Zerek* (2), is *Briscoe v. Stephens* (3). The judgment in that case shows clearly enough that, if the decision of an inferior court is pleaded as estopping the plaintiff from proceeding, the defendant must first show that the inferior tribunal had jurisdiction. The plaintiff can reply that there was no jurisdiction, and then the case has to be fought out.

A In my opinion, therefore, the county court judge is bound to hear this application for apportionment of the rent. The landlord may argue that there is nothing to apportion because these two flats were never one dwelling-house. If he fails on that, or if it is shown that the applicant's flat was let before Sept. 1, 1939, he will be in considerable difficulty because the tribunal would have no jurisdiction as they can only deal with cases in which the first letting was after Sept. 1, 1939. For these reasons I am of the opinion that the order of *mandamus* must go.

B LYNSKEY, J.: I agree. I only desire to add that I think the course taken in this case on behalf of the landlord before the learned county court judge was wrong. He objected to the jurisdiction. In my view, this was not a matter going to jurisdiction. If there had been, as there may have been, a valid decision of the rent tribunal which fixed the standard rent at a lower figure than it was thought to be, that was a matter of defence and not a matter going to jurisdiction. If that defence had been pleaded, the judge would have had to investigate whether there was a letting prior to Sept. 1, 1939, and, if there had been, he would have had to apportion the rent. If he was satisfied that there had not been a letting of these premises before Sept. 1, 1939, the standard rent would have been fixed, and he would not have been called on to apportion it because there was no necessity to do so. These are matters of defence, and do not go to jurisdiction. In those circumstances, the judge ought to have entertained the application, and, therefore, the order of *mandamus* ought to go.

D DEVLIN, J.: I agree, and I desire to add only a word in relation to one reason which was given by the judge for not hearing the matter. He says:

“Nor could I listen to any argument that the above conditions had not been fulfilled and that the tribunal had acted without jurisdiction, for that would be to abrogate to myself the prerogative rights of the Divisional Court to supervise inferior tribunals”.

E I think that that shows a misunderstanding of the nature of the powers which the court exercises by way of *certiorari* and *mandamus*. They are not in any sense exclusive powers. They are powers which the court exercises to give a speedy remedy against obvious excesses of jurisdiction. The authorities to which my Lord has referred make it clear that when any question is raised as to the jurisdiction of an inferior court—that is, a court with limited jurisdiction—that question must be tried by the court before whom it is raised. I agree, therefore, F that it was the duty of the judge to deal with this matter, not as a point of jurisdiction, but as a matter raised by way of defence in the course of the hearing of the action.

Order for mandamus granted.

Solicitors: *Richard Davies & Son* (for the applicant); *Crawley & de Reya* (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

NATIONAL COAL BOARD v. J. E. EVANS & CO. (CARDIFF),
LTD. AND ANOTHER.

[COURT OF APPEAL (Cohen, Singleton and Morris, L.J.J.), June 12, 13, 1951.]

*Trespass—No fault in defendant—Accidental damage to underground electric cable—
Cable laid by plaintiffs' predecessors without knowledge of owner of land—
Excavation by contractors employed by owner of land—Damage caused during
excavation.* A

The first defendants, who had obtained a contract from a county council to erect workshops on land belonging to the council, sub-contracted with the second defendants to excavate a trench across the land for drainage purposes. Without the knowledge of the council the plaintiffs' predecessors had placed an electric cable under the land, running across the line of the proposed trench at the same depth as the trench would be at that spot, and carrying electric current to a colliery belonging to the plaintiffs. The first defendants had been supplied by the council with a plan of the land showing the line of the required trench, but the underground cable was not marked on it, and neither the first defendants nor the second defendants knew of its existence. During the course of the excavation, a mechanical excavator, driven by a workman employed by the second defendants, broke the concrete cover of the cable and damaged the cable, but it was thought at the time that no serious damage was done. The clerk of works of the county council was informed of the accident, but the council did not inform the plaintiffs. As a result of the accident water seeped through the insulating cover of the cable and an explosion occurred and cut off the electric supply carried by the cable. The plaintiffs brought an action against the first and second defendants alleging trespass and negligence. On the facts it was found that the defendants were not guilty of negligence. B C D

HELD: as the plaintiffs were at fault in the matter, the accident being attributable mainly to the conduct of their predecessors in placing the cable on the council's land without the knowledge of the council, and as the defendants were entirely free from fault, having merely done what they were required by the council to do, there was no trespass by them. E

Holmes v. Mather (1875) (L.R. 10 Exch. 261) and *Stanley v. Powell* ([1891] 1 Q.B. 86), approved.

AS TO LIABILITY FOR TRESPASS, see HALSBURY, Hailsham Edn., Vol. 33, p. 3, para. 1 and p. 21, para. 32; and FOR CASES, see DIGEST, Vol. 43, pp. 419, 420, Nos. 426-436, and p. 431, Nos. 557-568. F

Cases referred to:

- (1) *Weaver v. Ward*, (1616), as reported in Hob. 134; 80 E.R. 284; 43 Digest 373, 4.
 - (2) *Leame v. Bray*, (1803), 3 East 593; 102 E.R. 724; 43 Digest 420, 429.
 - (3) *Holmes v. Mather*, (1875), L.R. 10 Exch. 261; 44 L.J.Ex. 176; 33 L.T. 361; 39 J.P. 567; 43 Digest 431, 567.
 - (4) *Stanley v. Powell*, [1891] 1 Q.B. 86; 60 L.J.Q.B. 52; 63 L.T. 809; 55 J.P. 327; 43 Digest 431, 568.
- G

APPEAL by the defendants from an order of DONOVAN, J., dated Dec. 20, 1950, whereby he held the defendants liable for trespass to an electric cable, the property of the plaintiffs, which was sunk under land which was the property of the Glamorgan County Council. The first defendants were contractors engaged by the council to do certain work on the land and the second defendants were sub-contractors engaged by the first defendants to cut a trench across the land for drainage purposes. Neither defendants knew that the electric cable ran under the land, and it was accidentally damaged during the excavation by a H

mechanical excavator driven by a workman employed by the second defendants. The county council were informed of the fact, but the plaintiffs were not informed. Some months later, as a result of the damage to the cable, the electricity supply carried by the cable failed. The plaintiffs brought an action against the defendants claiming damages for trespass and negligence. The learned judge found that there was no negligence on the part of the defendants, but he held that their absence of knowledge in regard to the cable was no defence against the allegation of trespass, and he gave judgment for the plaintiffs on that claim. The facts appear in the judgment of COHEN, L.J.

Sutton, K.C., and *D. Meurig Evans* for the first defendants.

Sutton, K.C., and *Pennant* for the second defendants.

Lloyd-Jones, K.C., and *Wallis-Jones* for the plaintiffs.

COHEN, L.J.: This is an appeal from a judgment of DONOVAN, J., given at Glamorganshire Assizes on Dec. 20, 1950, by which he held both defendants liable for damages for an alleged trespass to a cable, now the property of the plaintiffs, which was sunk under land, the property of the Glamorgan County Council. The judgment of the learned judge was a reserved judgment and it states very conveniently and clearly the facts and the conclusions which he had reached, and in my statement of the facts I shall follow what he said.

In August, 1948, the first defendants secured from the county council a contract to erect new workshops at the School of Mines, Treforest, Pontypridd. The work to be done included the cutting of a trench for drainage purposes from the new workshops across land occupied by the School of Mines to a manhole just outside that land. According to a plan put in, the trench had to be between 150 and two hundred yards long. The ground under which the drainage was to be sunk adjoined a lane at the back of houses in a street called Brook Street. The first defendants sub-contracted with the second defendants for the excavation of this trench. The first defendants were supplied with a plan by the county council for the purpose of the work that they had to do. This plan showed the line of the required trench, but did not show that an underground cable, the property of the plaintiffs and carrying electricity at a pressure of thirty-three thousand volts, ran under the land athwart the line of the proposed trench at a depth of three feet, the same depth, that is, as the trench would be where it met this cable. In September, 1948, the first defendants marked out for the second defendants the line of the required trench, and, in the same month, the latter commenced to dig out the excavation with a mechanical excavator. What happened thereafter, as found by the learned judge, is as follows. When the excavator was digging the trench in the autumn of 1948, it hit and broke the concrete cover of the cable and hit the cable itself, causing the damage which eventually broke the circuit. The driver of the excavator knew at the time what he had done. Mr. Weeks (the clerk of works of the Glamorgan County Council, who was in charge of the works on the site) and Mr. Dimmick (the manager of the second defendants) knew what had happened on the same day or very shortly afterwards. Neither Mr. Weeks, Mr. Dimmick, nor the driver thought that any real harm had been done to the cable, and, therefore, did not report the matter with a view to the facts being brought to the notice of the cable owners. This incident having happened, the cutting of the trench continued to its end, an earthenware drainpipe was laid in it, and the trench filled in. Nothing further happened until May, 1949, when the electricity supply carried by the cable failed. When the fault was located—that, apparently, was a troublesome matter—and the cable exposed, it was found that it had been damaged in such a way that, during the ensuing months, water had seeped slowly through the insulating cover and had eventually come into contact with the live core of the cable, causing an explosion which blew a hole in the cable and cut off the current. This was the result, as the learned judge found, of damage done to the cable in the previous autumn when it was hit by the excavator.

Those being the facts, the plaintiffs commenced proceedings against the defendants on Nov. 22, 1949. Their statement of claim, delivered on Jan. 9, 1950, stated the facts and alleged trespass and negligence. Paragraph 4 contained the particulars of negligence which were as follows:

"(a) Neither of the defendants took any or any effective measures to discover whether there was any electric cable in the way of their excavations. (b) Neither of the defendants took any steps to prevent damaging objects buried beneath the surface. (c) The defendants worked or controlled the mechanical excavator so unskilfully that it damaged the said electric cable."

In para. 5 this allegation was made:

"Although both defendants knew that the said cable had been seriously damaged in or about September, 1948, neither of the defendants gave any notice of such happening to the plaintiffs, and the plaintiffs knew nothing of the matter until May 3, 1949, when, by reason of the foregoing damage and the consequent deterioration of the cable through the seeping in of water and otherwise, the cable broke down and the electric current was cut off."

The plaintiffs then gave particulars of their damage, which came to some £598. The learned judge dealt, first, with the issue of negligence and said:

"The plan received by the first defendants from their principals, the Glamorgan County Council, showed no electric cable beneath the land in question. Usually, as one would expect, all underground cables are shown on the contract plans to which the contractor has to work. To the extent that no such cable is shown on the plan, the practice of contractors is to assume that none exists, unless of course there is some evidence on the site visibly contradicting the plan in this respect. This attitude seems to me to be reasonable, and, indeed, the plaintiffs do not assert the contrary. But, it is said, there was evidence visible on the site of an underground cable. There was an electric pylon on the same land as that in which the trench had to be cut, and not far from the trench. The position is shown on the plan, exhibit P.2, and I make the pylon to be some fifty yards from where the cable was eventually struck. At this pylon the electric cable, which hitherto has come overhead from Cwm Colliery, goes down the pylon into the earth. Some distance away, in the direction of the Albion Colliery, which is the destination of the electric current, there is another pylon. From exhibit P.2 I make this second pylon some four hundred yards distant from the first. It is between these two pylons that the cable runs underground, to emerge at the second pylon, and continue overhead to the Albion Colliery. It is said on behalf of the plaintiffs to each of the first and second defendants: 'You should have inspected the first pylon, which is on the same land as that in which you had to cut the trench. Then you would have seen that the cable there went into the ground. Next, you should have seen the second pylon, some hundreds of yards away, with a cable emerging from the ground. Thus you should have known or suspected that somewhere between those two pylons the cable ran underground. And, although the cable would be nowhere near the line of the intended trench if the cable ran in a straight line between the two pylons, nevertheless you should have further suspected that it might, as it does in fact, pursue an erratic course between the pylons, and that that erratic course might bring it, as in fact it did, across the line of the intended trench; and, until these suspicions were confirmed or removed, it was your duty to dig trial holes by hand along the line of the proposed trench'."

That was the learned judge's summary of the allegations of negligence and on that he expressed his conclusions as follows:

"In my opinion, that is putting far too big a burden on the first defendants, who, having received plans from their principals, the Glamorgan County Council, showing no electric cables in the line of the intended trench, assumed that the plan was right, this being the normal practice of contractors. After all, the Glamorgan County Council owned the land, and should surely be in a position to know what cables ran through their land."

- A That is a clear finding of fact, and, even though it is true that here the question is largely what is the proper inference to be drawn from known facts, such as the position of the pylons, none the less I think that this court should be hesitant in interfering with this finding of fact by the trial judge. Even had I come to the conclusion that I might possibly have drawn a different inference, I should hesitate to interfere with his finding, but in this particular case I would respectfully express my agreement with the conclusion which the learned judge has reached and I would add that, if it can be right to say that the defendants should have suspected that the cable might pursue an erratic line, I think that they would primarily have expected to find it laid under highways, as cables so often are, rather than under the land on which they were going to work. I agree, therefore, entirely with the learned judge's finding on the question of negligence
- C as pleaded in para. 4 of the statement of claim.

I turn to the question of trespass. On this matter the learned judge found for the plaintiffs. He states that

"... the answer made by the first defendants is that any such trespass was involuntary and accidental, and, therefore, not actionable."

- D He then says that the first defendants contend that the damage was too remote. With that I do not think that I shall have to deal. The learned judge went on to say: "They simply instructed the second defendants to dig the trench, without specifying" what should be done. He then deals with the important point in the defence, *viz.*, that the trespass was involuntary and accidental, and he comes to the conclusion that this was merely another way of pleading inevitable accident, and on the facts of the case he held that there was no inevitable accident. He states his reasons as follows:
- E

"It was intended to cut a trench by a mechanical excavator, and to cut it where it was in fact cut, and, though it was not intended to damage the cable, that result ensued, not through some act over which the first defendants lacked all control, but simply because they did not appreciate that what they were designedly and deliberately ordering would bring the excavator in contact with an electric cable. But this absence of information affords them, in my opinion, no defence against the allegation of trespass."

F

Later in his judgment he finds that the cable had been put, without permission, on land not proved to be the plaintiffs'.

- G As I understand the learned judge's judgment, he held that, if the act of interference with the plaintiffs or their property was an act which the defendants intended to perform, it was wholly immaterial whether the act was lawful and whether the defendants knew or were justifiably ignorant of the fact that the act might injure the plaintiffs, the plaintiffs' own unlawful conduct having prevented the defendants being aware of the fact that their act might injure the plaintiffs or their property. The learned judge felt himself constrained by
- H authority to hold that, even though the plaintiffs in the present case must be taken, on the evidence before the court, to have buried the cable under the land of the Glamorgan County Council without the knowledge of the council, the defendants were liable to the plaintiffs for the damage which the second defendants' excavator had caused.

Counsel for the defendants took us through a number of authorities and any gaps which he left were filled in by counsel for the plaintiffs. They started with *Weaver v. Ward* (1), in which (Hob. 134):

"Weaver brought an action of trespass of assault and battery against Ward. The defendant pleaded, that he was amongst others by the commandment of the Lords of the Council a trained soldier in London, of the band of one Andrews captain; and so was the plaintiff, and that they were skirmishing with their musquets charged with powder for their exercise *in re militari*, against another captain and his band; and as they were so skirmishing, the defendant *casualiter* and *per infortunium* and *contra voluntatem suam*, in discharging of his piece did hurt and wound the plaintiff, which is the same, etc. *absque hoc*, that he was guilty *aliter sive alio modo*. And upon demurrer by the plaintiff, judgment was given for him; for though it were agreed, that if men tilt or turney in the presence of the king, or if two masters of defence playing their prizes kill one another, that this shall be no felony; or if a lunatic kill a man, or the like, because felony must be done *animo felonico*: yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore if a lunatic hurt a man, he shall be answerable in trespass: and therefore no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, *prout ei bene licuit*) except it may be judged utterly without his fault."

It is to be observed that, even in that case, which was relied on by the plaintiffs, it was held that, where the defendant was entirely without fault, he would have a good defence to an action in trespass.

Some of the earlier authorities, most of which appear to have been decided on points of procedure, contain *dicta* which support the learned judge's conclusion. It will, I think, be sufficient if I refer to the observations of GROSE, J., in *Leame v. Bray* (2), where he said (3 East 600):

"Looking into all the cases from the Year Book in the [twenty-first year of Henry VII], down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass."

That, it is said, is applicable in this case. Since the defendants intended to use their excavator and to excavate whatever was found in the earth, therefore (it is said) they are liable in trespass. Speaking for myself, I cannot imagine a clearer instance of an accident which occurred utterly without fault on the part of the defendants. The cable was not visible, and there was nothing on the plan of the Glamorgan County Council to indicate its presence. It had been placed there without the knowledge of the county council and without any permission from them. In those circumstances, I can see no ground for attaching any blame to the defendants. The damage seems to have been caused by the action of the predecessors in title of the plaintiffs themselves, who, the judge has found, placed their cable on the land in question without any legal right to do so and, so far as we know, without taking any steps to inform the county council or anyone else of the presence of the cable on the land.

I would add that the *dicta* in the earlier cases do not, if read literally, appear to have been approved or followed in any modern case. On the contrary, in *Holmes v. Mather* (3), where an accident had occurred on the highway, the defendant's horses having run away and the plaintiff having been injured by them, BRAMWELL, B., said (L.R. 10 Exch. 267):

"For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid. I think the present action not to be maintainable."

After stating the principle on which most of the discussion in this case turned, BRAMWELL, B., said (*ibid.*, 268):

"As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is

intelligible enough: if the act that does an injury is an act of direct force *vi et armis*, trespass is the proper remedy (if there is any remedy) where the act is wrongful, either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful."

- A Counsel for the plaintiffs said that those observations, though apparently general, were really directed to the facts of the case before the court, which was a case of an accident on a highway. He called our attention to various statements in text-books which indicated that the law applicable to accidents on a highway might be distinguishable from accidents which occurred on private property, because it could hardly be said that in the case of an accident on private property
- B the arguments based on the convenience of mankind, which BRAMWELL, B., put in the forefront of his judgment, were relevant.

- I see no logical reason for placing such a limit on the general observations of BRAMWELL, B., but it is not necessary to express a final conclusion on this point. The accident in the present case was attributable mainly to the conduct of the plaintiffs in placing their cable on the land of the Glamorgan County Council,
- C without the knowledge of the county council and without any notification to them, and in these circumstances it would, I think, be not merely inequitable, but contrary to common law principles, as laid down in *Weaver v. Ward* (1), that the plaintiffs should be allowed to succeed. Clearly, I should have thought that they could not have succeeded in an action against the county council, since they were trespassers in placing their cable on the land, and I cannot see
- D any reason why the defendants should be in a worse position than the county council.

- The only other case to which I need refer is *Stanley v. Powell* (4), which was tried before DENMAN, J., who cited with approval ([1891] 1 Q.B. 93) the observations of BRAMWELL, B., in *Holmes v. Mather* (3). Neither *Holmes v. Mather* (3) nor *Stanley v. Powell* (4) is binding on this court, but, if I may say so with
- E respect, I see no reason to differ from the conclusions arrived at in those cases. I would add that *Stanley v. Powell* (4) was not a case of an accident on the highway. It was a case where the defendant had fired at a pheasant and injured the plaintiff, who was engaged as a carrier of game for the party. It would be strange that DENMAN, J., should have cited the authority of BRAMWELL, B., in *Holmes v. Mather* (3) if he had thought that those observations were confined
- F to the case of accidents on the highway. For these reasons, I think that the defendants are entitled to succeed and that the action should have been dismissed.

- SINGLETON, L.J.: On the facts it is clear that the first party at fault was the plaintiffs. They or their predecessors had a cable in someone else's land. The trespassers in the first instance were, therefore, the owners of the cable.
- G The county council, I assume, were entitled to tell them at any time to remove it, and that, I suppose, might have led to negotiations, but it is a surprising thing to find, in these days, that an electric cable serving a colliery undertaking was put through land of the county council and the council had no knowledge of it. When the excavator belonging to the second defendants damaged the concrete above the cable, the first defendants knew of the damage and informed the
- H clerk of works of the county council, who went to see it. No report, however, went from the Glamorgan County Council to the plaintiffs, and, in that sense, the council are at fault.

What is the position of the defendants in this action? Neither of them knew that the cable was there. They had every reason to assume that there was no obstruction other than anything shown on their plan, and this cable was not shown on the plan. Therefore, up to this stage one has both defendants without fault, each of them following the course which an ordinary contractor in such

circumstances would follow. The action was commenced against both defendants, alleging negligence against them and alleging that they were guilty of trespass. I have appreciated to the full the argument of counsel for the plaintiffs that the learned judge ought to have found that there was negligence, in that some fifty yards away there were pylons and, therefore, it might have been anticipated that there would be a cable under the land, but, having regard to the learned judge's finding, I do not think that there is any substance in that point. The plan was given to the contractors for a purpose and, when they were dealing with a responsible body like the Glamorgan County Council, they were entitled to rely on the plan. I agree with the learned judge's finding on that. I thought at one time that the plaintiffs might make a case on that which was called the second head of negligence, *i.e.*, that, after the accident had occurred, the defendants ought to have reported the damage, but I am inclined to think that the man who was using the excavator which did the damage performed his duty in reporting to the county council. If there was something in the county council's land which was damaged, the contractor working for them did his duty in reporting to them and leaving it to them to do what was necessary. He did not know whose the cable was. However, I express no final opinion on that, for the point has not been argued. The question was raised in the court below as to whether that kind of negligence was covered by the pleading in this case, and it seems to have been accepted that it was not so covered. It is, therefore, not open to counsel for the plaintiffs to seek to argue it in this court. I would, however, like to repeat what COHEN, L.J., has said on this point. I regard it as of the greatest importance that, when any contractor strikes a cable, it is his duty to let it be known in some way, so that information will reach the owners of the cable, who in turn may be able to avoid much damage or possibly to avoid a serious accident.

The argument before this court has been almost wholly on trespass. I do not propose to go through the authorities which have been cited to the court, but shall refer only to two of them, *Holmes v. Mather* (3) and *Stanley v. Powell* (4). I draw attention to *Holmes v. Mather* (3), in part because of its history. It was a decision of the Court of Exchequer, in a case of an accident on the highway, horses having run away and caused injury. The claim was heard originally at Durham Assizes before FIELD, J., and a jury. Verdict was entered for the defendant, leave being reserved to the plaintiffs to move to enter it for them for £50 on the second count (a trespass count), the court to be at liberty to draw inferences of fact and to make any amendment in the pleadings necessary to enable the defendant to raise any defence that ought to be raised. The case then came before the Court of Exchequer, consisting of BRAMWELL, B., CLEASBY, B., and POLLOCK, B., and it was argued for the plaintiffs by Mr. Herschell and for the defendant by Mr. Charles Russell. Two passages from the judgment of BRAMWELL, B., have been read by COHEN, L.J., and I do not repeat them. CLEASBY, B., who agreed with the judgment of BRAMWELL, B., added another reason for his decision, and POLLOCK, B., also agreed.

In *Stanley v. Powell* (4), a considered judgment of DENMAN, J., the learned judge, after referring to some of the earlier authorities, said ([1891] 1 Q.B. 89):

"The next case in order of date relied upon for the plaintiff was *Weaver v. Ward* (1), decided in 1607. There is no doubt that that case contains *dicta* which *per se* would be in favour of the plaintiff, but it also contains the following summing up of the law applicable to cases of unintentional injury by acts which are *prima facie* trespasses: 'Therefore, no man shall be excused of a trespass . . . except it may be judged utterly without his fault'."

After dealing admirably with all the old authorities, the learned judge said (*ibid.*, 92):

"All the cases to which I have referred were before the Court of Exchequer in 1875, in the case of *Holmes v. Mather* (3), and BRAMWELL, B., in giving

judgment in that case, dealt with them thus: 'As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: if the act that does an injury is an act of direct force *vi et armis*, trespass is the proper remedy (if there is any remedy), where the act is wrongful either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful. That is the effect of the decisions'."

The cable was in land of the Glamorgan County Council. The county council employed the defendants to make a trench. They gave them a plan. The cable was not shown on that plan. The county council did not know of the cable. There is no evidence whatever to show that the plaintiffs or their predecessors had any licence or permission to put that cable in the place in which it was put. As I have said, *prima facie* the cable is there wrongfully. If someone puts his car in my garage, I am entitled to move it. If I do so, I do not commit a trespass, nor does anyone whom I employ to move it. I am entitled to dig a hole on my land. If someone, without permission or without my knowledge, has put something on my land and I accidentally remove it, that is not trespass. He had no right to put it there. The defendants, in my view, are utterly without fault. That cannot be said of the plaintiffs, nor can it be said of the Glamorgan County Council. Following the views of the judges of days gone by, to whose opinions I have referred, I think that in these circumstances this court ought to hold that, where the plaintiffs are at fault and the defendants are free from fault, in that they have only done that which they were asked by the owner of the land to do, there is in fact no trespass by them. The plaintiffs' claim fails for the simple reason, as I think, that the facts proved do not disclose trespass on the part of either of the defendants. I agree that the appeal should be allowed.

MORRIS, L.J.: I am of the same opinion. *Weaver v. Ward* (1), to which COHEN, L.J., and SINGLETON, L.J., have referred, was decided in 1607 and has been much referred to in the later authorities. The words cited by my Lords, "therefore no man shall be excused of a trespass . . . except it may be judged utterly without his fault," are words which show, as DENMAN, J., said ([1891] 1 Q.B. 89) in *Stanley v. Powell* (4), that there clearly may be such cases. Illustrations of the types of such cases were given in the concluding words of the report in *Weaver v. Ward* (1). The words are (Hob. 134):

"As if a man by force take my hand and strike you, or if here the defendant had said, that the plaintiff ran cross his piece when it was discharging, or had set forth the case with the circumstances, so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

The first of those illustrations would be a case in which the act was not in reality the act of the defendant at all. The second illustration given is that "the plaintiff ran cross his piece when it was discharging." That illustration may, perhaps, be comparable with the facts of this case. In my judgment, the position of the defendants in this action must be judged on the same footing as the conduct of the Glamorgan County Council would have been judged if the county council had themselves done the work on their own land, instead of employing others to do it. If someone is lawfully digging on his own land and someone else comes and interposes an article between the spade as it is descending and the ground, so that the article is damaged, and damaged without any intention on the part of the person digging, it could not, in my judgment, be said that the latter was guilty of a trespass. It would be a case within the illustration given in *Weaver v. Ward* (1). The position, in my judgment, would be no different if someone, without the permission or knowledge of the owner of the land, buried an article under the soil in a place where the owner would be perfectly entitled to dig. If he did

so dig and unintentionally damaged the thing which had been buried without his knowledge or permission, it could not, in my judgment, be said that the occurrence was the fault of the owner of the land rather than the fault of the owner of the thing. In my opinion, those are the facts of the present case which affords an illustration of what was referred to as an act that might be "judged utterly without his fault." There was, in my judgment, no fault in either of the defendants. I agree with all the reasons given by COHEN, L.J., and SINGLETON, L.J., and, in my view, this appeal should be allowed.

Appeal allowed.

Solicitors: *Fortescue, Adshead & Guest*, agents for *Richards & Guest*, Cardiff (for the first defendants); *Rhys Roberts & Co.*, agents for *C. James Hardwicke & Co.*, Cardiff (for the second defendants); *R. S. S. Allen*, agent for *W. H. F. Barklam*, Cardiff (for the plaintiffs).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

DAVIS v. MINISTER OF PENSIONS.

[KING'S BENCH DIVISION (Ormerod, J.), April 6, 1951.]

War Pension—War service injury—Injury arising out of and in course of performance of duties—War reserve constable—Injury while proceeding to place of duty—Personal Injuries (Emergency Provisions) Act, 1939 (c. 82), s. 8 (1). Police—Position of constable while off duty.

On Apr. 21, 1943, the claimant, who was a war reserve constable, was riding his bicycle from his home to his place of duty when he was struck by an overhanging twig of a tree as the result of which he lost the sight of one eye. He claimed to have suffered a war service injury within the meaning of s. 8 (1) of the Personal Injuries (Emergency Provisions) Act, 1939, and so to be entitled to a pension.

HELD: the injury suffered by the claimant did not arise in the course of the performance by him of his duties within s. 8 (1), and, therefore, he was not entitled to a pension.

Per curiam: When the prescribed hours of duty of a police constable have come to an end and an emergency arises, it is his duty to attend to that emergency, and at that moment he is on duty in the strict and narrow sense which would bring him within the meaning of s. 8 (1), but until such an emergency arises, he is in the position of any other civilian.

FOR THE PERSONAL INJURIES (EMERGENCY PROVISIONS) ACT, 1939, s. 8 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 17, p. 895.

APPEAL by the claimant from a decision of a pensions appeal tribunal whereby it was held that an injury suffered by the claimant, a war reserve constable, while travelling to his place of duty was not a war service injury within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939, s. 8 (1).

Crispin for the claimant.

J.P. Ashworth for the Minister of Pensions.

ORMEROD, J.: The claimant, Albert Davis, appeals by leave of the tribunal against the decision of a pensions appeal tribunal of July 20, 1950, when it was held that an accident which occurred to him on Apr. 21, 1943, was not a war service injury within the meaning of s. 8 (1) of the Personal Injuries (Emergency Provisions) Act, 1939. The claimant was a war reserve constable and on the day in question it was his duty to present himself at the police station at 5.45 a.m. To do that he was cycling from his home to the police station, and at about 5.40 a.m., he was struck by the overhanging twig of a tree, with the

result that he lost the sight of one eye. He now claims that that injury should be regarded as a war service injury within the terms of s. 8 (1).

Section 8 (1) provides:

A “ ‘ war service injury ’ in relation to a civil defence volunteer, means any physical injury which the Minister certifies to have been shown to his satisfaction to have arisen out of and in the course of the performance by the volunteer of his duties as a member of the civil defence organisation to which he belonged at the time when the injury was sustained . . . ”

B There is no question here that the claimant was a member of a civil defence organisation within the meaning of this section, and the only question is whether the injury that he sustained when he was cycling to his duty on this occasion was a war service injury in that it arose out of and in the course of the performance by the claimant of his duties as a member of the particular civil defence organisation to which he belonged.

C The wording in the Act of 1939 follows closely the wording of s. 1 (1) of the Workmen's Compensation Act, 1925. The difference is that in the Act of 1925 an accident is referred to as one which arises out of and in the course of the employment of the workman, whereas the Act of 1939 refers to an injury which has arisen “ out of and in the course of the performance by the volunteer of his duties.” It has been held in a large number of cases under the Workmen's Compensation Acts that an accident which occurs to a workman on the way to his work is not an accident arising out of and in the course of his employment unless for some reason it is a part of the workman's duty to travel to his work in the particular way in which he was travelling at the time he was injured.

D In the present case it is unquestioned that the claimant was proceeding to his duty by a method of his own choosing. In these circumstances, on the face of it, he was not doing something which he was bound to do because of the terms of his employment. It is said, however, that there must be a distinction in this case because a constable is still on duty at any time although it is outside his hours of duty, and, therefore, any accident which happens to him must be an accident arising out of and in the course of the performance of his duties. I cannot accept that view. When the prescribed hours of duty of a constable have come to an end and an emergency arises it is his duty to attend to that emergency, and at that moment he is on duty in the strict and narrow sense which would bring him within the meaning of s. 8 (1) of the Act of 1939, but until such an emergency arises he is in the position of any other civilian. In the present case, F therefore, I am of opinion that this accident could not be said to have arisen in the course of the performance of any duty which the claimant had to perform as a member of the civil defence organisation, and I find it impossible to say that the tribunal have erred in law in coming to the decision to which they have.

Appeal dismissed.

G Solicitors: *Cutross & Trelawny* (for the claimant); *Treasury Solicitor* (for the Minister of Pensions).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

NOTE.

MURRAY AND ANOTHER v. HARRINGAY ARENA, LTD.

[COURT OF APPEAL (Cohen, Singleton and Morris, L.J.J.), June 5, 6, 7, 15, 1951.]

Negligence—Child—Sport—Ice-hockey—Child spectator injured by puck—Implied contract—Reasonable care for safety—Foreseeable danger incident to entertainment.

APPEAL by the plaintiffs from an order of ORMEROD, J., dated Dec. 20, 1950, whereby he gave judgment for the defendants in a claim for damages for personal injuries.

On Nov. 20, 1948, David Charles Murray, who was then six years old, was taken by his parents to the defendants' ice rink to watch a hockey match. They occupied front seats on one side of the rink, and during the game the boy was hit in the eye by the puck. The boy, through his father as next friend, and the father, on his own behalf, brought an action against the defendants as occupiers of the rink and promoters for reward of ice-hockey matches, alleging negligence and breach of an implied term in the contract that the arena was as safe as care and skill could make it. Around the rink was a wooden barrier three feet, eight inches, high, and there was no protection above this barrier for spectators at the sides of the rink. Behind each goal there was a netting five or six feet above the barrier. There was evidence that from time to time the puck went over the barrier at the side, but that it was not the practice to provide protection there because of the interference with the view of the spectators. There was no evidence to show that a serious accident to a spectator had ever occurred before. ORMEROD, J., found that the risk of the puck going over the side was not an unusual danger and that the principle in *Indermaur v. Dames* (1) did not apply. He further found that there was no negligence by the defendants nor a breach of an implied term in the contract, that there was no failure to take ordinary precautions, and that the plaintiffs voluntarily undertook the risk of accident.

Cases referred to:

- (1) *Indermaur v. Dames*, (1886), L.R. 1 C.P. 274; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* (1867) L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 36 Digest 35, 208.
- (2) *Hall v. Brooklands Auto-Racing Club*, [1933] 1 K.B. 205; 101 L.J.K.B. 679; 147 L.T. 404; Digest Supp.
- (3) *Stanley v. Powell*, [1891] 1 Q.B. 86; 60 L.J.Q.B. 52; 63 L.T. 809; 55 J.P. 327; 36 Digest 104, 698.
- (4) *Cox v. Coulson*, [1916] 2 K.B. 177; 85 L.J.K.B. 1081; 114 L.T. 599; 36 Digest 40, 242.
- (5) *Sheehan v. Dreamland, Margate, Ltd.*, (1923), 40 T.L.R. 155; 36 Digest 40, 243.
- (6) *Mersey Docks Trustees v. Gibbs. Same v. Penhallow*, (1866), L.R. 1 H.L. 93; 35 L.J.Ex. 225; 14 L.T. 677; 30 J.P. 467; 11 E.R. 1500; 36 Digest 19, 85.

Scott Henderson, K.C., and *H. G. Garland* for the plaintiffs.
Berryman, K.C., and *Marven Everett* for the defendants.

Cur. adv. vult.

June 15. SINGLETON, L.J., read a judgment in which he said: I regard it as clear from the authorities that the implied term is not that the occupiers shall guard against every known risk. There are some dangers which every reasonable spectator foresees and of which he takes the risk. It may strike one as a little hard that this should apply in the case of a six years old boy, but, in considering liability under an implied term in this contract, it would not be right to introduce a wider term because one of the parties is a youth. The implied term is to take

reasonable care. In measuring that one must have regard to the reasonable man (or spectator), and the duty arising under it does not involve an obligation to protect against a danger incident to the entertainment which any reasonable spectator foresees and of which he takes the risk: see *dictum* of SCRUTTON, L.J., ([1933] 1 K.B. 214) in *Hall v. Brooklands Auto-Racing Club* (2) and the footnote in *Stanley v. Powell* (3) ([1891] 1 Q.B. 86). I am in favour of dismissing the appeal on two grounds: (i) It was not proved to the satisfaction of the trial judge that the defendants were negligent or that they failed to do anything which they were under any obligation to do, and there is nothing which would justify this court in interfering with that finding. (ii) The injury sustained by the boy resulted from a danger incident to the game of which spectators took the risk.

COHEN and MORRIS, L.JJ. concurred.

Appeal dismissed.

Solicitors: *Bishop & Cooke* (for the plaintiffs); *Gardiner & Co.* (for the defendants).

J.D.P.

Re LOVE. *Ex parte* OFFICIAL RECEIVER (TRUSTEE)
v. KINGSTON-UPON-THAMES COUNTY COURT REGISTRAR.

[CHANCERY DIVISION (Danckwerts, J.), June 11, 18, 1951.]

Bankruptcy—Execution—Relation back of trustee's title—Execution completed before date of receiving order, and before notice of presentation of bankruptcy petition or of act of bankruptcy—Bankruptcy Act, 1914 (c. 59), s. 37 (1), s. 40 (1).

On Sept. 8, 1949, the bankrupt committed an act of bankruptcy by failing to comply with the requirements of a bankruptcy notice. On Oct. 4, a county court ordered the bankrupt to pay a sum of £10 as fines imposed on him for contempt of court. On Nov. 4, the registrar of the county court, as high bailiff, seized the bankrupt's household furniture, pursuant to warrants of execution dated Oct. 17. On Nov. 11, 1949, a bankruptcy petition was presented against the bankrupt in the High Court. On Nov. 15 the registrar sold the furniture for £101 15s. out of which he retained the amount of the fines of £10, under the County Courts Act, 1934, s. 170, no notice of the presentation of the bankruptcy petition or of an act of bankruptcy having then been received by him. On Dec. 14 a receiving order was made against the bankrupt, and on Jan. 5, 1950, he was adjudged bankrupt. The official receiver, as trustee of the property of the bankrupt, now claimed the repayment of the sum of £10 from the registrar on the ground that, as, under the Bankruptcy Act, 1914, s. 37 (1), his title related back to Sept. 8, 1949, when the act of bankruptcy was committed, the goods seized were vested in him and not in the bankrupt at the date of the seizure.

HELD: a creditor who had received payment by virtue of an execution duly completed within the meaning of s. 40 (1) and s. 40 (2) of the Act of 1914, was entitled to rely on the provisions of that section, which was not a wholly restrictive one, and, if he had completed the execution by seizure and sale before notice of the presentation of a bankruptcy petition or of an act of bankruptcy, he was entitled to retain the money which he had received and was not affected by the provisions of s. 37 and s. 38 of the Act, and, therefore, the official receiver was not entitled to demand payment of the £10 received by the registrar.

AS TO RIGHTS OF CREDITOR UNDER EXECUTION, see HALSBURY, Hailsham Edn., Vol. 2, pp. 355-357, paras. 479, 480; and FOR CASES, see DIGEST, Vol. 5, pp. 808-813, Nos. 6902-6923.

Cases referred to:

- (1) *Re Thomas. Ex p. Woods & Forests Comrs.*, (1888), 21 Q.B.D. 380; 59 L.T. 447; *sub nom. Re Trotter. Ex p. Thomas*, 57 L.J.Q.B. 574; 5 Digest 945, 7747.
- (2) *Re Webb (H. J.) & Co. (Smithfield, London), Ltd.*, [1922] 2 Ch. 369; 91 L.J.Ch. 741; 127 L.T. 373, *affd. H.L.*, *sub nom. Food Controller v. Cork*, [1923] A.C. 647; 92 L.J.Ch. 587; 130 L.T. 1; 10 Digest 999, 6936.
- (3) *Re Andrew. Ex p. Official Receiver (Trustee) (No. 2)*, [1937] Ch. 122; 106 L.J.Ch. 195; *sub nom. Re Andrew. Official Receiver v. Standard Range & Foundry Co., Ltd. (No. 2)*, [1936] 3 All E.R. 450; 155 L.T. 586; Digest Supp.
- (4) *Re Godwin. Ex p. Trustee v. Morris. Re Godwin. Ex p. Trustee v. British Reinforced Concrete Engineering Co.*, [1935] Ch. 213; 104 L.J.Ch. 189; 152 L.T. 392; Digest Supp.
- (5) *Re Samuels. Ex p. Trustee v. Tee*, [1935] Ch. 341; 104 L.J.Ch. 197; 152 L.T. 454; Digest Supp.
- (6) *Re O'Shea's Settlement. Courage v. O'Shea*, [1895] 1 Ch. 325; 64 L.J.Ch. 263; 71 L.T. 827; 5 Digest 925, 7573.
- (7) *Wild v. Southwood*, [1897] 1 Q.B. 317; 66 L.J.Q.B. 166; 75 L.T. 388; 5 Digest 914, 7479.
- (8) *Re Pollard. Ex p. Pollard*, [1903] 2 K.B. 41; 72 L.J.K.B. 509; 88 L.T. 652; 5 Digest 815, 6933.

MOTION for (a) a declaration that on Nov. 4, 1949, the date of an execution levied by the registrar of Kingston-upon-Thames County Court, the goods on which execution was levied were vested in the official receiver as trustee of the property of the bankrupt, and (b) payment of the sum of £10 retained by the registrar from the sale of the goods as the amount of fines imposed on the bankrupt by the county court, on Oct. 4, 1949, for contempt of court. It was contended by the official receiver that, as his title as trustee related back to an act of bankruptcy committed by the bankrupt on Sept. 8, 1949, the goods seized were vested in him and not in the bankrupt at the date of seizure. The facts appear in the judgment.

Muir Hunter for the official receiver.

Denys B. Buckley for the registrar.

Cur. adv. vult.

June 18. **DANCKWERTS, J.**, read the following judgment. This is an application by the official receiver, as the trustee of the property of the bankrupt, John William Love. The circumstances in which it is made are as follows. On Sept. 8, 1949, an act of bankruptcy was committed by failing to comply with a bankruptcy notice. A petition was presented on Nov. 11, 1949. A receiving order was made on Dec. 14, 1949, and on Jan. 5, 1950, the bankrupt was adjudged a bankrupt. All this took place in the High Court. On Oct. 10, 1949, judgment was entered in the Kingston-upon-Thames County Court in favour of the Minister of National Insurance against the bankrupt for the sum of £60 7s. 3d., representing arrears of contributions due from the bankrupt under the relevant Acts, and at the same time a warrant of execution was granted to the Minister, the costs of such execution being £1 6s., making a total sum of £61 13s. 3d. Earlier, on Oct. 4, 1949, the bankrupt had been ordered to pay a sum of £10, being the amount of fines imposed on him by the county court for contempt of court. The registrar of the Kingston-upon-Thames County Court is also the high bailiff, and so the officer in charge of execution. Pursuant to warrants of execution, dated Oct. 17, 1949, the registrar, on Nov. 4, 1949, seized the bankrupt's household furniture, and on Nov. 15, 1949, he sold the furniture for £101 15s. Out of this sum the amount of the judgment debt was paid to the judgment creditor and the amount of the fines of £10 was retained by the registrar by virtue of

the County Courts Act, 1934, s. 170. When the official receiver demanded repayment from the Minister of the sum of £61 13s. 3d. received by him the Minister repaid the amount. The registrar, however, has refused to repay the sum of £10.

A In these circumstances the official receiver claims a declaration that at the date of the execution on Nov. 4, 1949, the goods and chattels seized were vested in him as the trustee of the property of the bankrupt, and payment of the said sum of £10. The claim of the official receiver is based on the proposition that by virtue of the Bankruptcy Act, 1914, s. 37 and s. 38; and the relation back of the trustee's title to the act of bankruptcy committed on Sept. 8, 1949, on which the receiving order was made on Dec. 14, 1949, the goods and chattels which were seized were the property of the trustee and not of the bankrupt at the date of the seizure. It will be observed that the date of the seizure (Nov. 4, 1949, under
B warrants dated Oct. 17, 1949) was after the date of the act of bankruptcy, but the execution was completed by seizure and sale before the date of the receiving order (Dec. 14, 1949). Assuming that the fines amounting to £10 represent debts which were due to the Crown, a question which might arise on the present application would be whether, in any case, the provisions of s. 37 and s. 38 are effective against the Crown. However, counsel for the registrar, while wishing to keep
C the point open in case of an appeal, was not prepared to press it before me, in view of the decision in *Re Thomas. Ex p. Woods & Forests Comrs.* (1). Counsel for the official receiver would have been prepared to argue that the matter is concluded in the Court of Appeal by *Re Webb (H. J.) & Co. (Smithfield, London), Ltd.* (2) (which is, of course, a company case), and he relied also on the provisions of the Crown Proceedings Act, 1947, s. 26 (1). In view of the attitude
D of counsel for the registrar, I need not consider this question.

The Sale of Goods Act, 1893, s. 26 (1) settles the time when the goods of a judgment debtor are bound by a writ of execution, viz., "... as from the time when the writ is delivered to the sheriff to be executed." By s. 26 (2):

"... the term 'sheriff' includes any officer charged with the enforcement of a writ of execution."

E In the present case the registrar, as the high bailiff, is the officer so charged, and the material date appears to be Oct. 17, 1949. The Bankruptcy Act, 1914, s. 40, is the first in a group of sections bearing the title "Effect of bankruptcy on antecedent and other transactions." The provisions of this section are as follows:

F "(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. (2) For the
G purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver. (3) An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods
H in good faith under a sale by the sheriff shall, in all cases, acquire a good title to them against the trustee in bankruptcy."

No question of notice of the presentation of any bankruptcy petition or of the commission of any available act of bankruptcy arises in the present case. On the actual facts of the present case the terms of s. 40 are completely fulfilled. The execution against the goods of the debtor was completed by seizure and sale of the goods on Nov. 15, 1949, before the date of the receiving order, which was made on Dec. 14, 1949. Moreover, it has been held by the Court of Appeal in

Re Andrew. Ex p. Official Receiver (Trustee) (No. 2) (3), approving *Re Godwin. Ex p. Trustee v. Morris. Re Godwin. Ex p. Trustee v. British Reinforced Concrete Engineering Co.* (4) and *Re Samuels. Ex p. Trustee v. Tee* (5), that the words "the benefit of the execution" in s. 40 (1) do not refer to moneys actually received by the judgment creditor in whole or partial satisfaction of his debt, but refer to the charge which a judgment creditor obtains by the issue of the execution, so that to the extent that a judgment creditor has received payment of his debt (whether in part or in whole) there is nothing which can be disturbed by the provisions of s. 40. In *Re Andrew* (3), however, the payments which the judgment creditor received were made before May 28, 1935, when the debtor committed an act of bankruptcy (of which it would appear that the judgment creditor had notice), and the possible effect of the relation back of the trustee's title was not considered by the Court of Appeal.

There is no doubt that, in actual fact, at the dates of seizure and sale in the course of the execution in the present case the goods were the property of the debtor, but counsel for the official receiver contended that by reason of the provisions of s. 37 the goods must be treated in law as having been at that date the property of the official receiver (as the trustee in bankruptcy), and so there was a wrongful seizure and sale (notwithstanding the terms of s. 40), and he further contended that this result is required by the policy of the Bankruptcy Acts which demands an equal division of the bankrupt's property among all his creditors (unless otherwise specifically provided) through the trustee, in accordance with the terms of s. 18 (1) of the Act, in the event of adjudication. This result is achieved by applying the provisions of s. 38 (1) and s. 37 (1) of the Act. Section 38 (1) provides that "the property of the bankrupt divisible amongst his creditors" shall not comprise certain things (which are immaterial for the purposes of the present case) but shall comprise

"(a) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge . . ."

Section 37 (1) provides:

"The bankruptcy of a debtor . . . shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition . . ."

Certainly as long ago as the Act of 1571 (13 Eliz., c. 7) the principle of preventing one creditor achieving an advantage over another creditor of an insolvent trader appears in the bankruptcy legislation. Under the Act of 1571, in theory at any rate, a trader from the moment of committing an act of bankruptcy was deprived of the power of free disposition of his property to the prejudice of his creditors. Later Acts have tended to limit the period during which a bankruptcy might upset prior events, and the relation back for a period of twelve months provided for in the Bankruptcy Act, 1869, s. 11, seems to have been inconveniently long. It was also found necessary to introduce certain protective provisions to save genuine transactions in the ordinary course of business, of which s. 45 of the Act of 1914 is an example. One of the matters which has been canvassed is whether s. 40 of the Act of 1914 is such a protective section or is merely "restrictive," whatever that may mean. The provisions of s. 40, s. 41 and s. 45 of the Act of 1914 correspond to s. 45, s. 46 and s. 49, respectively, of the Bankruptcy Act, 1883. Exactly similar provisions were not contained in the Act of 1825 (6 Geo. 4, c. 16) or the Act of 1869, but s. 95 of the Act of 1869 provided that certain "transactions," including executions

“ . . . executed in good faith by seizure and sale before the date of the order of adjudication . . . ”

A and without notice of an act of bankruptcy should “ be valid, notwithstanding any prior act of bankruptcy.” This has been described as a “ protective provision ” [the side-note to the section being “ Protection of certain transactions entered into by or in relation to the property of the bankrupt ”], and, a similar provision having been omitted from the Act of 1883, it has been suggested that the provisions of the Act of 1883 corresponding to s. 40 of the Act of 1914 indicate a change of policy.

B My attention was called to certain decisions in regard to the provisions of the earlier Acts. In *Re O'Shea's Settlement* (6) the Court of Appeal decided that a charging order under the Judgments Act, 1838, s. 14, on stock or shares or money in court belonging to a judgment debtor was not a “ transaction ” protected by the Bankruptcy Act, 1883, s. 49 (which corresponds to s. 45 of the Act of 1914). The court seem to have thought that an execution could not be a “ transaction ” for the purposes of the section, but it appears to have been overlooked that in s. 95 of the Act of 1869 the legislature treated an execution as being within the term “ transaction by and in relation to the property of a bankrupt.” Section 45 of the Act of 1883 (which corresponds to s. 40 of the Act of 1914) was not relied on in that case. In *Wild v. Southwood* (7) VAUGHAN WILLIAMS, J., applied the decision of the Court of Appeal in *Re O'Shea's Settlement* (6) to the case of a charging order under the Partnership Act, 1890, s. 23. So far as these two cases depend on the meaning of “ transaction ” in s. 49 of the Act of 1883, they do not assist very much in regard to the provisions of s. 40 of the Act of 1914. VAUGHAN WILLIAMS, J., however, also expressed his views in regard to s. 45 of the Act of 1883 (corresponding to s. 40 of the Act of 1914) which he described as “ a restrictive section,” as compared with s. 49 of the Act of 1883 (s. 45 of the Act of 1914), which he referred to as “ the protective section.” In the course of his judgment, VAUGHAN WILLIAMS, J., said ([1897] 1 Q.B. 319):

E “ What is the right of the execution creditor? His right is to seize the goods or property of the bankrupt, and to levy execution thereon. He has no right to seize or levy execution on the property of anyone else. Now, at the date when the first step towards getting execution, or anything in the nature of execution, was taken, was the interest of the bankrupt in the partnership property his property or not? If it was his property, the execution creditor had a right to go against it; if it was not, the creditor had no such right. The first step towards obtaining the charging order was the taking out of the summons on Apr. 20, 1896, and at that time the bankrupt's interest in the partnership had ceased to be his interest. It had vested in the official receiver, and became the property of the trustee in bankruptcy in the events which happened. This law of relation back, which makes the title of the trustee vest as from a date antecedent to the transaction or event which took place without any petition in bankruptcy having occurred or a receiving order having been made, operates no doubt very hardly in many cases, and therefore various Acts of Parliament have contained protective sections to relieve those persons who would be injured by the stringency of that law. Apart from those protective sections, it is plain that this execution cannot hold good against the trustee in bankruptcy whose title relates back to a period anterior to it.”

I The learned judge then considered whether the charging order came within the protective provisions of the Bankruptcy Act, 1883, s. 49 (corresponding to s. 45 of the Act of 1914). I was referred to *Re Pollard. Ex p. Pollard* (8), but it seems to me that it was merely decided in that case that, on the facts relating to a writ of sequestration, there had been nothing equivalent to “ seizure and sale ” at the

material date for the purposes of s. 45 of the Act of 1883 (corresponding to s. 40 of the Act of 1914). I do not find that case of assistance, therefore.

In substance, I think that the argument of counsel for the official receiver is based on the proposition put forward by VAUGHAN WILLIAMS, J., in *Wild v. Southwood* (7), that, by virtue of the rules as to the property of the bankrupt divisible among his creditors in bankruptcy relating back to "the commencement of the bankruptcy," the property seized in execution may turn out to have been the property of the trustee in bankruptcy and not of the bankrupt at the material date. It is true that, as pointed out by counsel for the registrar, this position depends on a fiction superimposed on the true facts by subsequent events, viz., the receiving order and the adjudication in bankruptcy, but if the provisions of the bankruptcy law require this operation, then it must be applied, notwithstanding the hardship which may thereby be caused. It is a position which is created by the artificial provisions of the Bankruptcy Acts. The process described by VAUGHAN WILLIAMS, J., in *Wild v. Southwood* (7) seems to me to be the result of the provisions now contained in s. 38 and s. 37 of the Bankruptcy Act, 1914. I have difficulty, however, in following the argument that s. 45 of the Act of 1883 was, and s. 40 of the Act of 1914 is, wholly restrictive and not at all protective. And why should the conclusion be drawn (as apparently it has been drawn) that the Act of 1883 was intended in this respect radically to alter the position as contained in s. 95 of the Bankruptcy Act, 1869, which gathered together several provisions in a manner which was evidently intended to protect the transactions therein mentioned against the rigour of the bankruptcy law?

I do not reach this conclusion. I think that the Act of 1883 was not intended radically to alter the law but was a re-grouping of the relevant provisions. Similarly, in the Act of 1914, s. 40 is one of a group of sections bearing the description "Effect of bankruptcy on antecedent and other transactions". It will be observed, incidentally, that the word "transaction" is used in the Act of 1914 to describe the events to be mentioned in all these sections. The words "Restriction of rights of creditor under execution or attachment" are, it is true, to be found in a side-note to s. 40. Unless, however, s. 40 is intended to be a declaration of the position of a judgment creditor who has levied execution and not merely a restrictive provision, it seems to me that it is calculated to mislead judgment creditors in an unfortunate manner. The normal and reasonable inference, surely, is that, if the judgment creditor has completed the execution by seizure and sale without any notice of an act of bankruptcy, he is then safe from the risk of losing his money by reason of a subsequent bankruptcy on the part of the debtor. It appears to me most unfortunate if the result of the general provisions found earlier in the Act is to deprive a judgment creditor, whose case falls exactly within the terms of s. 40 in regard to a completed execution, of the money which he has duly received. I do not think that I am compelled to reach such a result. In my view, s. 40 is not wholly restrictive and a creditor who has received payment by virtue of an execution duly completed, as mentioned in s. 40 of the Act, is entitled to rely on the provisions of that section and is not affected by the general provisions of s. 37 and s. 38 of the Act. In my view, this gives a desirable coherency to the provisions of the Bankruptcy Act, 1914, in accordance with the description which precedes s. 40 to s. 47 of the Act. Accordingly, the official receiver is not entitled to demand payment of the sum of £10 received by the registrar, and the application fails.

Order accordingly.

Solicitors: *Solicitor, Board of Trade* (for the official receiver); *Treasury Solicitor* (for the registrar).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

NOTE.**Re RELIANCE PROPERTIES, LTD. WAYGOOD, OTIS & CO.,
LTD. v. RELIANCE PROPERTIES, LTD.**

[COURT OF APPEAL (Sir Raymond Evershed, M.R., and Jenkins, L.J.), June 11, 1951.]

A *Court of Appeal—Appeal against order for compulsory winding-up of company—
To be entered in interlocutory appeals list.*

APPEAL by a company against an order for its compulsory winding-up made by VAISEY, J., on Apr. 16, 1951. The Court of Appeal constituted to hear the appeal had only two members, and the question arose whether it had jurisdiction.

B Cases referred to:

- (1) *Re Naval, Military & Civil Service Co-operative Society of South Africa, Ltd.*, [1903] W.N. 120; Digest, Practice, 796, 3594.
- (2) *Re Globe General Insurance Co.*, (1884), 29 Sol. Jo. 66.

P. H. B. W. Foster for the company.

C *Winterbotham* for the petitioning creditor.

SIR RAYMOND EVERSLED, M.R., said that by R.S.C., Ord. 58, r. 9, it was provided that in matters of this kind the time limit for the appeal should be the same as the time limit for an appeal from an interlocutory order under r. 15. Clearly the language of that rule proceeded on the assumption that an appeal from a winding-up order was an appeal from a final order, though it recognised the need for despatch. It would be difficult to think of any order made by the court which in substance or character was more final than a winding-up order. So far as the court was concerned, it was a final direction in the proceedings. When *Re Naval, Military & Civil Service Co-operative Society of South Africa, Ltd.* (1) was before the court in 1903 on an application for security for costs on an appeal from a winding-up order, VAUGHAN WILLIAMS, L.J., who was presiding, observed that it would be convenient that appeals from compulsory winding-up orders should be treated as interlocutory, and not as final, appeals, but he (His Lordship) did not understand the learned lord justice to have expressed the view that for all purposes they should be treated as interlocutory appeals. He appeared to mean that for the purpose of bringing them before the Court of Appeal they should be dealt with as though they were, though they might well not in fact be, interlocutory appeals. It was most desirable that that should be so, and in order that effect might be given to that observation His Lordship (SIR RAYMOND EVERSLED, M.R.) stated that appeals from orders on winding-up petitions should be entered in the interlocutory appeals list. He made that direction in order that they might come quickly before the court and not render necessary (as happened in this case) special applications to the court.

G The attention of the court has been drawn to a short note in the SOLICITORS' JOURNAL of *Re Globe General Insurance Co.* (2) before BOWEN, L.J., and FRY, L.J. The court then stated that, although the time for appealing was limited by Ord. 58, r. 9, the appeal was final and not interlocutory and must, therefore, be entered in the final list. But in the circumstances already mentioned, and having regard to the later view expressed by VAUGHAN WILLIAMS, L.J., the direction which he

H (His Lordship) had already given should henceforth be adopted.

Solicitors: *Thompson & Co.* (for the company); *Dennison, Horne & Co.* (for the petitioning creditor).

F.G.

Re KLEINWORT'S SETTLEMENT TRUSTS. WESTMINSTER
BANK, LTD., AND OTHERS *v.* BENNETT AND OTHERS.

(CHANCERY DIVISION (Vaisey, J.), June 14, 15, 1951.)

Settlement—Capital or income—Tenant for life and remainderman—Apportionment—Capital profits dividend—Profit on sale of company's assets—Company to continue as investment and holding company.

Company—Capital profits dividend—Capital or income—Assets of company acquired by State—Profit on sale—Reconstruction of company as investment and holding company—Receipt of dividend by settlement trustees.

On Nov. 3, 1944, the trustees of a settlement, acting within their powers, invested £8,000 of the trust fund in £2,000 ordinary stock of Thomas Tilling, Ltd. On Mar. 17, 1949, Thomas Tilling, Ltd., passed a resolution for the distribution of £20,600,000 British Transport three per cent. guaranteed stock as a special capital profits dividend on its ordinary stock, £5 of Transport stock being distributed to the holders of each £1 of the ordinary stock in Thomas Tilling, Ltd. Pursuant to that resolution, the trustees received £10,000 British Transport stock, and they now sought directions whether the said holding ought to be dealt with as capital or income of the trust fund.

Held: the £10,000 British Transport stock was income belonging to the tenants for life under the settlement, and, although there might well be jurisdiction in a court of equity to apportion the holding between capital and income in special circumstances, there were no circumstances in the present case to warrant the exercise of that jurisdiction.

Re Sechiari ([1950] 1 All E.R. 417), applied.

Seemle that the equitable jurisdiction to apportion an accretion of the nature of the £10,000 British Transport stock between capital and income may exist only where the trustees have been guilty of a breach of trust resulting in the accretion.

AS TO DISTRIBUTION BY COMPANY OF PROFITS AS DIVIDENDS OR CAPITAL, see HALSBURY, Hailsham Edn., Vol. 29, pp. 647-650, paras. 929, 930; and FOR CASES, see DIGEST, Vol. 40, pp. 662-666, Nos. 1999-2042.

Cases referred to:

- (1) *Re Sechiari*, [1950] 1 All E.R. 417.
- (2) *Re Doughty*, [1947] 1 All E.R. 207; [1947] Ch. 263; 176 L.T. 173; 2nd Digest Supp.
- (3) *Re Harrison's Will Trusts*, [1949] Ch. 678; 2nd Digest Supp.
- (4) *Re Ward's Will Trusts*, [1936] 2 All E.R. 773; [1936] Ch. 704; 105 L.J.Ch. 315; 155 L.T. 346; Digest Supp.

ADJOURNED SUMMONS for directions to the trustees of a settlement whether they should distribute £10,000 three per cent. guaranteed British Transport stock received by them as holders of £2,000 stock of Thomas Tilling, Ltd., to the persons entitled to the income of the trust fund or whether they should retain any and if so what part of the said stock as capital.

Thomas Tilling, Ltd., had considerable interests in passenger road transport and road haulage undertakings. As a result of the Transport Act, 1947, these interests were sold by the company to the British Transport Commission for £24,800,000 which was satisfied by the allotment to the company of British Transport three per cent. guaranteed stock at 101 per cent. At an extraordinary general meeting of the company its memorandum was altered so that the company became entirely an investment and holding company, and at the same meeting the company resolved to pay a special capital profits dividend, which resulted in the receipt by the trustees of the £10,000 three per cent. guaranteed British Transport stock above mentioned.

Jopling for the plaintiffs, the trustees of the settlement.

J. A. Brightman for the first to seventh defendants, the tenants for life.

W. F. Waite for the remaindermen and infant defendants.

VAISEY, J.: This is a summons in an action entitled in the matter of three settlements, and it concerns the second of those settlements, which is dated Jan. 12, 1927. The plaintiffs are the trustees of the settlement. There is a large number of defendants, of whom I need only say that some of them are interested in income as tenants for life under the trusts of the settlement, and others are interested in capital under those trusts in remainder. By an order of *UTHWATT, J.*, made in this action on Dec. 4, 1942, a scheme was sanctioned whereby, among other things, the range of investments authorised by each of the three settlements was enlarged so as to include (among other things) the purchase of the ordinary stock of any company quoted or dealt with on the London Stock Exchange. In accordance with the trusts of the said settlement as varied by the said scheme, the trustees, on Nov. 3, 1944, invested £6,000, subject to the trusts of the said settlement, in the purchase of £2,000 ordinary stock of *Thomas Tilling, Ltd.*, at the price of £3 for each £1 of such stock. On Mar. 17, 1949, *Thomas Tilling, Ltd.*, passed a resolution for the distribution of £20,600,000 of British Transport three per cent. guaranteed stock as a special capital profits dividend on its ordinary stock, £5 of such Transport stock being distributed to the holders of each £1 of the Tilling stock held by them. Pursuant to such resolution, the plaintiffs as trustees received £10,000 of Transport stock. The summons asks me to give directions whether the plaintiffs should distribute the £10,000 Transport stock to the persons entitled to the income of the trust fund, or whether they should retain any, and, if so, what part, of the Transport stock as capital.

On Feb. 7, 1950, in *Re Sechiari* (1), *ROMER, J.*, declared, in circumstances indistinguishable from the present case, that another sum of this Transport stock received by trustees in respect of a sum of Tilling stock forming part of a settled fund was to be treated, not as an accretion to capital but as dividend or income, but the order was expressed to be made without prejudice to any question whether, in the circumstances of the execution of the trust, the court had, or would exercise, any jurisdiction to apportion the dividend on equitable principles between income and capital. If I am not actually bound by that decision I am in full agreement with it, and it is not, and cannot be, disputed that this sum of £10,000 Transport stock has to be treated as dividend or income belonging to the life tenants, and the only question for my decision is as to the suggested jurisdiction to apportion which was adverted to in the concluding words of the order of *ROMER, J.*

The life tenants here do not, I think, dispute that such a jurisdiction exists, or may exist, and that it could be exercised by the court in proper circumstances. It may be so, though I am not entirely satisfied that the jurisdiction does not depend on and arise out of the power and duty of the court to remedy a breach of trust. By way of example, and only by way of example, if the trustees had acquired the Tilling stock on the eve of, or within a short time before, the resolution of Mar. 17, 1949, at the instigation of a life tenant, or expressly with the object of benefiting a life tenant, or for some other ulterior motive, the court might well consider that an apportionment should be made, but that is not this case. It is, no doubt, a question of degree. The disparity between the amount of the original capital of the Tilling stock and the amount of the Transport stock is certainly very striking, but it is not, in my judgment, such as by itself to justify the court's interference, in the circumstances.

It was pointed out in argument that the trustees might have sold the Tilling stock *cum* rights, or might have sold the rights, in either of which cases the proceeds would have been capital, and it was suggested that they ought to have sought the directions of the court whether it was their duty to adopt one or other of those courses for the benefit of capital, or, on the other hand, to remain,

as they did, passive, and accept the Transport stock for the benefit of income. It was further suggested that, if the directions of the court had been so sought, the trustees would have been ordered to arrange for half the Transport stock to go to capital and the other half to income, on the principle that equality is the best equity in the absence of any other measure. Finally, it was suggested that I ought to do now what I could have done then, and divide the Transport stock in equal shares between capital and income.

I am unable to accede to those suggestions in the present case. While it may well be that the suggested jurisdiction exists and while I do not doubt the power of the court to exercise it in suitable special circumstances—although, as I have said, it may be that interference by the court could only be justified where the trustees could be said to have committed some breach of trust consisting either of some action or inaction on their part—here, in my judgment, there are no special circumstances, and I cannot think that there is anything in the nature of a general rule that profits distributed, in whatever shape, as dividends, and belonging under well-settled principles to the tenant for life, must be subject to an apportionment for the benefit of capital. The cases which seem to me to govern the general principle applicable to this kind of income rights are *Re Doughty* (2), and *Re Harrison's Will Trusts* (3). These accretions to the normal income of the trust fund are sometimes metaphorically described as “windfalls,” and when they have left the parent tree I can see no principle for notionally replacing them on the boughs from which they have fallen. I direct the plaintiffs to deal with the Transport stock as part of the income of the trust funds of which the Tilling stock formed part.

Order accordingly.

Solicitors: *Theodore Goddard & Co.*, and *Deacons & Pritchards* (for all parties except the infant defendants); *Official Solicitor*.

[Reported by H. McL. MORRISON, Esq., *Barrister-at-Law*.]

PENTECOST AND ANOTHER v. LONDON DISTRICT AUDITOR AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Devlin, JJ.),
June 13, 14, 1951.]

Local Government—Audit—Surcharge—“Negligence”—Local Government Act, 1933 (c. 51), s. 228 (1) (d).

By the Local Government Act, 1933, s. 228 (1) “It shall be the duty of the district auditor at every audit held by him . . . (d) to surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred . . .”

In refusing to surcharge a local authority or their officers in respect of certain payments made under building contracts which had been objected to by ratepayers, the district auditor stated as his reasons that, though isolated instances of defective work had escaped the notice of the council's technical supervising officers, “they do not appear . . . to have been of an extent or of such frequent occurrence as to warrant my finding that, but for gross negligence on the part of the council's supervising officers, they would have been brought to light. The objections, therefore, fail.”

HELD: “negligence” in s. 228 (1) (d) of the Local Government Act, 1933, meant, not “gross negligence,” but negligence at common law, *i.e.*, a breach of duty causing loss; the district auditor was, therefore, wrong in holding that a finding of gross negligence was necessary before he could direct a surcharge; but, on the facts as found, there had been no negligence, and so the appeal against his decision must be dismissed.

Dicta of LORD O'BRIEN, C.J., in R. v. Browne ([1907] 2 I.R. 518), and of BRANSON, J., in *Davies v. Cowperthwaite* ([1938] 2 All E.R. 689), criticised.

AS TO THE DUTY OF THE DISTRICT AUDITOR, SURCHARGE FOR NEGLIGENCE, see HALSBURY, Hailsham Edn., Vol. 21, p. 223, para. 415; FOR THE LOCAL GOVERNMENT ACT, 1933, s. 228 (1) (d), see HALSBURY'S STATUTES, Second Edn., Vol. 14, p. 474.

A

EDITORIAL NOTE. By the Local Government Act, 1933, ss. 243 and 305, it is provided that Part X of the Act, which contains s. 228, shall extend to the administrative county of London.

Cases referred to:

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(1) *R. v. Browne*, [1907] 2 I.R. 505.

(2) *Davies v. Cowperthwaite*, [1938] 2 All E.R. 685; 159 L.T. 43; 102 J.P. 405; Digest Supp.

(3) *Overend & Gurney Co. v. Gibb*, (1872), L.R. 5 H.L. 480; 42 L.J.Ch. 67; 9 Digest 468, 3056.

(4) *Re Faure Electric Accumulator Co.*, (1888), 40 Ch.D. 141; 58 L.J.Ch. 48; 59 L.T. 918; 9 Digest 510, 3342.

C

APPEAL under s. 229 of the Local Government Act, 1933, against the decision of a district auditor refusing to surcharge for alleged negligence in connection with building contracts.

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The appellants, two ratepayers of the metropolitan borough of Wandsworth, were employed as painters by the borough council, and, while engaged on the inside painting of houses on council housing estates, they observed the work on the outside painting which was being carried out by contractors under contracts of a total value of £13,000. Considering that some of this work was not being properly done, they drew up a list of complaints and referred them to their trade union, which, on Oct. 24, 1949, made representations to the council. On Mar. 29, 1950, the council appointed a special sub-committee to investigate the matter.

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The sub-committee reported that the contracts had been completed substantially in accordance with their terms, but that the contractors should be called on to make good some defective work. The contractors made good the work, but on Jan. 3, 1951, the appellants, being still dissatisfied, appeared before the district auditor at the audit of the accounts for the year ending Mar. 31, 1950, and objected to items in the account on the ground that they were payments in

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respect of work either not done or improperly done by the contractors. They contended that, if the council had exercised proper supervision or if their technical employees, particularly the clerks of works, had not been guilty of lack of care, either the payments would not have been made or payments in respect of improper work would have been made by the contractors. After an adjournment to Jan. 11, 1951, when he heard evidence from officers of the council, the district

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auditor refused to surcharge the council or their officials responsible for passing the work and gave his reasons in writing in accordance with the requirements of s. 226 (2) of the Act of 1933. He found that, though there had been isolated instances of defective work which had escaped the notice of the council's technical supervising officers, they did not warrant a finding that they would have been brought to light but for gross negligence on the officers' part. The ratepayers

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now contended that the district auditor was wrong in law and applied the wrong test in arriving at his decision and conducted the audit without a proper regard for his duties.

Collard for the ratepayers.

Simes, K.C., and *A. H. Bray* for the district auditor.

M. Lyell for the borough council.

LORD GODDARD, C.J.: I will ask LYNSEY, J., to give the first judgment.

LYNSKEY, J., stated the facts and continued: It is urged, first of all, that in his decision the district auditor said that he was unable to surcharge unless he could find gross negligence on the part of either the council or on that of the officials concerned. It is true that he ends his decision by saying:

"After mature consideration of the evidence I have come to the conclusion that there have been isolated instances of defective work which have escaped the notice of the council's technical supervising officers, but they do not appear to me to have been of an extent or of such frequent occurrence as to warrant my finding that, but for gross negligence on the part of the council's supervising officers, they would have been brought to light. The objections, therefore, fail."

It is said on behalf of the present objectors that the district auditor applied the wrong test in that before he could surcharge the council or their officials he must find them guilty, not of gross negligence, but of negligence. The Local Government Act, 1933, sets out the duties of the district auditor in s. 228 (1), which provides, among other things:

"It shall be the duty of the district auditor at every audit held by him . . . (d) to surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred . . ."

A similarly worded section in an Irish Act was considered by the King's Bench Division in Ireland in *R. v. Browne* (1) where LORD O'BRIEN, C.J., took the view that, as the word "negligence" was used with the word "misconduct," the negligence must be construed as being something in the nature of negligence involving moral culpability, or, to use another phrase which is sometimes used, *crassa negligentia*, or gross negligence. The matter came before a Divisional Court in this country in *Davies v. Cowperthwaite* (2), where BRANSON, J., referred to *R. v. Browne* (1), and quoted, apparently with approval, the observations of LORD O'BRIEN. He said ([1938] 2 All E.R. 689):

"It is true that, in the Irish case of *R. v. Browne* (1), LORD O'BRIEN, C.J. ([1907] 2 I.R. 518), drew attention to the fact, in dealing with s. 20 of the Act of 1902, which, so far as is material, is in the same language as is the section with which we have to deal, that the word 'negligence,' being associated in the section with the word 'misconduct', involves, he thinks, some element of moral culpability. With great respect, I agree. I should not be prepared to hold that a member of a council, even though he were advised by the clerk that an act that he was proposing to do was not lawful, would necessarily be guilty of misconduct if, nevertheless, honestly believing that the advice which was given to him was erroneous, he proceeded to do that act."

In *Davies v. Cowperthwaite* (2) BRANSON, J., was not dealing with a case of negligence. He was dealing with a case of misconduct, and in so far as he approved or agreed with the observations of LORD O'BRIEN in *R. v. Browne* (1) his remarks were clearly *obiter dicta*, and, therefore, his view is not binding on us. The view I take of s. 228 (1) (d) is that it means what it says—that it is the duty of the district auditor

"to surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred."

Epithets applied to negligence, so far as the common law is concerned, are meaningless. Negligence is well known and well defined. A man is either guilty of negligence or he is not. Gross negligence is not known to the English common law so far as civil proceedings are concerned, and one has only to consider the phrase in criminal cases, particularly in cases of manslaughter. My view is that the word "negligence" in s. 228 (1) means negligence as used in its ordinary

sense, and that the district auditor used the wrong phrase when he referred to "gross negligence." He did so, apparently, because that was his interpretation of both the Irish case and the decision of BRANSON, J.

A If the district auditor's decision had stood with that finding alone, this court would have had to say that he had applied the wrong test in considering whether there had been loss occasioned by negligence or not, but, on reading the whole of his finding, it is seen that, although he says there was no evidence of gross negligence, his actual findings amount to a finding of no negligence on the part of either the officials of the council or the council. For that reason, although he has used the wrong phrase in framing his decision as to the test to be applied, if the correct test were applied, the result, in my view, would be the same. In those circumstances, I would dismiss the appeal.

B LORD GODDARD, C.J.: I agree. I desire to add a few words in regard to *Davies v. Cowperthwaite* (2) and the use of the expression "gross negligence" in the district auditor's finding. In *Davies v. Cowperthwaite* (2) the court relied on and approved the decision of the Irish Court in *R. v. Browne* (1). Both those cases dealt with misconduct and not with negligence. The allegation in both was that the council, having received certain advice, disregarded the advice and made the payments, and it was said that that was misconduct. If the court in Ireland thought that the same test should be applied to negligence as to misconduct, with all respect to them I disagree. The judgment in *Davies v. Cowperthwaite* (2) was, in fact, *obiter* in so far as it dealt with negligence. The use of the expression "gross negligence" is always misleading. Except in the one case when the law relating to manslaughter is being considered, the words "gross negligence" should never be used in connection with any matter to which the common law relates because negligence is a breach of duty, and, if there is a duty and there has been a breach of it which causes loss, it matters not whether it is a venial breach or a serious breach. A breach of a legal duty in any degree which causes loss, is actionable. The expression *crassa negligentia* has generally been used by equity judges in considering cases relating to the degree of duty owed by directors, and if such cases as *Overend & Gurney Co. v. Gibb* (3), and *Re Faure Electric Accumulator Co.* (4) are understood, I believe it will always be found that the court was dealing with the degree of duty which the directors owe, and where they have been held not liable, although it has been contended that they have been guilty of *crassa negligentia*, it is because the court has found the duty has not been broken. All that has been found against the director is that he has been guilty of an error of judgment or a want of judgment, which is not enough to hold him liable. Where it is a matter of the duty which is imposed, either by statute or by common law, any breach of the duty is enough, provided it causes loss, to impose liability. I can see no ground for reading into the clear words of this statute "by whose negligence or misconduct the loss or deficiency has been incurred," the word "gross," or holding that the section should be construed as referring to gross negligence and not to any degree of negligence. I agree that this appeal fails, because the only true interpretation of the district auditor's findings in this case is that there was no negligence.

H DEVLIN, J.: I agree, and I add a few words only because we are differing from the *obiter dicta* contained in *R. v. Browne* (1), and in the judgment in *Davies v. Cowperthwaite* (2) of BRANSON, J. (and HUMPHREYS, J., agreed with his judgment)—*obiter dicta* which, of course, have high persuasive authority. I think the construction of the statute must be approached by assuming that *prima facie* the word "negligence" is used in every statute in its ordinary common law meaning, and I am not satisfied that the mere fact that it has been used as an alternative to misconduct affects its meaning in any way, either by adding to it the epithet "gross," which my Lord has pointed out is one which should be discouraged in relation to the common law, or by adding to it any element of

moral culpability. Moreover, I should have thought that the wording of the statute itself suggests the contrary. Clearly, negligence is intended to be an alternative to misconduct, and if there is added to negligence the element of moral culpability, it is difficult to see what the distinction is between negligence with moral culpability and misconduct. I think, therefore, that the right construction of the word "negligence" is its ordinary meaning, which my Lord has assigned to it. It does not follow that every mistake or every want of judgment or every error of judgment on the part of any council or official will lead to a surcharge. The test will be that of negligence in its ordinary sense, which is commonly applied in these courts.

Appeal dismissed.

Solicitors: *Seifert, Sedley & Co.* (for the ratepayers); *Sharpe, Pritchard & Co.* (for the district auditor and the borough council).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

VITKOVICE HORNÍ A HUTNÍ TEZIRSTVO v. KORNER.

[HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord Oaksey, Lord Radcliffe and Lord Tucker), April 4, 5, 9, 10, June 20, 1951.]

Practice—Service—Service out of jurisdiction—Breach of contract committed within jurisdiction—Proof of breach—Contracts to pay pension and salary as consultant—Contracts made in Czechoslovakia—Monies alleged to be payable in England—R.S.C., Ord. 11, r. 1 (e)—R.S.C., Ord. 11, r. 4.

The respondent applied under R.S.C., Ord. 11, r. 1 (e), for leave to serve notice of a writ of summons out of the jurisdiction on the appellants, a Czechoslovak company, in an action in which he claimed sums of money alleged to be due to him under two agreements, on the ground that, under the contracts between the parties, the money was, in the events which had happened, payable in England. The respondent, formerly a Czechoslovakian, but now a naturalised British subject, had been a servant of the appellants and the agreements were made in Czechoslovakia, one being a pensions agreement and the other an agreement for his services as a consultant after his retirement on the understanding that he would reside in England, France or Switzerland. Shortly after his retirement in 1938, he came to live in England, where he had remained ever since. In support of the allegation that breaches of the contracts took place in England, evidence was given on behalf of the respondent that under Czechoslovakian law, failing contrary agreement, it was the duty of a debtor to pay his creditor wherever he might be residing. On May 15, 1946, an order was made granting the application, but on Nov. 22, 1948, on an application by the appellants under R.S.C., Ord. 12, r. 30, the order was set aside by a master whose decision was affirmed by the judge on June 28, 1949. The learned judge held that he had no jurisdiction to grant leave for service out of the jurisdiction because he was not satisfied that there had been a breach of either of the contracts within the jurisdiction. The respondent appealed from this decision and the Court of Appeal allowed his appeal and restored the order of May 15, 1946, with a qualification that, if it appeared that the claim under the service agreement was not payable within the jurisdiction, the respondent was not to obtain judgment on that head of claim.

HELD: (i) on an application for leave to serve notice of a writ of summons out of the jurisdiction under R.S.C., Ord. 11, r. 1 (e), the burden on the plaintiff, under R.S.C., Ord. 11, r. 4, was, not to "satisfy" the court that he was right, but to make it sufficiently to appear that the case was a proper one for service out of the jurisdiction, and for this purpose it was not

necessary to prove the fact beyond all reasonable doubt, provided that there was a good arguable case; the learned judge, therefore, was wrong in thinking that he had no jurisdiction to grant leave for service out of the jurisdiction because he was not "satisfied" that there had been a breach within the jurisdiction, and, as he did not purport to exercise his discretion, it was competent for the Court of Appeal to review his order and to exercise their discretion under Ord. 11, r. 4; and, on the evidence, the case was a proper one for leave to be given for service out of the jurisdiction.

Malik v. Narodni Banka Ceskoslovenska ([1946] 2 All E.R. 663), considered.

(ii) in granting leave to serve notice of a writ of summons out of the jurisdiction, it was not desirable for the court to introduce into the order an undertaking by the respondent, in the form used in *Thomas v. Hamilton (Dowager Duchess)* (1886) (17 Q.B.D. 592), such a practice being not within the spirit of R.S.C., Ord. 11.

Decision of the COURT OF APPEAL (sub nom. Korner v. Witkowitz Bergbau und Eisenhuetten Gewerkschaft) ([1950] 1 All E.R. 558), affirmed.

AS TO SERVICE OUT OF THE JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 26, pp. 31-35, paras. 44-50; and FOR CASES, see DIGEST, Practice, pp. 344-351, Nos. 610-666.

Cases referred to:

(1) *Malik v. Narodni Banka Ceskoslovenska*, [1946] 2 All E.R. 663; 176 L.T. 136; 2nd Digest Supp.

(2) *Chemische Fabrik vormals Sandoz v. Badische Anilin und Soda Fabriks*, (1904), 90 L.T. 733; Digest, Practice, 340, 577.

(3) *Thomas v. Hamilton (Duchess Dowager)*, (1886), 17 Q.B.D. 592; 55 L.J.Q.B. 555; 55 L.T. 385; Digest, Practice, 371, 816.

(4) *Hemelryck v. Lyall Shipbuilding Co.*, [1921] 1 A.C. 698; 125 L.T. 133; *sub nom. Van Hemelryck v. William Lyall Shipbuilding Co., Ltd.*, 90 L.J.P.C. 96; Digest, Practice, 345, 613.

(5) *The Hagen*, [1908] P. 189, 201; 77 L.J.P. 124; 98 L.T. 891; Digest, Practice, 340, 579.

(6) *The Fagernes*, [1927] P. 311, 312; 96 L.J.P. 183; 138 L.T. 30; Digest, Practice, 351, 667.

(7) *Tyne Improvement Comrs. v. Armement Anverso's Société Anonyme, The Brabo*, [1949] 1 All E.R. 294; [1949] A.C. 326; [1949] L.J.R. 435; 2nd Digest Supp.

APPEAL by the defendants, a Czechoslovak company, from an order of the Court of Appeal (BUCKNILL and SINGLETON, L.JJ., DENNING, L.J., *dissentiente*), dated Feb. 13, 1950, and reported [1950] 1 All E.R. 558, reversing an order of SLADE, J., made in chambers and dated June 28, 1949.

On May 15, 1946, the respondent obtained an *ex parte* order from Master MOSELEY, under R.S.C., Ord. 11, r. 1 (e), for leave to serve on the appellants notice of a writ of summons out of the jurisdiction in an action claiming sums of money alleged to be due to him under two agreements (a pension agreement and a service agreement) made in Czechoslovakia, on the ground that the monies were payable to him in England. On Nov. 2, 1948, on an application under R.S.C., Ord. 12, r. 30, by the appellants, who had entered a conditional appearance to the writ, an order was made by Master GRUNDY setting aside the order of

May 15, 1946, and this latter order was upheld by SLADE, J., on the ground that he was not satisfied that there had been a breach of the contracts within the jurisdiction, and, therefore, the court had no jurisdiction to grant leave to serve notice of the writ out of the jurisdiction. On an appeal by the respondent, the Court of Appeal held that he was entitled to an order for service out of the jurisdiction and restored the order of May 15, 1946, with a qualification that, if it appeared that the claim under the service agreement was not payable within the jurisdiction, the respondent was not to obtain judgment on that head of claim.

Beney, K.C., and Clive Burt for the appellants.

Sir Andrew Clark, K.C., and Dennis Lloyd for the respondent.

The House took time for consideration.

June 20. The following opinions were read.

LORD SIMONDS: My Lords, in my opinion, this appeal should be dismissed. For that reason I intend to confine my remarks within the narrowest limits, for I do not wish in any way to prejudice any issue which may come before the court for determination.

It is not easy to state with precision the question now before the House. It will emerge when I have briefly stated the relevant facts. On May 15, 1946, the respondent, Emil Korner, formerly a Czechoslovakian, but since 1947 a naturalised British subject, applied *ex parte* at chambers in the King's Bench Division of the High Court of Justice for leave to issue a writ against the appellants, a Czechoslovakian company, claiming certain sums which he alleged to be due to him under two agreements described in these proceedings as the pension agreement and the service agreement, and for leave to serve notice of this writ on the appellants out of the jurisdiction. The application, which was founded on that part of R.S.C., Ord. 11, r. 1 (e), which provides that such service may be allowed by the court where the action is

"... brought against a defendant not domiciled or ordinarily resident in Scotland or Ireland, in respect of a breach committed within the jurisdiction of a contract wherever made ..."

was duly granted by Master MOSELEY. The appellants entered a conditional appearance to the writ and on Jan. 15, 1947, applied in chambers that the order of Master MOSELEY and the writ of summons issued pursuant thereto and all subsequent proceedings should be set aside. The grounds of this application were (i) that there was no jurisdiction to make the order or to try the action; (ii) that, if there was jurisdiction, the discretion of the court should not be exercised in favour of the respondent; and (iii) that the *forum conveniens* was in the republic of Czechoslovakia. On this application a number of affidavits were filed, a considerable delay occurred, and it was not until Nov. 22, 1948, that Master GRUNDY made an order setting aside the order of Master MOSELEY and the writ of summons in the action, the notice thereof ordered to be served out of the jurisdiction and the service thereof, and all subsequent proceedings. From this order the respondent appealed to SLADE, J., who on June 28, 1949, dismissed the appeal, but gave the respondent leave to appeal to the Court of Appeal. He appealed accordingly and on Feb. 13, 1950, that court (BUCKNILL and SINGLETON, L.J.J., DENNING, L.J., *dissentiente*) allowed his appeal and restored the order of Master MOSELEY with a qualification to which I shall refer later. From that order the present appellants have by leave appealed to this House. The grounds of their appeal remain those which I have already stated as founding the application to Master GRUNDY, with the formidable addition that they now further contend that the Court of Appeal ought not to have interfered with the exercise by the learned judge of a discretion vested in him by the Rules of the Supreme Court. To this the respondent replies that the learned judge did not purport to exercise his discretion in the matter at all, but, adopting (as the respondent contends) a wrong construction of the relevant rules, held that he had no jurisdiction to make the order, and the respondent adds that the Court of Appeal exercised its discretion on right principles and, therefore, that its order should not be disturbed.

My Lords, to me it appears that the crux of the matter lies in the question whether the learned judge did exercise his discretion, and did so on right principles, and, having studied his careful judgment with the greatest attention, I have come to the conclusion that he did not. As I have said, the respondent relied on the allegation that there had been a breach or breaches within the

jurisdiction of two agreements. It was common ground between the parties that the agreements were made in Czechoslovakia and that the law of that country was "the law of the contract" and that the appellants were there resident. The jurisdiction of the court, therefore, only arose if the action was brought in respect of a breach of the agreements committed within the jurisdiction, and, even if the jurisdiction was established, it was a discretionary jurisdiction which must be exercised with caution and with a bias against invading the sovereignty of a foreign State. These matters were well appreciated by the learned judge, but, as I think, it was in his construction or application of R.S.C., Ord. 11, r. 4, that he fell into error. That rule, which applies equally to an application under any of the heads of r. 1, provides:

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"Every application for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action . . . and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the court or judge that the case is a proper one for service out of the jurisdiction under this order."

The learned judge concludes his judgment with these words:

"For the reasons I have given, I hold that the court has no jurisdiction in the circumstances of this case, because I am not satisfied that there has been any breach of either of these contracts within the jurisdiction and for the further reasons that I have given in the case of the service agreement. I base my judgment solely on that and I decide nothing at all, because it is unnecessary to decide it, on the question of what discretion I would have exercised had it become necessary to consider what was the *forum conveniens*."

I do not think that the learned judge can have meant that it is only on the question of *forum conveniens* that it is the duty of the court to exercise a discretion, but, however that may be, it is, I think, clear that the judge, holding that he had no jurisdiction, did not purport in any way to exercise his discretion.

Why, then, did the learned judge hold that the court had no jurisdiction to grant leave? It was, he says, because he was not satisfied that there was a breach within the jurisdiction. This is the meaning which, following certain observations of LORD GODDARD, C.J., in *Malik v. Narodni Banka Ceskoslovenska* (1), he places on the words of R.S.C., Ord. 11, r. 4:

"... made sufficiently to appear to the court or judge that the case is a proper one for service out of the jurisdiction under this order."

But, my Lords, whether the issue is as to the making of a contract within the jurisdiction (r. 1 (e) (i)), or the making of it by an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction (r. 1 (e) (ii)), or as to the law which by its terms or by implication governs it (r. 1 (e) (iii)), or as to the place where the alleged breach has been committed, the obligation of the plaintiff is, not to "satisfy" the court that he is right, but to make it sufficiently appear that the case is a proper one for service out of the jurisdiction under the order. As LORD DAVEY said (90 L.T. 735) in *Chemische Fabrik vormals Sandoz v. Badische Anilin und Soda Fabriks* (2):

"This [*i.e.*, r. 4] does not, of course, mean that a mere statement by any deponent who is put forward to make the affidavit that he believes that there is a good cause of action is sufficient. On the other hand, the court is not, on an application for leave to serve out of the jurisdiction . . . called upon to try the action or express a premature opinion on its merits . . ."

Yet, as I read the judgment of the learned judge (and here, too, I think, he founds on the observations of LORD GODDARD, C.J., in *Malik's case* (1)), he adopted

a standard of proof in regard to the place of breach which, in effect, amounted to a trial of the action or a premature expression of opinion on its merits. For example, one reason, but not the only reason, why the respondent alleged that there was a breach within the jurisdiction was that, as he swore in an affidavit made, it is true, somewhat late in the proceedings, there was an express agreement made between himself and a representative of the appellants that payment under the pension agreement should be made in London if he was resident in London. It could not possibly be said that the allegation was on the face of it false or frivolous. On the contrary, SINGLETON, L.J., in the Court of Appeal said that the court ought to accept it. At the highest, it could be said that it was open to doubt until it had been tested by cross-examination and examined in the light of any other evidence that might be adduced at the trial. Therefore, when the learned judge said that he was not "satisfied" that there had been a breach within the jurisdiction, he can only have meant that the respondent had not proved that fact beyond all reasonable doubt. That, however, is something quite different from the burden which the rule imposes, for a plaintiff can make it sufficiently appear that the case is a proper one for service out of the jurisdiction while falling short of the standard of proof which must be attained at the trial. If it were not so, it would become the duty of the court to do just what LORD DAVEY said was not its duty, *viz.*, to try the action on the preliminary application.

It is, no doubt, difficult to say precisely what test must be passed for an applicant to make it sufficiently appear that the case is a proper one. I do not wholly like the expression "a *prima facie* case," for, where leave to serve has been given *ex parte* under R.S.C., Ord. 11, and application is then made under R.S.C., Ord. 12, r. 30, to set the proceedings aside, a conflict may arise in which the question is not so much whether a *prima facie* case has been made out as whether, on all the materials then before him, the judge is of opinion that the case—I can find no better word—is a proper one to be heard in our courts. The description "a good arguable case" has been suggested and I do not quarrel with it. For the purpose of this appeal, however, it is sufficient to say negatively that the learned judge fell into error in thinking that the court had no jurisdiction to grant leave because he was not "satisfied" that there had been a breach within the jurisdiction. On this footing it was clearly competent for the Court of Appeal to review the judge's order and in the exercise of their discretion to make such order as they thought fit. In that court BUCKNILL, L.J., giving, as I think, the proper force and effect to R.S.C., Ord. 11, r. 4, entertained jurisdiction and restored the order of Master MOSELEY. I see no ground for saying that he exercised his discretion on wrong principles. On the contrary, if the matter were *res integra*, I should have exercised it in the same way. SINGLETON, L.J., reached the same result, but, as I venture to think, used, perhaps *per incuriam*, language which is not accurate, for he too suggests that there is a special standard of proof required where it is alleged that a breach occurred within the jurisdiction. The plaintiff must, says the lord justice ([1950] 1 All E.R. 572), "show it to the satisfaction of the court." If this expression has the meaning which SLADE, J., attributed to it, it is not what the rule requires. Inasmuch, however, as the lord justice concluded that the respondent had passed the test, whatever it was, it followed that the jurisdiction of the court was founded, and, this being so, the lord justice in the exercise of his discretion allowed the appeal. I see no reason for saying that he exercised it wrongly. DENNING, L.J., would have dismissed the appeal, but, as I think, he, too, adopted the test which it was assumed had been laid down by LORD GODDARD, C.J., in *Malik's* case (1), and on that footing was constrained to express an opinion on many questions on which any opinion must be premature until the trial of the action. On these and other matters I have abstained from giving my own opinion, for I am conscious that I have not all the materials which will be available at the trial.

At the opening of this opinion I said that the Court of Appeal had by its order made a qualification on the order made by Master MOSELEY. That arises in this way. There were, as I have said, two agreements of which breaches were alleged. In regard to one of these, called the salary agreement, BUCKNILL, L.J., felt more doubt whether there had been a breach within the jurisdiction, and, accordingly, though I think SINGLETON, L.J., somewhat unwillingly concurred in this, the court required from the respondent an undertaking, which was embodied in the order, that, if it appeared at the trial of the action that the salary, in respect of which the respondent claimed, was not payable within the jurisdiction, the respondent would not ask for such salary, in so far as the sum was not payable within the jurisdiction, or interest thereon, or damages for breach of contract to pay the same. In this the court followed the precedent of *Thomas v. Dowager Duchess of Hamilton* (3). So far as I am aware, it has rarely, if ever, been followed, and I do not think that it is a desirable form of order, but the respondent has not cross-appealed and I think, in the circumstances, that it would not be right to deprive the appellants of whatever advantage they may get from it. It will be sufficient, therefore, if the House dismisses this appeal, and I move accordingly.

My noble and learned friend, LORD NORMAND, who is unable to be here, has asked me to say that he concurs in the opinion which I have read.

LORD OAKSEY (read by LORD RADCLIFFE): My Lords, I agree that this appeal should be dismissed. I do not think it is possible to distinguish between the standard of proof required under R.S.C., Ord. 11, r. 1 (e) (i), r. 1 (e) (ii), and r. 1 (e) (iii), and the other grounds on which an application is made under the rule. The court must decide in every case whether it is a proper case for service out of the jurisdiction. It is true that, so far as that decision is concerned, it is final and will not be litigated again at the trial, but the fact that it is an interlocutory decision decided on affidavit evidence and the words "unless it shall be made sufficiently to appear to the court" indicate that it is equally on all points a discretionary matter. It is clear, I think, that SLADE, J., adopted different standards of proof as a matter of law in regard to the matters which he had to decide, and I am, therefore, of opinion that the Court of Appeal were right in holding that he had misdirected himself and that it was necessary for them to exercise their discretion under the rule. The majority of the Court of Appeal were of opinion that this is a proper case for service out of the jurisdiction and I do not think that the exercise of their discretion ought to be interfered with. Even if there were only the slightest evidence as to the breach of the pensions agreement having been committed within the jurisdiction, the evidence as to *forum conveniens* is, in my opinion, such as to make it sufficiently to appear that the case is a proper one for service out of the jurisdiction.

LORD RADCLIFFE: My Lords, I think that the problems of construing and applying the provisions of R.S.C., Ord. 11, have been invested with something more of mystery than they properly require. Some of the difficulties which have arisen may be traced to a tendency to treat r. 1 of the order as if it were not part of a scheme which included r. 4 as well, whereas, as I conceive, the key to the procedure lies in a proper construction of r. 4. Service out of the jurisdiction is, of course, an exceptional measure. The ordinary principles of international comity are invaded by permitting it, and that quite apart from the question whether judgment will, or will not, ultimately be given against the person served. It is only natural, therefore, that the courts should approach with circumspection any request for leave to issue a writ against such a person. Rule 1 defines the circumstances in which a judge may in his discretion allow such a writ to be served, but, if r. 1 stood alone, the judge would be left in the dilemma of choosing between asking no more of the applicant than his assertion that the action which he desires to bring involves one or more of the qualifying conditions (which

would be to ask less than the language of the rule seems to require) and asking the applicant to establish beyond reasonable doubt by appropriate evidence that the necessary conditions are, in fact, fulfilled (which would be, in effect, to try the case *ex parte* before it had been heard). Neither alternative presents itself to me as reasonable, and I think that the measure of the judge's duty must be found within the words of r. 4. This rule prescribes the procedure which is to be observed on every application under the order, and it is well to recall that the order is dealing from first to last with what must be by its nature an *ex parte* application. There must be affidavit or other evidence stating that in the belief of the deponent the plaintiff has a good cause of action. The evidence must show in what place or country the proposed defendant may be found and whether he is a British subject or not, and, finally, it must disclose the grounds on which the application is made. I cannot feel any doubt that the word "grounds" is adequate to cover the alleged facts which bring the case within r. 1 as well as any additional facts which are relevant to the exercise of the court's discretion, and this requirement by itself seems to me to show that the judge is expected to exercise some more critical function than that of merely accepting the statement on affidavit that the plaintiff is believed to have a good cause of action. Indeed, that belief would be quite consistent with the absence of any of the conditions necessary to justify service out of the jurisdiction. The last direction contained in r. 4 is in form a prohibition:

"... no such leave shall be granted unless it shall be made sufficiently to appear to the court or judge that the case is a proper one for service out of the jurisdiction under this order."

I suggest, however, to your Lordships that it is from these words, and these words alone, that it is possible to ascertain what measure of proof the judge should require before deciding that he is authorised to make an order under this procedure. It must sufficiently appear to him that it is a proper case. The phrase is a composite one and it is not elucidated by taking it to pieces, but it seems to me clear that the use of the word "sufficiently" in this context shows that it is not necessary that the judge should be satisfied beyond reasonable doubt as to the existence of the qualifying conditions. Further, a case does not sufficiently appear to be a proper case for the purposes of this order unless, on consideration of all admissible material, there remains a strong argument for the opinion that the qualifying conditions are, indeed, satisfied.

My Lords, it is thus that I construe this order, and I do so with all respect to the views of those who have much greater experience than I have in the practical task of applying it. I turn now to see how the construction which I have adopted accords with the views of the learned judges who have dealt with this matter in the courts below. Strictly speaking, they were not dealing with an application under R.S.C., Ord. 11. They were dealing with an application under R.S.C., Ord. 12, r. 30, to discharge an order already made. I think, however, that the principles which govern the making of an order must govern a decision to revoke it when made. SLADE, J., in his most lucid judgment, has divided his responsibility between that of requiring no more than a *prima facie* case for the existence of a contract and of a breach of it and that of requiring to be satisfied on the evidence that a breach has, in fact, taken place within the jurisdiction. I think that there are two criticisms to be made of this view of the law. One is that R.S.C., Ord. 11, gives no ground for drawing a distinction between the standard of proof necessary to establish one of its requirements and the standard of proof necessary to establish another, nor have I myself been able to work through the logical process of being satisfied as to where a breach of contract had taken place without being, at any rate, as much satisfied that the contract existed and had been broken. The other criticism is that "a *prima facie* case" puts the standard of proof somewhat too low, while to be "satisfied" puts it somewhat too high. These are, of course, only words, and I do not wish to chop their meaning overfine.

I prefer, however, the test of a strong case for argument which I have just suggested. A *prima facie* case may not be much short of this when the application is, as it always is under Ord. 11, *ex parte*, but when the next stage is reached and an application is made to set aside the service after conditional appearance, which is the form of application which your Lordships are dealing with here, I confess that I do not know what exactly is conveyed by "a *prima facie* case." There is

A voluminous affidavit evidence on both sides, some of it conflicting, and the affair seems to me at this stage to have passed beyond the point at which anything can properly be said to possess a *prima facie* validity. If, at such a stage, a judge requires to be satisfied as to the existence of one or more of the qualifying conditions before he regards himself as free to act, I think that he is requiring that all reasonable doubt should have been eliminated from his mind. I think

B that that is to go too far in favour of the defendant and to give him more than he can be entitled to on any general principle.

In deciding as he did, the learned judge thought that he was applying a principle laid down by the Court of Appeal in *Malik v. Narodni Banka Ceskoslovenska* (1). I daresay that he was right in thinking that that case did contain a statement of principle which was binding on him, but, if it did, I think

C that the principle was not rightly expressed and I have given my reasons for so thinking. No sufficient purpose would be served, therefore, if I were to scrutinise the language which was used by the court in the *Malik* case (1), nor would it be of any real assistance to your Lordships to observe on some of the phrases which have been used in this case and in that on previous occasions. The order which is now under review is concerned essentially with a matter of procedure and in

D all but exceptional cases that procedure ends naturally and the more happily with an exercise of his discretion by the judge in chambers. It so happens that on this occasion a divergence of views in the courts below has left your Lordships with the duty of analysing the language of the order and endeavouring to state with precision what are the principles according to which it should be applied. I do not myself think that its language presents any very great difficulty so long

E as it is approached with two main considerations in mind. The first is that authority to sanction the issue of a writ outside the jurisdiction is not lightly to be assumed. The second is that both the nature of the case and the wording of r. 4 itself show that the existence of the conditions which govern the authority cannot be ascertained with the same finality as would be appropriate at a trial, in which evidence and argument could be exhaustively deployed.

F My Lords, on the substance of the appeal I agree with the decision of the majority of the Court of Appeal, though I am not altogether in agreement with their respective constructions of the order or of their methods of applying it. What determines me is that, when the evidence is weighed, there remains a strong argument for the respondent's contention that in respect of each of his heads of claim there has been a breach within the jurisdiction. I will take, first, the service

G agreement, and I do not think it desirable at this stage to do more than indicate briefly to your Lordships what are the considerations which have weighed with me. It looks as if there were some instalments due under that agreement which have never been paid or set off against a debit on account. The payments were stipulated to be due in sterling and they were agreed on at a time when the respondent was going to leave Czechoslovakia, was not going to leave Europe, and was expected to reside in England, France or Switzerland. Add to this that

H it does not seem to be disputed between the Czechoslovakian lawyers that, failing contrary agreement, the appellants as debtors would have to make payment to the respondent as creditor wherever he might be residing and that the respondent has deposed that before 1938 he had nominated Rothschilds' bank in London as the place of payment, and I think that he is left at this stage with a good case for his argument that there has been a breach of this agreement within the jurisdiction.

The pensions agreement stands on rather a different footing. The obligation was expressed in terms of Czechoslovakian currency and the agreement was made in Czechoslovakia in respect of service to and a pension from the appellants, a Czechoslovakian concern. All these circumstances, however, are, perhaps, not very strong to determine the place of payment, when it is recalled that pension payments are intended for those who have severed their connection with the company, their service being over. A company operating in Central Europe, with international connections, might well anticipate that its pensioners would be found living outside the country and make provision accordingly. The appellants have deposed that, under the pensions scheme, pensions accrued due and were payable in Czech crowns in Moravaka Ostrava. The document which sets out the terms of the scheme has not been put in evidence and the appellants have only themselves to thank, as I see it, that we are not in a position to study it. However that may be, the respondent's rights depend directly, not on the general scheme, but on the promise that was made to him in the letter dated Jan. 18, 1929. By this letter, the appellants have undertaken that he should have made up to him any difference in value if the value of the Czech crown came to be reduced by more than ten per cent. of its then gold value. Such an undertaking does not bear directly on the question where payment was to be made, but it is only consistent with the assumption that the parties were at that time contemplating that the respondent would or might require to be paid outside Czechoslovakia. It is, I think, significant that the appellants kept his account with them under the heading "*Ausl. Kc*" [foreign Czech crowns]. It suggests strongly that they recognised that he was entitled to be paid abroad. The explanation which the appellants' witness has offered as to the import of that entry seems to me in itself inexplicable. On the whole, therefore, the respondent seems to me to have made out a good argument for the view that what appears to be the general rule of Czechoslovakian law should be applied and that his residence in this country entitles him to be paid in this country.

Your Lordships will observe that I have hitherto made no reference to the special assurance which the respondent says that he received from the late Dr. Sonnenschein at the time of the negotiation of his pension agreement. That assurance was first introduced into this case by the respondent's further affidavit of June 9, 1948. I have not taken it into account, much as it influenced the views of the majority of the Court of Appeal. I do not think it necessary to do so, having regard to the other considerations to which I have already alluded, and, for my part, I would not feel altogether happy at giving weight at this stage of the proceedings to an oral assurance made in 1929 and forgotten so long and so profoundly by the respondent, who now, alone, can depose to it. The distinction between remitting monies from Czechoslovakia to be received in London and making payment in London out of resources provided from Czechoslovakia is itself a fine one, and I could feel no sufficient confidence that such an assurance, so recollected, would enable me to choose the right alternative.

If one comes to the point of concluding that, on this application, it has been made sufficiently to appear that the breaches complained of took place within the jurisdiction, the case presents itself to me as in all other respects a proper one for leave to be given for service abroad. I regret the introduction of an undertaking by the respondent into the order made by the Court of Appeal. To exact such an undertaking is to revive the form of order made in *Thomas v. Dowager Duchess of Hamilton* (3). I think that the objection to such a practice is that it is not really within the spirit of R.S.C., Ord. 11. It is the duty of the judge at that preliminary stage to make up his mind whether the evidence and arguments justify the exercise of his discretion. If they do, there is no reason why the plaintiff should be further embarrassed by an undertaking of this kind, but the judge must make up his mind before he exercises his special authority to allow service in another jurisdiction and, if he cannot feel sufficient confidence as

to the existence of the required conditions, it is to evade the issue to allow proceedings to go ahead and to defer until the trial what should have been the preliminary determination of the matter.

LORD TUCKER: My Lords, in setting aside the order for service of notice of the writ out of the jurisdiction in the present case, SLADE, J., dealt with the application by following, as he thought, the line indicated as appropriate to such cases by LORD GODDARD, C.J., sitting as a member of the Court of Appeal in *Malik v. Narodni Banka Ceskoslovenska* (1). The first and all-important question in this appeal is whether in so doing he misdirected himself and thereby left the Court of Appeal free to exercise its own discretion as it thought fit. If he did not misdirect himself, then his decision should stand, since the operation of the machinery of R.S.C., Ord. 11, is for the master and judge in chambers, and it is, in my view, clear that there was ample material in the present case on which a judge in chambers in the exercise of his discretion could have decided either to allow or to refuse service out of the jurisdiction. Indeed, the difference of judicial opinion as to the facts and inferences which should be drawn from the evidence which has manifested itself at different stages in this appeal is in itself sufficient to show how different judges may quite properly take different views as to the manner in which they would exercise their discretion. The language used by LORD GODDARD, C.J. ([1946] 2 All E.R. 664) in *Malik's* case (1) and applied by SLADE, J., was as follows:

“The first thing that the plaintiff has to show is that he is bringing his action in respect of a breach committed within the jurisdiction. I say at once that I cannot accede to the part of the argument of counsel for the plaintiff in which he says that the question whether there is a breach, and the question whether it is committed within the jurisdiction, stand exactly on the same footing. The court in these cases must approach the matter on the footing of the assumption that there has been a breach, and then they have to consider whether or not the breach has been committed within the jurisdiction because it is only if the breach has been committed within the jurisdiction that this court can allow the writ to be served out of the jurisdiction. The case to which counsel referred as supporting his argument that the two matters are on exactly the same footing is *Hemelryck v. Lyall Shipbuilding Co.* (4) in the Privy Council, but I do not think that that case goes anything like the length that he asks us to go for this reason. No doubt, when the court is considering whether it will give leave to serve notice of the writ out of the jurisdiction the court wants to see that there is, at least, an arguable case. If it can see, by what appears on the affidavits, that the case put up is a groundless or frivolous one, the court can refuse to give leave because it can say: Whether you allege a breach within the jurisdiction or not, you are putting up a case which on the face of it is groundless and we are not going to allow notice of a writ to be served, wherever the breach took place. On the other hand, the court, having looked at the affidavits, could say that there were disclosed on the affidavits facts which, if they were proved at the trial, would show that there had been a contract and breach of the contract. The action has to be in respect of the breach of contract. The court on this application is not going to inquire whether the case is one in which the plaintiff must necessarily succeed, but, if they see on the face of the proceedings that it is a groundless action, no doubt, they will not allow an order to go for service out of the jurisdiction. As a general rule, the court will approach the case on the footing that the plaintiff has got a case which can be properly put before the court and argued, and one in which, if the court finds in accordance with the facts alleged by him, the result would probably be judgment for him. When, however, it comes to the question whether a breach has been committed within the jurisdiction, that is another and very different proposition. We have been reminded by counsel

for the bank during the course of the argument that r. 4 of Ord. 11 expressly says that: "... no such leave shall be granted unless it shall be made sufficiently to appear to the court or judge that the case is a proper one for service out of the jurisdiction under this order." Therefore, the court has to be satisfied on the affidavits that the action is brought in respect of a breach committed within the jurisdiction."

Before considering this language, it is to be remembered that it has frequently been laid down that this jurisdiction is to be exercised with great care and that any doubts should be resolved in favour of the foreigner. For example, see *per* FARWELL, L.J. ([1908] P. 201) in *The Hagen* (5). As I read LORD GODDARD's words, he is saying no more than that, before it is "made sufficiently to appear to the court" that notice of a writ should be served out of the jurisdiction, the court will require more cogent evidence with regard to those matters, which may not thereafter be the subject of any further investigation, than in the case of those issues which will necessarily be fought out at the trial. Take for example a case of tort under R.S.C., Ord. 11, r. 1 (*ee*). Suppose it is sought to serve notice of a writ out of the jurisdiction in respect of a collision at sea alleged to have taken place within the jurisdiction, the court will not be concerned to enter into the question of the negligence of the defendants provided that the affidavits disclose a case which appears to merit consideration at the trial, but, assuming negligence, it should, in my opinion, require cogent evidence pointing to a strong probability that the collision occurred within the jurisdiction before it will allow service out of the jurisdiction, this being an issue which may never arise at the trial and which, if it does arise, and if it be proved that the collision took place outside the jurisdiction, will not divest the court of the jurisdiction it has wrongly assumed. *The Fagernes* (6) is an example of such a case. In dealing with cases of contract, it is more difficult to define the position with precision, though no difficulty, I think, arises in practice. If the plaintiff is relying on a breach of contract within the jurisdiction, it may be necessary, as in the present case, to show the existence of a contract containing as one of its terms a provision, express or implied, for payment in England. It is then said: How can it be true to say that the court will readily assume the existence of the contract, but will require cogent evidence that the breach took place within the jurisdiction, when this depends on what the terms of the contract were? How, it is said, can one have different standards of proof of one and the same thing?

My Lords, this appears to me a mere question of words. In such a case as the present, there is no dispute that contracts had been made for the payment, in one case of salary, and in the other of pension. The judge was not concerned to inquire closely to ascertain all the terms of these contracts, or whether or not the defendants might have a sufficient set-off to extinguish their alleged indebtedness thereunder, but he was, as I think, concerned to inquire and to satisfy himself that the probabilities of the case were strongly in favour of the plaintiff's contention that the contracts contained a term providing for payment in England. I do not think it is quite accurate to say that there are different standards of proof required in each case. The rule is dealing with an interlocutory application. There is no issue which has to be "proved" in the sense that matters in issue require to be proved at a trial. It has to "be made sufficiently to appear to the ... judge that the case is a proper one for service out of the jurisdiction under this order", and this involves that it must be made sufficiently to appear to him that there has been a breach within the jurisdiction and this may involve it being made sufficiently to appear to him that the contract relied on contained a term requiring payment in England. I cannot think that, when LORD GODDARD, C.J., used the words "the court has to be satisfied", in *Malik's* case (1), he meant anything more than what I have endeavoured to express above. "Made sufficiently to appear" is an awkward expression which can, I think, be conveniently and accurately expressed as "satisfied" without it being thought that

he thereby meant that it had to be "proved" as issues require to be proved at a trial.

A My Lords, I agree with the analysis of Ord. 11, which has been made by my noble and learned friend, LORD RADCLIFFE, and his statement of the principles according to which it should be applied, but I find nothing therein inconsistent with the view which I have endeavoured to express that the cogency of the evidence required to justify an order for leave to serve out of the jurisdiction may vary with regard to the different matters which fall to be considered before such an order can be made. I feel considerable doubt whether SLADE, J., misdirected himself in the present case, but I am not prepared to dissent from the conclusion reached by your Lordships that he used language calculated to give the impression that he considered that a breach within the jurisdiction had to be proved to the same extent as matters in issue must be proved at a trial, and that he appeared to think the exercise of his discretion would only be required with regard to the *forum conveniens*. This being the position, it was open to the Court of Appeal to exercise their own discretion and no grounds exist for disturbing the exercise of that discretion by the majority of the court. I have, however, I think, already sufficiently indicated that I respectfully feel unable to agree with the view expressed by BUCKNILL, L.J., towards the end of his judgment where C he says ([1950] 1 All E.R. 567):

D "I think that the concluding words of R.S.C., Ord. 11, r. 4, applicable as they are to all the instances of R.S.C., Ord. 11, r. 1, only require that in each case and on every material part of it the court must not act merely on vague statements, such as statements based on information and belief, or on statements which are obviously untrue, or, as contended in *The Brabo* (7), on statements that the law as to the liability of the party sued here is difficult and complicated, and that the matter had better be left to be decided by the trial judge. Having regard to the general principles laid down in *The Hagen* (5), that will not suffice. In each case the plaintiff must, as I think, make out a *prima facie* case, and, if that case is based on facts which E are put in issue, nevertheless leave should be given."

F If this is the test, it would seem that an *ex parte* order for service out of the jurisdiction can seldom, if ever, be set aside on further evidence if a *prima facie* case has been shown on the original application. I agree that the introduction of an undertaking by the respondent into the order in the form used in *Thomas v. Dowager Duchess of Hamilton* (3) is undesirable. For the reasons which I have stated, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Blyth, Dutton, Wright & Bennett* (for the appellants); *Rubinstein, Nash & Co.* (for the respondent).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

HARRISON v. HARRISON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), June 1, 22, 1951.]

Divorce—Custody—Child born before marriage—Not legitimated per subsequens matrimonium—Matrimonial Causes Act, 1950 (c. 25), s. 26 (1).

The term "children" in s. 26 (1) of the Matrimonial Causes Act, 1950, does not include a child born out of wedlock in circumstances which prevent the child being legitimated by the subsequent marriage of the parents. Accordingly, on the dissolution of the parents' marriage, no order for the custody of the child can be made.

AS TO ORDER FOR CUSTODY OF ILLEGITIMATE CHILD, see HALSBURY, Hailsham Edn., Vol. 10, p. 754, para. 1188; and FOR CASES, see DIGEST Supps.

FOR THE LEGITIMACY ACT, 1926, s. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 2, p. 493, and FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 26, see (*ibid.*) Interim Service, 1950, p. 324.

Cases referred to:

- (1) *M. v. M.*, [1945] 2 All E.R. 525; [1946] P. 31; 115 L.J.P. 29; 173 L.T. 305; 2nd Digest Supp.
- (2) *Bednall v. Bednall & Shivussawa*, [1927] P. 225; 96 L.J.P. 150; 137 L.T. 632; Digest Supp.
- (3) *Green v. Green*, [1929] P. 101; 98 L.J.P. 58; 140 L.T. 93; Digest Supp.
- (4) *Jones v. Jones*, (1929), 98 L.J.P. 74; 140 L.T. 647; Digest Supp.
- (5) *Langworthy v. Langworthy*, (1886), 11 P.D. 85; 55 L.J.P. 33; 54 L.T. 776; 27 Digest 552, 6057.
- (6) *Colquitt v. Colquitt*, [1947] 2 All E.R. 50; [1948] P. 19; [1948] L.J.R. 897; 177 L.T. 399; 111 J.P. 442; 2nd Digest Supp.
- (7) *Fulham Parish v. Woolwich Union*, [1907] A.C. 255; 76 L.J.K.B. 739; 97 L.T. 117; 71 J.P. 361; 37 Digest 255, 503.
- (8) *Morris v. Britannic Assurance Co., Ltd.*, [1931] 2 K.B. 125; 100 L.J.K.B. 263; 145 L.T. 45; Digest Supp.

SUMMONS by the wife in a suit for dissolution of marriage for an order for the custody of a child.

J. B. Gardner for the wife.

The husband was not represented.

Cur. adv. vult.

June 22. **BARNARD, J.**, read the following judgment. This is a summons by a wife claiming an order for custody in respect of a child. The husband, by letter, admits that he is the father of the child and consents to the wife having custody. The wife is Clarice Harrison and she married the husband, Alfred Harrison, on Apr. 24, 1943. She had given birth to the child in question on Apr. 22, 1938. At the time of the birth of the child the wife and the husband were living in adultery, the wife being then married to Arthur Henry Harrison, who subsequently divorced her on the ground of her adultery with the husband. This child cannot, therefore, be legitimated under the Legitimacy Act, 1926. On Mar. 13, 1951, the wife obtained a decree *nisi* for the dissolution of her marriage with the husband, and in her petition she claimed custody of the child, but this question was referred by the commissioner, who heard the case, to the judge in chambers. The decree was made absolute on May 17, 1951. On July 10, 1947, the wife had applied to a court of summary jurisdiction for maintenance for herself and the child and was awarded maintenance for herself only, her application in respect of the child being dismissed.

Counsel for the wife relies on the wording of s. 26 (1) of the Matrimonial Causes Act, 1950, which reads:

"In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the

final decree, make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court."

Counsel for the wife emphasised the difference between the wording of that section and the wording of s. 5 (b) of the Summary Jurisdiction (Married Women) Act, 1895, which gives the court jurisdiction *inter alia* to make an order that the legal custody of any child of the marriage between the applicant and the husband, while under the age of sixteen years, be committed to the applicant. He submitted that under the Matrimonial Causes Act, 1950, the only test to apply was parenthood, and in support of his argument he quoted some *dicta* of DENNING, J., in *M. v. M.* (1). In that case DENNING, J., decided that the section, which was then s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, applied to a child legitimated by the subsequent marriage of the parents and refused to follow *Bednall v. Bednall & Shivussawa* (2), *Green v. Green* (3), and *Jones v. Jones* (4). In the course of his judgment, however, the learned judge said ([1945] 2 All E.R. 527):

"The powers conferred by the Judicature (Consolidation) Act, 1925, s. 193, are not confined to children of the marriage, but apply to 'children the marriage of whose parents is the subject of the proceedings,' as it is put in one place, or the 'children of the petitioner and respondent,' as it is put in another place. Both those expressions seem to me to make parenthood the test, not legitimacy. The difficulty arises from the cases of *Bednall v. Bednall & Shivussawa* (2), *Green v. Green* (3) and *Jones v. Jones* (4). According to those cases, an order for custody can only be made in respect of legitimate children. It is to be noticed, however, that s. 193 applies not only to proceedings for divorce, but also to proceedings for nullity of marriage; and in *Langworthy v. Langworthy* (5), a nullity case where there never was a valid marriage, the Court of Appeal held that the section enabled the children of the union to be provided for. That decision was not cited in any of the three cases, and it seems to me to show that the test under s. 193 is parenthood, not legitimacy."

In *Langworthy v. Langworthy* (5) it was held that the court had jurisdiction to order a provision to be made for the child of the marriage which the court had declared void, because the court was expressly given such jurisdiction, namely, in nullity proceedings, by s. 35 of the Matrimonial Causes Act, 1857. Section 35 of the Matrimonial Causes Act, 1857, as amended by s. 4 of the Matrimonial Causes Act, 1859, was replaced by s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, which was in its turn replaced by s. 26 (1) of the Matrimonial Causes Act, 1950. The phraseology of all three sections is substantially the same.

In *Colquitt v. Colquitt* (6) LORD MERRIMAN, P., in giving the considered judgment of the Divisional Court to the effect that a legitimated child is a child of the marriage within the meaning of the Summary Jurisdiction Acts, approved the decision of DENNING, J., in *M. v. M.* (1), but he adversely criticised his statement that parenthood was the test and not legitimacy. That part of the judgment reads as follows ([1947] 2 All E.R. 52):

"In *M. v. M.* (1) ([1945] 2 All E.R. 528), DENNING, J., placed great reliance on the decision of the Court of Appeal in *Langworthy v. Langworthy* (5), which is referred to as showing that the test under s. 193 of the Judicature Act, 1925, is 'parenthood not legitimacy.' That case established that a child of the union who is rendered illegitimate by the annulment of the marriage can be dealt with under s. 193, for the very reason, as is pointed out by COTTON and FRY, L.JJ. (11 P.D. 89), that the section expressly refers to nullity proceedings, but in relation to proceedings for

divorce, at any rate, we think that to say that parenthood, not legitimacy, is the test, goes too far. It cannot, in our opinion, be suggested that, although the parenthood is undisputed, an illegitimate child who cannot be legitimated is the subject of custody proceedings under s. 193, on the divorce of the spouses who are, in fact, his parents, but we agree with DENNING, J., that the fact that the wording of s. 193 is wide enough to cover the case of a child of the union rendered illegitimate by the annulment of the marriage of his parents, tends to support the view that in divorce proceedings it is also wide enough to include a child who has been rendered legitimate."

Prima facie the term child or children in a statute means legitimate child or children, but a wider meaning may be given, where that meaning is more consonant with the object of the statute: see *Fulham Parish v. Woolwich Union* (7). Following this decision MACKINNON, J., in *Morris v. Britannic Assurance Co., Ltd.* (8) held that the term "child" used in the Industrial Insurance Act, 1923, included illegitimate children because the nature of the obligation as to which insurance was desired was the same whether the child was legitimate or illegitimate. In many statutes, which are applicable to children, such as the Unemployment Act, 1934, the Law Reform (Miscellaneous Provisions) Act, 1934, the Unemployment Insurance Act, 1935, the Widows', Orphans' and Old Age Contributory Pensions Act, 1936, the Finance Act, 1936, the Workmen's Compensation (Supplementary Allowances) Act, 1940, and the Pensions (Increase) Act, 1944, there are sections which specifically define the expression "child" as including an illegitimate child, for the purpose of that particular statute. There is no definition of the expression "child" either in the Matrimonial Causes Act, 1950, or in the appropriate Acts which preceded it. I have, therefore, to ask myself, what was the object of the statute.

The preamble to the Matrimonial Causes Act, 1857, makes it clear that its object was to constitute a court with exclusive jurisdiction in matters matrimonial in England and with authority in certain cases to decree the dissolution of a marriage. The provisions of the Act also give the court jurisdiction in matters ancillary to the dissolution of the marriage, to enable the court to adjust matters as between the parties to the marriage, in the light of its dissolution. The statute is concerned with marriage, and I cannot think that the legislature had anything but the children of the marriage in mind. Both the Legitimacy Act, 1926, and the Adoption of Children Act, 1926, give the legitimated child and the adopted child respectively the status of a child of the marriage, with some exceptions which are immaterial to the question I have to consider. I agree entirely with the view expressed by the Divisional Court in *Colquitt v. Colquitt* (6), and with what LORD MERRIVALE, P., said ([1929] P. 104) in *Green v. Green* (3), in referring to s. 35 of the Matrimonial Causes Act, 1857, and to s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, that children in these enactments means legitimate children. I am concerned solely with a claim for legal custody. The wife, already, has the *de facto* custody, and, so far as maintenance is concerned, the fact that a man marries a woman with a young child, whether he be the father of the child or not, is a matter which the court would take into consideration in awarding the woman maintenance after a dissolution of the marriage, assuming the child was still under age and needing support. For the reasons I have given, this summons must be dismissed.

Summons dismissed.

Solicitor: J. A. H. Powell, Law Society, Divorce Department (for the wife).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

GOODWAY v. BECHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Oliver and Cassels, JJ.), April 5, 1951.]

Animal—"Unlawful and malicious killing"—*Defence of property*—*Dog chasing chickens*—*Right of poultry-owner to kill*—*Reasonableness*.

A The appellant, who was the owner of a poultry farm, saw a dog belonging to the respondent's stepson chasing his chickens. Although the appellant had a gun at the time he did not fire at the dog, but he warned the respondent that, if again he found the dog worrying the chickens, he would shoot it. On the next day the appellant saw the dog among his chickens and killed it. On his being summoned for unlawfully and maliciously killing the dog, B justices found that, while the appellant acted under considerable provocation, "he did not exhaust every practicable means of stopping the dog from attacking the fowls," and they convicted him.

HELD: the true test to be applied was whether the appellant had acted reasonably in what he did; in the circumstances, he had so acted; and, therefore, the conviction should be quashed.

C *Dictum* of SCOTT, L.J., in *Cresswell v. Sirl* ([1947] 2 All E.R. 733), applied.

EDITORIAL NOTE. In *Gott v. Measures* ([1947] 2 All E.R. 610) LORD GODDARD said: "A person may be justified in shooting a dog if he honestly believes that it is necessary as being the only way in which he can protect his property." Subsequently, *Cresswell v. Sirl* (*infra*) was decided by the Court of Appeal. In the present case the latter decision is applied to criminal proceedings D under the Malicious Damage Act, 1861, and the test of reasonableness is added to that of necessity. Here the test of reasonableness was applied.

AS TO RIGHT TO KILL A TRESPASSING DOG, see HALSBURY, Hailsham Edn., Vol. 1, p. 566, para. 973; and FOR CASES, see DIGEST, Vol. 2, p. 214, Nos. 95-103.

E Case referred to:

(1) *Cresswell v. Sirl*, [1947] 2 All E.R. 730; [1948] 1 K.B. 241; [1948] L.J.R. 654; 112 J.P. 69; 2nd Digest Supp.

CASE STATED by Wiltshire justices.

On Sept. 21, 1950, at a court of summary jurisdiction sitting at Corsham, an information was preferred by the respondent, Sir William Wrixon Becher, under F s. 41 of the Malicious Damage Act, 1861, against the appellant, Francis Frederick Goodway, charging him with having unlawfully and maliciously killed a certain dog, the property of Adrian Bridgwater, the respondent's fourteen-years-old stepson. For the appellant it was contended that when he shot the dog it was attacking his fowls, and that, in the circumstances, he acted reasonably in G regarding the shooting as necessary for the protection of the fowls. For the respondent it was contended that a person was not justified in shooting a dog if he knew that less violent measures were available and that the appellant might have taken other steps to safeguard his poultry, *e.g.*, by chasing the dog off the land, or beating it, or requesting the respondent to shut it up. The justices, being of the opinion that, while the appellant acted under considerable provocation, he did not exhaust every practicable means of stopping the dog from H attacking his fowls, convicted him of the offence charged and fined him £2.

Skelhorn for the appellant.

Perks for the respondent.

LORD GODDARD, C.J.: The appellant and his brother are poultry farmers and own eighty-five acres of land in the parish of Corsham, Wiltshire, adjoining the property of the respondent, Sir William Becher. The respondent's stepson owned a mongrel bitch which on successive days in August, 1950, worried the appellant's fowls. On the first day, when the appellant went to collect the

eggs he found that all the eggs had been broken and were on the floor or in the nesting boxes. On the next day the appellant, carrying a gun, saw a black and brown mongrel dog worrying and chasing his fowls. He did not use the gun on that day, which, it seems to me, shows that he was not altogether an unreasonable person, but he complained to the respondent that the dog had been chasing his fowls and that he had seen it go off to the respondent's premises. The appellant told the respondent that if he caught the dog doing it again he would shoot it. On the third day, however, the dog was again chasing the fowls, and the appellant shot and killed it. There is no branch of the common law which requires more urgent amendment than the law relating to animals. There is the old law that one cannot have trespass by the act of a dog, but it has been laid down in recent cases that a person can protect his property from a dog. A

The question is whether, in shooting the dog the appellant was acting reasonably, or unreasonably so that it can be said he was acting maliciously. The evidence was that on this third morning, between nine and half past eleven, the respondent went to look for his dog several times and could not find it. At 9 a.m. that morning a dog was seen chasing the fowls and pulling out their tail feathers. Twenty minutes afterwards the appellant and his brother went to the field and the appellant took a gun with him. He stood on one side of the field in a gap and the brother went to the other side of the field. The brother saw the dog come out of the poultry house where all the eggs had been found broken. He chased the dog and tried to drive it into the fowlhouse to catch it, but he could not do so. If he had driven the dog into the fowlhouse and then shot it different questions might have arisen. That would rather have been pronouncing sentence of death than doing something to protect property. The dog went on chasing the fowls, and, when it got near where the appellant was standing, he fired and killed it. B C D

The justices found that there were other steps that the appellant could have taken, such as those provided by s. 2 of the Dogs Act, 1871, i.e., by complaining to a court of summary jurisdiction and obtaining an order that the dog should be kept under control. There is, however, an old proverb about shutting the door after the steed has been stolen, and, if the appellant had done that, a fortnight or three weeks might have passed before he got his order and meanwhile the dog would probably have destroyed all the fowls. The justices say E

"... that while the defendant acted under considerable provocation, he did not exhaust every practicable means of stopping the dog from attacking his fowls." F

I am far from saying that these are simple cases for justices to deal with and this court never blames justices if they go wrong in law, but I think they approached this case from a wrong point of view. The question is not whether the appellant took every practicable means of stopping the dog, but whether he acted reasonably in what he did. G

The law on this subject has been laid down in *Cresswell v. Sirl* (1), a decision of the Court of Appeal, which, although it was a civil case, we should follow. SCOTT, L.J. ([1947] 2 All E.R. 733) said of the person who shoots: H

"(2) He has by proof to establish two propositions, but each proposition may be established in either of two ways: *Proposition No. 1*: That at the time of shooting, the dog was either (a) actually ... attacking the animals in question, or (b) if left at large, would renew the attack so that the animals would be left presently subject to real and imminent danger unless renewal was prevented."

Both of those factors apply in the present case. The dog was actually attacking the fowls and it is obvious that the fowls would be left in imminent danger of further attacks, because the dog had shown by its conduct that it was a fowl worrier.

"*Proposition No. 2:* That either (a) there was, in fact, no practicable means, other than shooting, of stopping the present attack or preventing such renewal, or (b) that the defendant, having regard to all the circumstances in which he found himself, acted reasonably in regarding the shooting as necessary for the protection of the animals against attack or renewed attack."

- A While, as a general rule, this court always accepts the findings of justices, if it is shown that they have arrived at their conclusion through approaching the facts in a wrong way this court, having all the facts, can say what the justices ought to have found. Here it was wrong for them to find that the appellant did not exhaust every practicable means of stopping the dog, and, therefore, he did not act reasonably. The question was whether the appellant was acting reasonably in doing what he did, and, in my opinion, he did so act. Therefore, in my opinion, this appeal should succeed and the conviction should be quashed.

- B OLIVER, J.: I agree. One of the findings of the justices relied on by counsel for the respondent was that the appellant on the morning in question went out with the fixed intention of shooting the dog. If that means whatever it was doing, there was no evidence which justified such a finding. What I take it that the finding means is that he went out with the intention of shooting the dog if he found it worrying the fowls. Then, however, there would be nothing illegal in doing so. He would be saying in those circumstances: "If this dog is worrying my fowls again, I am going to shoot it."

- C CASSELS, J.: I agree. In my view, the justices came to a wrong conclusion in law. A farmer is entitled to protect his property even against his neighbour's favourite dog. If that dog finds its happiest time in worrying the farmer's fowls, the farmer is entitled to take action. On the occasion of the act by the appellant which led to his conviction, he found the dog committing this destruction for the third time. He had his gun with him and the justices have found that he took out his gun with the intention of shooting the dog. He probably did, but only if he found it worrying and chasing his fowls, and that is exactly what he did find. It was said that he should have fired the gun into the air or applied to a court of summary jurisdiction under the Dogs Act, 1871, s. 2. The suggestion was made in the course of the case that this particular dog was gun-shy. I cannot see any reason for saying that this farmer acted wrongly because he did not wait, while the fowls were being worried and chased, to see what the effect of a gunshot would be on the dog when the gun was aimed into the air. I observe that the justices have also found that the appellant acted under considerable provocation. That is true. They have also found that the appellant did not act reasonably. In my view, all the evidence demonstrated that he did act reasonably, and I agree with the conclusion at which my Lords have arrived.

- G Solicitors: *Darley, Cumberland & Co.*, agents for *Wansbroughs, Robinson, Tayler & Taylor*, *Devizes* (for the appellant); *Collyer-Bristow & Co.*, agents for *Wood & Awdry*, *Chippenham* (for the respondent).

[Reported by F. A. AMES, ESQ., Barrister-at-Law.]

NOTE.

PARTABMULL RAMESHWAR v. K. C. SETHIA (1944), LTD.

[HOUSE OF LORDS (Lord Porter, Lord Normand, Lord Oaksey, Lord Radcliffe and Lord Asquith of Bishopstone), May 3, 7, 8, June 28, 1951.]

Contract—Implied term—Shipment of jute from India to Italy—Export permitted only under licence and subject to quota—Contract not expressed to be subject to quota—Conditions governing sellers' ability to perform contract under quota system known to both parties.

APPEAL by the sellers from a decision of the Court of Appeal (TUCKER, SINGLETON and JENKINS, L.JJ.), dated Dec. 6, 1949, and reported [1950] 1 All E.R. 51, dismissing an appeal from a decision of LORD GODDARD, C.J., dated June 23, 1949, whereby he upheld the award of the committee of the London Jute Association, stated in the form of a Special Case for the opinion of the court, on four appeals, which were brought before the committee by the buyers, against awards made by arbitrators in favour of the sellers in regard to four separate contracts. The committee of the London Jute Association quashed the awards of the arbitrators and made an award of damages in favour of the buyers, subject to the question of law raised in the Special Case.

The sellers were a partnership carrying on business in Calcutta and dealing, *inter alia*, in jute. The buyers were a limited liability company, registered in England and carrying on business in London. By the four contracts, two of which were made on July 28, 1947, and the other two on Sept. 5, 1947, the sellers agreed to sell certain quantities of jute, the shipments to be made to Genoa by October, 1948. The contracts were on c.i.f. terms and expressed to be on the terms and conditions of the London Jute Association contract. They were not expressed to be "subject to quota." They were to be construed according to the laws of England and to be deemed to be performed there. At all material times the export of jute from India was prohibited except under licence, both parties being aware of this fact. In February, 1947, the government of India introduced a quota system for regulating the export of jute. Under this system shippers were required to choose as their basic year one of the years from 1937 to 1946, and were allotted a quota in regard to the countries to which they had shipped in their basic year and in proportion to the amount shipped to those countries in that year. The sellers chose 1946 as their basic year, but they had made no shipments to Italy in that year, with the result that no quota was allotted to them for Italy and they were unable during 1947 to make any shipments under the contracts. Under new regulations which were in force for the first six months of 1948 they were allotted a small quantity of jute for shipment to Italy, but by October, 1948, the time fixed for the completion of the contracts, they had shipped less than one-third of the amount which they had contracted to ship. The buyers claimed damages for breaches of the four contracts and the disputes were referred to arbitration. It was contended on behalf of the sellers that an implied term should be read into the contracts that they were subject to the necessary licences and quotas being obtainable, as it must obviously have been the intention of the parties to include such a term to give the transaction the efficacy which both parties had intended it to have.

The Court of Appeal held that the court would read an implied term into a contract only where it was clear that both parties intended that term to operate; that, although both parties knew that the contracts could only be met out of the sellers' quota, the question whether that quota would suffice for the purpose depended on matters concerning the conduct of the sellers' business which were peculiarly within their knowledge as opposed to that of the buyers (*e.g.*, the sellers alone would know (*a*) which year they had chosen as their basic year and what quota they were likely to receive as a result of their choice, and (*b*) what contracts with other buyers had to be satisfied out of their quota), and that an unqualified

provision to the effect that the contract was subject to the quota being sufficient and to the seller using his best endeavours to obtain a sufficient quota, would be quite inadequate to secure the business efficacy of the contracts; and, therefore, as the parties could not be taken to have intended that the term sought by the sellers to be implied should be incorporated in the contracts, it was impossible to read into the contracts of July and September, 1947, the term contended for by the sellers.

A

Cases referred to:

(1) *The Moorcock*, (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 12 Digest 611, 5048.

(2) *Ralli Brothers v. Compania Naviera Sota Y Aznar*, [1920] 2 K.B. 287; 89 L.J.K.B. 999; 123 L.T. 375; 11 Digest 397, 699.

B

(3) *Re Anglo-Russian Merchant Traders & Batt (John) & Co. (London)*, [1917] 2 K.B. 679; 86 L.J.K.B. 1360; 116 L.T. 805; 12 Digest 397, 3223.

Pritt, K.C., and *J. G. S. Hobson* for the sellers.

Scott Cairns, K.C., *MacKenna, K.C.*, and *Threlfall* for the buyers.

In considered opinions, the HOUSE OF LORDS agreed with the conclusions and reasoning of the Court of Appeal and dismissed the appeal.

C

Decision of the Court of Appeal affirmed.

Solicitors: *Linklaters & Paines* (for the sellers); *Stuart Hunt & Co.* (for the buyers).

J.D.P.

D

Re BRASSEY'S DEED TRUSTS. COUTTS & CO. v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Birkett, L.J.J.), June 18, 19, 20, 1951.]

E

Estate Duty—Passing—Property deemed to pass—Policy of assurance—Premiums paid by trustees of settlement—Death of assured—Cesser of payment of premiums—Claim on "slice" of capital to produce premiums—Finance Act, 1894 (c. 30), s. 2 (1) (b), s. 7 (7).

By a deed of appointment and re-settlement, dated Aug. 8, 1935, made between R.B., the life tenant under the original settlement, H.B., the tenant in tail in remainder, and trustees, certain investments and cash were directed to be held by the trustees on trust (i) as regards the cash, to make certain payments and to purchase from R.B. at their surrender value certain policies of assurance on his life, and (ii) as regards investments, to retain or sell the same and re-invest the proceeds and out of the income of the investments and re-investments and the proceeds of the policies (thereinafter called "the trust fund") to pay (*inter alia*) the premiums and other moneys necessary for keeping on foot certain policies of assurance (including those purchased from R.B.). The balance of the income of the trust fund was to be held on protective trusts for H.B. during his life, and subject thereto the trust fund was to be held on trust for various other persons having successive interests, R.B. being excluded from all beneficial interest. At all times after the date of the re-settlement the premiums in respect of the policies on the life of R.B. were paid by the trustees. On Nov. 14, 1946, R.B. died, and estate duty was claimed under the Finance Act, 1894, s. 2 (1) (b), in respect of the "slice" of the trust fund required to produce the income necessary to pay the premiums on the policies on the life of R.B.

H

HELD: the persons entitled to the trust fund subject to the protected life interest of H.B. had immediately before R.B.'s death a right to have annual sums withdrawn from the income of the trust fund and used in

keeping up the policies; such right was an "interest" within the meaning of s. 2 (1) (b) of the Act of 1894, notwithstanding that it did not entitle such persons to immediate beneficial enjoyment of the sums; that interest ceased on the death of R.B.; and, therefore, estate duty was payable under s. 2 (1) (b) calculated on the "slice" of capital ascertained in accordance with s. 7 (7) of the Act of 1894.

A.-G. v. Lloyds Bank, Ltd. ([1935] A.C. 382), distinguished.

Re Hodson's Settlement ([1939] 1 All E.R. 196) and *Westminster Bank, Ltd. v. A.-G.* ([1939] 2 All E.R. 72), applied.

Decision of ROMER, J. ([1951] 1 All E.R. 102), affirmed.

AS TO PROPERTY IN WHICH AN INTEREST WAS LIMITED TO CEASE ON THE DECEASED'S DEATH, see HALSBURY, Hailsham Edn., Vol. 13, p. 236, para. 226; and FOR CASES, see DIGEST, Vol. 21, pp. 9, 10, Nos. 34-42.

Cases referred to:

(1) *Re Hodson's Settlement*, [1939] 1 All E.R. 196; [1939] Ch. 343; 108 L.J.Ch. 200; 160 L.T. 193; Digest Supp.

(2) *Westminster Bank, Ltd. v. A.-G.*, [1939] 2 All E.R. 72; [1939] Ch. 310; 108 L.J.Ch. 294; 160 L.T. 432; Digest Supp.

(3) *A.-G. v. Lloyds Bank, Ltd.*, [1935] A.C. 382; 104 L.J.K.B. 523; 152 L.T. 577; Digest Supp.

(4) *Cowley (Earl) v. Inland Revenue Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 21 Digest 7, 27.

(5) *A.-G. v. Milne*, [1914] A.C. 765; 83 L.J.K.B. 1083; 111 L.T. 343; 21 Digest 46, 296.

APPEAL by the trustees of a re-settlement from an order of ROMER, J., dated Dec. 13, 1950, reported [1951] 1 All E.R. 102, whereby it was declared that estate duty became payable in connection with the death of Robert Bingham Brassey under the Finance Act, 1894, s. 2 (1) (b), in view of the cesser of the liability of the income of the trust funds to bear the premiums on certain policies of assurance on the life of the deceased which were subject to the trusts of the re-settlement.

R. Cozens-Hardy Horne for the trustees.

Pennyquick, K.C., and *J. H. Stamp* for the Crown.

SIR RAYMOND EVERSHED, M.R.: This appeal has raised the question whether duty under the Finance Act, 1894, s. 2 (1) (b), is exigible on the death of one Robert Bingham Brassey, whom I will refer to, as he has been called throughout the case, as Captain Brassey, on Nov. 14, 1946, in the circumstances to be stated.

I propose to go at once to the deed of re-settlement of Aug. 8, 1935, to which the parties were Captain Brassey, of the first part, and his son, Hugo Bulkeley Brassey (whom I will call Hugo, as he has been called during the argument), of the second part, and trustees, of the third part. The re-settlement recited an earlier deed of settlement made in 1897 whereby certain estates known as the Heythrop estates were settled on strict settlement. Shortly before the execution of the deed which I am now summarising, there had been a disentailing deed in the usual form, and the deed of 1935 was made in exercise of the power reserved in the disentailing assurance to Captain Brassey and Hugo jointly to appoint. Exercising that power, they appointed so that Captain Brassey was thereafter excluded from any beneficial interest in the trust premises. The first operative trust was to the effect that the trustees should out of capital make certain payments. One of those consisted in the purchase from Captain Brassey for a named sum of certain policies, which are set out in the first part of the third schedule to the deed. There were four policies, being policies of assurance on the life of Captain Brassey issued by the Clerical, Medical and General Life Assurance Society. The total amount for which the life was insured

and which therefore became payable on Captain Brassey's death was £40,000, and the total of the premiums payable in respect of those policies was, to the nearest pound, £1,977 per annum. Reverting to the body of the deed, the trusts then set out were to this effect. The trustees were out of the income of the investments named to pay, as they fell due, the premiums in respect of the four policies. Subject thereto the income of the trust premises was limited on protective trusts during Hugo's life whereby Hugo was the primary beneficiary. Subject to those trusts, the capital was limited in favour of the children and issue of Hugo as he should appoint, subject thereto on trust for the children of Hugo in equal shares, and subject thereto again there was a general testamentary power of appointment conferred on Hugo. There was also a power for Hugo to appoint in favour of a widow. Those trusts exhausted the beneficial limitations in the settlement. In so far, therefore, as those trusts should be inapplicable—for example, if Hugo should die without issue and should not exercise his general testamentary power—the trust premises would then stand limited according to the appropriate trusts under the original settlement of 1897, and under those trusts (in default of any of the trusts of the deed of 1935 coming into operation) Hugo would become tenant in tail of the premises. Subject to that trust, the next limitation would be in favour of the testamentary appointees of Captain Brassey. In default thereof, the next limitation would be in favour of Captain Brassey's daughters, or Hugo's three sisters, respectively as tenants in tail. I need not pursue the matter further.

Before leaving the deed, I should refer to the fact that, by cl. 2 (c), there was a provision that the trustees should not be chargeable or responsible

“for any omission or neglect to enforce any covenant thereinbefore contained in relation to any policy for the time being subject to the trusts thereof or to keep up or restore any such policy or effect any new policy pursuant to the provisions thereinbefore contained.”

I have said that Captain Brassey died in 1946, and, as the four policies with the Clerical, Medical and General Life Assurance Society had been maintained, there then fell into the hands of the trustees as part of the trust premises the sum of £40,000, the policy monies. The claim under s. 2 (1) (b) is not, however, a claim to exact duty on that sum. As counsel for the Crown explained, the benefit that arose by receiving the policy monies is, for present purposes, an irrelevant benefit. There is, perhaps, a certain irony in that concession, for counsel have made it clear that the somewhat obscure provisions of the Finance Act, 1894, are apt to work in a rather mysterious way. Observe the facts of the present case. During the period between 1935 and 1946, being the residue of Captain Brassey's life, a sum of £1,977 was yearly diverted from Hugo's enjoyment and employed in the payment of the premiums to the Clerical, Medical and General Life Assurance Society. On the death of Captain Brassey that diversion ceased and the £40,000 was received. But, if the Crown's claim is right, as I have felt constrained to conclude that it is, the duty exigible which arises out of the provisions relating to the policies appears to amount to a sum of £60,000 to £70,000, not less than fifty per cent. more than the capital value of the policies, a result which, by depriving Hugo of £1,977 per annum, the trustees in the due performance of their obligations have managed to achieve. If the trustees had been given prophetic vision, they might have thought with justice that they would have best served the interests of their beneficiaries by consigning the policies to the flames on the day following the execution of the re-settlement and thereafter declining to pay any premiums. As counsel pointed out, they would have run the substantial risk that, if Captain Brassey had not survived this conflagration by three years, they would have been even worse off than they are now, but, given sufficient prophetic vision, they would, in the event, have enabled Hugo to enjoy the £1,977 per annum of which he was deprived and would have succeeded in enriching the trust estate by the sum of about £25,000. I have said

all this because such a result seems startling, and, for my own part, I was impressed with the argument which counsel for the trustees put before us that it was a result which the sections could not be said to have contemplated, and that, in particular, there was here a non-fulfilment of the essential condition which s. 2 (1) (b) imposes, *viz.*, that an interest enjoyed by some person ceased on the death of the deceased. But, stating in a sentence my conclusion and the reasons for it, I have felt constrained in light of the decisions of this court in *Re Hodson's Settlement* (1) and *Westminster Bank, Ltd. v. A.-G.* (2) to agree with ROMER, J., for the reasons which he gave that the necessary conditions for the application of the section have been fulfilled.

In the course of his judgment, the learned judge put the matter thus ([1951] 1 All E.R. 106):

"Accordingly, if the trustees, in disregard of their trust obligations, had paid the whole of the trust income to Hugo Brassey, there can be no doubt but that the court would, at the instance of the remaindermen, have intervened and compelled them to devote sufficient of the income to the maintenance of the policies. From this it follows, in my judgment, that the remaindermen had *pro tanto* an 'interest' in the trust income and a corresponding 'interest' in the property, *i.e.*, the trust fund, of which that income was the fruit. I am unable to avoid the conclusion that this was an interest in property within the purview of s. 2 (1) (b), or that that interest ceased on the death of Captain Brassey; and, in my view, the fact that the right was vested in the remaindermen in their capacity of reversioners is of no real materiality. It was contended on behalf of the plaintiffs that it is not permissible to split up the rights of the remaindermen and, by doing so, to identify some immediate interest and isolate it from their title to possession of the property, which was reversionary and nothing else. I cannot, however, accept this contention. The fact that the remaindermen's right to the possession and the enjoyment of the property was and is future does not and cannot alter the further fact that a right to insist on income being applied to premiums (like a right to enforce accumulation, as to which see *Westminster Bank, Ltd. v. A.-G.* (2)), is a valuable ancillary right which confers an immediate interest in the property from which the income is derived."

Out of respect to the argument of counsel for the trustees, I feel it would not be right for me to leave the matter with a mere affirmation of that conclusion, and I proceed, therefore, to state, I hope briefly, the considerations which have led me to that result, and particularly to make reference to one point which emerged at the end of the argument, namely, the application Aye or No of the case of *A.-G. v. Lloyds Bank, Ltd.* (3).

By way of premise, I think it necessary for me to read the relevant language of s. 2 (1) (b) and also refer to s. 7 (7). Section 2 provides:

"(1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say:— . . . (b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest . . ."

If the matter had stopped there, it would appear clearly that the subject-matter to be taxed was the benefit accruing or arising by virtue of the cesser of the previous interest. Section 7, however, enjoins a different method of computation, for it provides:

"(7) The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall . . . (b) if the interest extended to less than the whole income of the property, be the principal

value of an addition to the property equal to the income to which the interest extended."

- That paragraph has been referred to before now as somewhat enigmatic in its language. It has enshrined in the records of cases under this Act what is known as "the slice theory." But, for present purposes, the point to be made is that, though the subject-matter to be taxed is property to the extent to which a benefit arises, that benefit is assessed by looking at the extent of the interest which has ceased. Where, as here, the interest stated to have ceased is an interest in a certain part of the income of the trust estate, then one is to treat as the subject-matter to be taxed, being the value of the benefit accruing or arising, a proportion of the whole trust premises rateably equivalent to the proportion which the sum of income in question bears to the total income. It is in that way that the apparently startling result is achieved that, though these premiums produced a sum of £40,000, the amount of them represented a share of total income which is expressed, when the same proportion of capital is calculated, by a figure of £104,000 or £105,000. If the conditions are satisfied, that result seems inevitable. Counsel for the Crown, indeed, said that, if attempt is made to create limited interests of this character in trust premises, inevitably and as an arithmetical certainty there arises a claim for duty on a capital sum which is far greater in value than the limited interest which is created. Whether that is arithmetically true, and whether, if true, it is just, I cannot say, and it is unnecessary for me to try to determine the problem. But that such results may emerge is now perhaps painfully apparent. From what I have read it is of the essence of the matter, as counsel for the Crown conceded, that two conditions must be satisfied: (i) an interest ceasing on the death of the deceased, and (ii) a benefit accruing or arising by the cesser of the interest.

- I have already indicated that, if the matter had been free from authority, which, I think, binds this court, I might have felt inclined or disposed to say that the sort of interest which is defined in this case as so ceasing was not within the intendment of s. 2 (1) (b), and, perhaps, I should have derived some comfort from the passages in LORD MACNAGHTEN'S speech in *Earl Cowley v. Inland Revenue Comrs.* (4) ([1899] A.C. 210), to which counsel for the trustees alluded. For the interest here is not a right to enjoy actual income paid to some person. Such a case is not uncommon and falls within s. 2 (1) (b)—for example, where a testator or settlor provides for the payment of an annuity, say £100 a year, during a life. When the life drops, the interest of the annuitant ceases because he then ceases to enjoy that £100 per annum. Here the only persons who had the privilege of receiving sums year by year from the trustees were the Clerical, Medical and General Life Assurance Society. All are agreed that they should be disregarded under s. 2 (1) (b) for any purpose. One has to find some beneficial interest under the settlement. The way it has been formulated is—I borrow the language of junior counsel for the Crown—that if one finds that some person or persons has or have the right to have some sum of income withdrawn or diverted from the person who would otherwise be entitled to receive it and applied for purposes from which they will ultimately derive a benefit, then that person or those persons has or have an interest within the meaning of the language of s. 2 (1) (b).

- I have stated the relevant limitations under the settlement, and it is apparent that during the remainder of Captain Brassey's life there was a class of persons, for whose benefit this provision in the instrument was inserted, who had a right to have the £1,977, so to say, withdrawn from trust circulation and put into the building-up of these policies. They were numerous. They consisted of all those persons for whose benefit eventually the capital of the trust might be held—Hugo's issue and children, Hugo's general testamentary appointees, Hugo's widow, Hugo himself as tenant in tail, Captain Brassey's general appointees, Hugo's three sisters as tenants in tail respectively under the Heythrop settlement. At all material dates Hugo was unmarried. He had, therefore, no issue

at the date of the death of Captain Brassey, and immediately before and immediately afterwards. So, of this numerous class of persons interested many were non-existent. But, as counsel for the Crown observed, and I think rightly, since there are some persons in existence within that class, *viz.*, Hugo's sisters, it is impossible to say, if in other respects the argument is good, that there were no persons having such a right as I have tried to define, namely, the right to have these annual sums so diverted and applied.

There still remains the question whether the interest, defined as junior counsel for the Crown defined it, is such an interest as s. 2 (1) (b) contemplates. Counsel for the trustees argued that the only interest contemplated by the section was an interest of the nature of a beneficial enjoyment of some sum of income or some other property, whereas here it is merely a right to enforce the trust. It is at that point, as it seems to me, that the two cases in this court to which I have already referred are relevant, and indeed, as I think, compelling. They were both cases which related to trusts for accumulation. I should, I think, be taking up time unduly if I referred at length to the facts of those cases. It is sufficient to say that in both cases there was a trust for accumulation either of the whole of the income of the settled fund or of the whole less some fixed sum payable to an annuitant, and after the death of the settlor there were trusts whereby certain persons, children and more remote issue of named individuals, became entitled in succession to limited interests and to the capital of the funds, including the accumulated funds. I hope I have stated sufficiently the essential feature of those cases. There was this difference. In *Hodson's* case (1), which was decided first, the claim arose only as regards the application of s. 1 of the Finance Act, 1894, to the accumulated fund, but in the second case, the *Westminster Bank* case (2), the claim, also under s. 1, related to the whole capital of the trust premises, including the accumulated fund. But, for present purposes, that distinction is immaterial. I have said that both were claims under s. 1, and to that point I shall return in a moment. In *Re Hodson's Settlement* (1), the judgment of the court was, as it was in the *Westminster Bank* case (2), delivered by CLAUSON, L.J. He dealt exhaustively with a number of decisions (including the *Lloyds Bank* case (3)) and he examined closely the structure of s. 1 of the Act and the necessary conditions to its application. He quoted the celebrated passage from the speech of LORD PARKER OF WADDINGTON in *A.-G. v. Milne* (5) that the expression "passing on the death" used in s. 1 of the Act is to denote some actual change in title or to possession of the property as a whole. He went on ([1939] 1 All E.R. 202):

"In the present case, the property as a whole is the accumulations fund, and it would appear *prima facie* that, applying the words of LORD PARKER, it is not open to this court to hold otherwise than that on Mr. Hodson's death the accumulations fund passed. Up to the death, the income was subject to a trust for accumulation for the ultimate benefit of the lady and her children. Upon the death, this trust ceased, and the lady became thenceforward for the rest of her life the sole beneficiary in the income of the fund. It is true that before the death the lady had an interest of a contingent character in the income of the fund, since she had a right to have it accumulated so as to provide a fund the fruit of which would, if she survived Mr. Hodson, come to her, but this circumstance would not prevent the change in the beneficial possession of the property as a whole which took place on Mr. Hodson's death from operating as a 'passing' of the property on his death."

After an examination of the authorities which I have already mentioned, he concluded (*ibid.*, 208):

"In our judgment, this court is bound, in view of the later authorities, to hold that the view taken by this court in *A.-G. v. Lloyds Bank, Ltd.* (3) of the principles to be applied in such cases as the present must now be

A recognised to have been deficient, in that it failed to bring out the crucial point that, in order to arrive at a correct decision, attention must be focussed upon a comparison between the persons beneficially interested in the fund the moment before the relevant death and the persons so interested the moment after the death, and upon the question whether the death effected an alteration in rights, as distinguished from merely removing the possibility of an alteration. Accordingly, if the persons beneficially interested are the same both before and after the death, and if the death merely removes the possibility of an alteration of their rights, as was, in the view of the House of Lords, the case in *A.-G. v. Lloyds Bank, Ltd.* (3), there is no passing; whereas in the present case, while the beneficiaries are, no doubt, the same before and after the death, but the death brings to an end one set of trusts of income and shifts the beneficial interest in the income to the possession of one who (though no doubt previously a contingent beneficiary) had no beneficial interest in possession before the death, there is a 'passing' within s. 1 of the Act."

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To those references I add one further citation—and it is of vital importance—from the *Westminster Bank* case (2). There, as I have said, the facts differed for the present purpose only in that the whole fund and not merely the accumulated fund was in question. The learned judge said ([1939] 2 All E.R. 73):

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"In our judgment, the reasons which led us to hold that the accumulations fund in *Re Hodson's Settlement* (1), passed under Finance Act, 1894, s. 1, on the settlor's death must lead to the same conclusion as regards the originally settled funds and the accumulations fund in question in this case, setting aside for the moment any question as regards the policies. Previous to their mother's death, the children of Mrs. Van der Goes had an interest in the income of these funds, since they had a right to have that income accumulated so as to provide an accumulated fund the fruit of which would come to them, and the children of those children had a corresponding right to have it accumulated so as to provide an accumulated fund the capital of which would, in default of appointment to the contrary, come to them."

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In the light of those references, it seems to me that, unless there is some distinction between s. 1 in this regard and s. 2 (1) (b), it is not open for this court to say other than that the class of persons whom I have stated represented, so to speak, by the three Hugo sisters, had immediately before Captain Brassey's death the right to have these annual sums withdrawn and paid in keeping up the policies, and that such a right is "an interest" within the language of the section under consideration. I have already read that part of the judgment of ROMER, J., where he founded his conclusion on the assertion of that proposition. Since the result of keeping up these policies has turned out financially so disastrous, one cannot avoid wondering whether any court would have enforced any such right. But, as I have already said, the disaster would have been even blacker if the policies were abandoned, unless Captain Brassey survived the abandonment for three years. I think, therefore, that it cannot for that reason be said that this right is one which no court would have enforced and, therefore, can be disregarded for the purposes in question, and the provision in cl. 2 (c) of the re-settlement cannot, in my judgment, produce that result. If, then, the interest is of the character I have named, I cannot satisfactorily formulate or discern any distinction in principle between a provision to accumulate during the settlor's life so much per annum out of income by investing in the ordinary way, on the one hand, and a provision to keep up policies which will mature on the death of the settlor, on the other hand. In principle, the operation seems to me to be the same—a provision for building-up a fund of capital which will become part of the trust premises for all purposes on the settlor's death.

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I am still passing over the question whether there is some difference between s. 1 and s. 2 (1) (b) in this regard in order that I may complete what I think to be the consequences which necessarily flow from what I have so far said. I have said that that interest which I have defined ceased on the death of Captain Brassey. What, then, was the benefit which accrued or arose? I think it was the circumstance that this £1,977 no longer was withdrawn from what I have called trust circulation, but became immediately available for the enjoyment of the person entitled, under the protective trusts, to the income of the trust premises. It follows, therefore, that the benefit accruing or arising must be valued in the manner stipulated by s. 7 (7), and you arrive arithmetically—on this there has been no question raised before us—at the figure which I have already stated of £105,000.

I add a word or two about the *Lloyds Bank* case (3), to which counsel for the trustees referred, though, perhaps, I have anticipated what can be said about it by my citation from the judgment of CLAUSON, L.J., in *Re Hodson* (1). If it could be said that before and after the relevant date the person or persons—if there were more than one—interested under the settlement were the same (and their respective interests, if they were more than one, were also the same), then I think it may necessarily follow from the *Lloyds Bank* case (3) that any passing, actual or notional, for the purposes of estate duty would be negatived. But it does not seem to me that those conditions can be found in the present case. Before Captain Brassey's death there was a number of persons interested under the settlement. Their various successive interests I have already attempted to state. After the death many of them were the same persons, though their interests were not entirely the same. In addition, other interests had arisen. In the first place, there was the widow of Captain Brassey, who became entitled to a jointure of £3,000 per annum out of income. Further, by his will Captain Brassey in fact exercised his general power of appointment so that his three daughters, Hugo's three sisters, ceased to have an interest as tenants in tail respectively under the Heythrop settlement and became on the failure of prior limitations between them absolutely entitled by virtue of the appointment. Therefore, there was no such identity of persons and interests as, I think, would make the *Lloyds Bank* case (3) applicable so as to defeat the Crown's claim here.

I now turn to what is the last point to which I would like to refer. As counsel for the trustees pointed out, both the *Hodson* case (1) and the *Westminster Bank* case (2) arose under s. 1—i.e., in both cases the question was one of the passing of property, using that word in the sense in which LORD PARKER defined it in the quotation from his speech to which I have referred. In this case it is one of notional passing. It is true that the particular language which we have to construe here appears in para. (b) of s. 2 (1) and there is no corresponding language in s. 1, but, to my mind, that does not affect the result, namely, that what CLAUSON, L.J., said in giving the judgments of the Court of Appeal in *Re Hodson's Settlement* (1) and *Westminster Bank, Ltd. v. A.-G.* (2) is equally applicable when this para. (b) has to be considered. It would, indeed, be curious if it were otherwise. Counsel quoted the reference in LORD MACNAGHTEN's speech in the *Cowley* case (4) to the effect that s. 2 is designed, putting it broadly, to bring within the actual grasp of the Act cases which were within the spirit, though they fell outside the precise language, of s. 1. Consider for a moment such a case as is illustrated by the present case, but where there is not a specific sum to be laid aside each year in the way of accumulations, but the whole of the income less an annuity; or take what is, perhaps, a simpler example, the case where what is directed to be accumulated is not £X per annum out of the income, but a fraction of the total income, say one-tenth out of a total income of say £1,000 per annum. In such a case as that it would appear to follow from the decision in the *Westminster Bank* case (2) that a corresponding portion of the trust fund would pass. It would seem to me to be strange if, instead of providing that one-tenth

of the income should be accumulated, one said that £100 a year, which is in effect the same thing, should be accumulated, the result would be that there would be neither an actual nor a notional passing under s. 1 or s. 2. In both types of case the effect of s. 1 and s. 2, I think, is to say that you must treat as "passing" the requisite portion of the fund, the income of which has been applied in that particular way of accumulation.

- A** Reverting to the formula I have already used, a certain sum of income has been withdrawn in order to build up a fund for the benefit of those entitled in the future. It seems to me that when the general scheme of the Act is regarded, there is no real basis for supposing that something which is regarded as an interest for the purpose of determining whether there has been a passing, or something which precisely corresponded to it, should not be regarded as "an interest" within s. 2 (1) (b) for the purposes of a notional passing. As I have already pointed out, in order that there may be a passing, quoting from CLAUSON, L.J., there must be a real change in the title to or the possession of the trust premises, the property passing. You achieve such a result if you say that before the relevant death there was an "interest" different from that which followed it, which former interest ceased at the death. If that is so, I find it impossible to say that rights which can be properly, and must be held in this court to be properly, described as an interest which ceases so as to give rise to a passing cannot be properly regarded as an interest within the meaning of the language of s. 2 (1) (b). I find it impossible to say that the fact that *Hodson's* case (1) and the *Westminster Bank* case (2) are s. 1 cases renders inapplicable and not binding on this court the conclusions which I think necessarily flow from the language which I have quoted, particularly in the *Westminster Bank* case (2), from the judgment of CLAUSON, L.J. For these reasons, I have come to the conclusion—I have felt compelled to come to the conclusion—that this appeal fails. However erratic, as has been apparent in this respect, may be the actual working of the terms of the Act, and however financially disastrous has proved to be the due performance of their duties by the trustees under the trust, I see no escape from holding that the duty claimed is properly exigible.
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JENKINS, L.J.: For the reasons stated by the learned judge and by the Master of the Rolls, to which I cannot usefully add anything, I agree that the claim made in this case for duty under the Finance Act, 1894, s. 2 (1) (b), is well-founded, and, accordingly, that this appeal fails and should be dismissed.

F **BIRKETT, L.J.:** I agree.

Appeal dismissed.

Solicitors: *Norton, Rose, Greenwell & Co.* (for the trustees); *Solicitor of Inland Revenue.*

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

Re WINDER'S WILL TRUSTS. WESTMINSTER BANK, LTD.
v. FAUSSET AND ANOTHER.

[CHANCERY DIVISION (Romer, J.), June 19, 1951.]

Settlement—Capital or income—Tenant for life and remaindermen—Capital profits dividend—Profit on sale of part of company's interests—Sale during testator's lifetime—Dividend payable in respect of date during testator's lifetime, but not paid until after his death.

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By his will, made on Jan. 15, 1948, the testator gave his residuary estate to his trustees on trust to pay the income thereof to a niece during her lifetime, and after her death to hold both capital and income on trust for his great-niece on her attaining the age of twenty-five or marrying, with an ultimate gift over. The testator held £200 ordinary stock of a company whose interests included passenger road transport and road haulage undertakings. During the testator's lifetime these interests were acquired from the company by the British Transport Commission for the sum of £24,800,000, which was satisfied by an allotment to the company of British Transport three per cent. guaranteed stock at 101 per cent., the interest on the purchase price accruing as from Jan. 1, 1948, and the profits from the transport interest passing to the commission from that date. On Feb. 21, 1949, notice was sent to the testator of an extraordinary general meeting of the company to be held on Mar. 17, 1949, to consider an ordinary resolution to pay a special capital profits dividend on its ordinary stock by distributing to each stockholder on the register on Feb. 21, 1949, £5 British Transport stock for each £1 of the company's ordinary stock held by him. On Feb. 27 the testator died. At the meeting of the company on Mar. 17 the resolution with regard to the special profits dividend was passed, and on Apr. 1 the dividend was paid. As a result, the trustees of the testator's estate received £1,000 British Transport stock, and the question to be determined was whether it was to be treated as capital or income of the estate.

HELD: as the dividend was paid in respect of a transaction completed before the testator died and was made payable in respect of a date during his lifetime, even though it was not actually paid until after his death, what was received should be regarded as income which accrued due before his death and, accordingly, formed an asset of his estate before his death, and, therefore, the sum of British Transport stock was to be regarded as capital of the testator's residuary estate for the purposes of the will.

Re Muirhead ([1916] 2 Ch. 181), applied.

Re Sechiari ([1950] 1 All E.R. 417), distinguished.

AS TO DISTRIBUTION BY COMPANY OF PROFITS AS DIVIDENDS OR CAPITAL, see HALSBURY, Hailsham Edn., Vol. 29, pp. 647-650, paras. 929, 930; and FOR CASES, see DIGEST, Vol. 40, pp. 662-666, Nos. 1999-2042.

Cases referred to:

- (1) *Re Sechiari*, [1950] 1 All E.R. 417.
- (2) *Hill (R. A.) v. Permanent Trustee Co. of New South Wales, Ltd.*, [1930] A.C. 720; 144 L.T. 65; *sub nom. Re Hill (Richard)*. *Hill v. Permanent Trustee Co. of New South Wales*, 99 L.J.P.C. 191; Digest Supp.
- (3) *Re Kleinwort's Settlement*, *ante*, p. 328.
- (4) *Re Muirhead*, [1916] 2 Ch. 181; 85 L.J.Ch. 598; 115 L.T. 65; 20 Digest 282, 410.
- (5) *Re Jowitt*, [1922] 2 Ch. 442; 91 L.J.Ch. 449; 127 L.T. 466; 9 Digest 593, 3966.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of Arthur Wellesley Winder and in the events which had happened, a sum of £1,000 British Transport stock received by the trustees of the will as capital

profits dividend on £200 ordinary stock of Thomas Tilling, Ltd., which formed part of the testator's residuary estate, was to be treated as capital or income for the purposes of the trusts of the will.

Wilfrid Hunt for the trustees.

Rink for the tenant for life.

Templeman for an infant contingently entitled in remainder.

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ROMER, J.: This summons raises a question which arises out of the fact that the testator possessed as an item of his property a sum of £200 of the ordinary stock of Thomas Tilling, Ltd., and the question is whether £1,000 British Transport three per cent. guaranteed stock which the trustees of his will received after his death by virtue of that holding is to be treated as capital or as income of his estate.

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By his will, which he made on Jan. 15, 1948, the testator gave his residuary estate to his trustees on trust to pay the income thereof to the first defendant, Mrs. Fausset, during her life, with remainder to the second defendant, Miss Heather Fausset (Mrs. Fausset's daughter, who is now nineteen), contingently on her attaining the age of twenty-five or marrying. On Nov. 8, 1948, a statement

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was issued by the chairman of Thomas Tilling, Ltd., to the stockholders, informing them:

"An agreement with the British Transport Commission for the acquisition by the commission of the company's interests in passenger road transport and road haulage undertakings affected by [the Transport Act, 1947], following the provisional agreement announced in the Press, has now been completed. The consideration for the transfer is £24,800,000 to be satisfied by an allotment of British Transport three per cent. guaranteed stock 1968-73 at 101 per cent., the Stock Exchange price on Sept. 30 last. Interest at the rate of three per cent. per annum on the purchase price accrues as from Jan. 1, 1948, and the profits from the transport interest from that date will pass to the commission."

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Later in the statement, after setting out which of the company's interests were transferred to the commission and which were retained by the company, he said:

"It is proposed to recommend at a meeting to be convened later that on Apr. 1, 1949, a capital distribution be made out of the amount received to holders of ordinary stock at the rate of £5 of British Transport three per cent. guaranteed stock 1968-73 in respect of each £1 stock held. Interest on this stock up to that date will be received by the company."

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On Feb. 21 the stock of Thomas Tilling, Ltd. was quoted for the first time ex dividend. On the same day notices convening a meeting to be held on Mar. 17 were sent out to the stockholders, accompanied by a circular letter signed by the secretary. That letter said:

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"The business of this extraordinary general meeting will be to consider, and if thought fit to pass ordinary and special resolutions in connection with, the following matters . . ."

In reference to the ordinary resolution, which was described as a resolution relating to the special profits dividend, the letter said:

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"This provides for the proposed capital distribution referred to in the statement by the chairman, Sir Frederick Heaton, dated Nov. 8, 1948, on the agreement with the British Transport Commission. In the event of the resolution being passed each ordinary stockholder on the register on Feb. 21, 1949, will receive £5 (nominal) British Transport three per cent. guaranteed stock 1968-73 for each £1 ordinary stock of the company held. This British Transport stock will be distributed as at Apr. 1 next, interest on such stock up to that date being received by the company."

It also said that there would be sent to each ordinary stockholder of the company on the register on Feb. 21, 1949, a form of acceptance in respect of the British Transport stock to which he would become entitled. The actual resolution in regard to the special profits dividend was in the following form:

"That a special capital profits dividend on the ordinary stock of the company of £20,806,000 payable out of the profit realised by the company on the recent sale of part of its undertaking to the British Transport Commission be and the same is hereby declared and that such dividend be payable to the ordinary stockholders on the register on Feb. 21, 1949, in proportion to their holdings of ordinary stock and be paid and satisfied by the distribution amongst them as at Apr. 1, 1949, of £20,600,000 British Transport three per cent. guaranteed stock 1968-73 (part of the consideration received by the company from the British Transport Commission for the sale above referred to) taken at its issue price of 101 per cent."

That letter and the notices were sent out on Feb. 21, 1949, and six days later, on Feb. 27, 1949, the testator died. On Mar. 17, 1949, a meeting of the company was held. The ordinary resolution with regard to the dividend was passed and on Apr. 1, 1949, it was paid. As a result of it, the trustees of the testator's estate received £1,000 of British Transport three per cent. guaranteed stock, and they desire to be told whether they ought to retain it as capital of the testator's estate or distribute it as income.

The relevant terms of the will are as follows. After appointing the plaintiffs as executors and trustees and making a number of pecuniary bequests and specific bequests and devises, the testator, by cl. 7, gave "all my estate whatsoever and wheresoever" to the trustees on trust, first, to raise a sum thereout to pay his funeral and testamentary expenses, debts, and the legacies given by him, and then:

"(ii) To retain the residue of my property (hereinafter called 'my residuary estate') in its existing state of investment at my death. (iii) To pay the income of my residuary estate to my said niece Naomi Mary Fausset [the first defendant] during her life without power to anticipate the same during coverture. (iv) From and after the death of my said niece to stand possessed of my residuary estate (both capital and income) for [the second defendant] provided she shall attain the age of twenty-five years or marry under that age ..."

with certain trusts in her favour of the income of the residuary estate in the meantime, and then there is an ultimate gift over to certain charities. By cl. 8 he says:

"I direct that for the purpose of simplifying the administration of my estate the bank shall from time to time at their absolute discretion have the following additional powers ..."

Then follow certain administrative powers, and, finally, under cl. 8 (d):

"To treat all rents dividends and other periodical payments received after my death as income it being my intention that as between capital and income of my estate there shall be no apportionment in respect of accruing income payments."

It appears that the testator's gross estate was a large one, valued for the purpose of estate duty at £101,000 odd, and his holding of £200 ordinary stock in Thomas Tilling, Ltd., was valued at his death at £262 10s., based on the then market price of 26s. 3d. ex dividend per £1 unit of stock. The estate duty attributable to that holding, which had to be and was paid, amounted to £80 15s. 2d.

The question in general terms whether this capital profits dividend should be treated as income or as capital has been the subject of more than one application to the court, and, so far as I am aware, the first time it came up for consideration

was in *Re Sechiari* (1), which came before me and in which, having regard to certain principles which had been laid down by the Judicial Committee of the Privy Council in *Hill (R. A.) v. Permanent Trustee Co. of New South Wales, Ltd.* (2), I arrived at the conclusion that the dividend should be regarded and treated, not as capital, but as income. I inserted into the order a protective provision to enable the parties, if so advised, to resort to any equitable jurisdiction which there might exist for apportioning the dividends as between capital and income, that being a jurisdiction which, as VAISEY, J., observed in *Re Kleinwort's Settlement* (3), might be exercised if special circumstances were to be established. I am not concerned with that equitable jurisdiction today, the only question with which I am now concerned being whether the principles which led me to decide *Re Sechiari* (1) in the way which I did decide it lead to a similar conclusion on the present application.

Counsel for the first defendant, the tenant for life, contends that *Re Sechiari* (1) and the principles in *Hill's* case (2) apply to the present case. He says that the fact that the resolution, as a result of which this dividend was paid, was that payment should be made to members who were on the register of Thomas Tilling, Ltd. on Feb. 21 is quite irrelevant, as the crucial date is the date of the declaration of the dividend, there being no right vested in a member to anything until that date arrives and the declaration is passed, and the resolution does not even purport to make the dividend payable retrospectively to Feb. 21 but merely, as between the company and the recipient, fixes the recipient, for convenience sake, by reference to that date. He says then, and rightly, that, even if the company had purported to alter the persons who were to take beneficial interests under the testator's will, it could not do it, because it is not what the company does in a matter of this kind which determines matters as between tenant for life and remaindermen, but it is what the settlor does when he establishes the settlement. He submits that, as the resolution was passed some time after the testator's death and the dividend itself was not received until even later, the mere fact that it is issued by reference to the register on Feb. 21, when the testator was alive, does not prevent it from being income payable to the tenant for life in accordance with the decision in *Re Sechiari* (1).

I think, so far as they go, I should accept those propositions, but what I have to decide is whether or not, on the true construction of the testator's will and in the events which have happened, the tenant for life is entitled to the dividend. If she is entitled to it, she can only, as I see, be entitled to it if it can properly be described as "income of the testator's residuary estate," for that is all that is given to her under the will. Neither counsel for the tenant for life, nor counsel for the infant beneficiary, was disposed to rely on cl. 8 of the will, although at first sight it might be thought to have some bearing on the matter. They said (and I am disposed to think that they are right) that it was not directed to a matter of this kind, but was introduced merely for convenience in administration in regard to accruing income payments.

The only question, which is a simple one to state, but not so simple to answer, is: Can the British Transport stock fairly be regarded as income of the residuary estate? It appears to me that counsel for the infant beneficiary is right when he says that the distribution was made payable in respect of a date or period during the testator's lifetime, although it was not actually paid until after the testator's death, and, accordingly, that what is received must be regarded as income which accrued due before the testator's death and is, accordingly, capital. He referred me to *Re Muirhead* (4), where a dividend paid after the death of the tenant for life, but in respect of a period which had determined before her death, was held to be payable wholly to the estate of the deceased life tenant. Similarly, he says, it is perfectly plain from the statements which appear in the circulars and resolutions relevant to the matter that this stock was paid in respect of a transaction which had been completed before the testator died.

The persons to receive the stock were to be determined on a date before the testator's death, namely, Feb. 21. The resolution says that the dividend is to be paid out of the profits realised on the recent sale of assets, and, in the second paragraph of the chairman's statement, it is stated that interest accrues from Jan. 1, 1948, from which it is to be fairly reasonably inferred that that was the date of purchase. Counsel for the second defendant went on to say that, as the result of the decision in *Re Muirhead* (4), when the right to the dividend arises by the resolution, one looks to the period in respect of which it is paid. Finally, he said, and I think rightly, that at the testator's death the right to the dividend, if and when it was passed (and everybody seemed to have taken it for granted that the resolution would be passed), was a separate asset of his estate. It was quoted ex dividend and would be treated for the purposes of duty, presumably, as a separate asset, attracting duty as such, and the date of the actual declaration had nothing to do with the matter.

That was certainly the position at the time of the testator's death. If he sold his £200 stock, he would sell it ex dividend in the absence of a special bargain. Later on he would receive a separate asset, which at that time existed in the form of a contingent or future right to an asset. That formed part of his property, just as much as other items of the estate formed part of his property, and it seems to me, in those circumstances and taking all the dates and other relevant considerations into account, that it is quite impossible to say that this guaranteed stock is income of the residuary estate. It formed an asset of the estate before his death and, therefore, to my mind, it cannot be said to form part of the income of the residuary estate after his death. On that ground it seems to me that the case is altogether removed from the area which was covered by *Re Sechiari* (1) and the principles which I applied in *Re Sechiari* (1). Counsel for the tenant for life tried to displace the view which I have formed by reference to *Re Jowitt* (5), which was a decision that, in the case of a payment by a company to its shareholders out of revenue, the Apportionment Act, 1870, applies only if the payment is made or declared in respect of a definite period, and he says that no special period exists in relation to the declaration of this dividend, but I do not think that is material for consideration. If I come to the conclusion, as I do, that the right to this payment crystallised prior to the testator's death, then it seems to me that that must necessarily lead to the conclusion that, when the payment was received, it could not form part of the income of his residuary trust fund but formed part of his capital estate for the purposes of cl. 7 of his will. Accordingly, I propose to declare, in answer to the question raised in the summons, that on the true construction of the will and in the events which have happened the £1,000 guaranteed stock which the trustees received by way of capital profits dividend ought to be treated as capital for the purposes of the trusts of the will.

Declaration accordingly.

Solicitors: *Rose, Johnson & Hicks*, agents for *Woolley, Bevis & Diplock*, Brighton (for the trustees); *Walker, Rowe & Clark*, agents for *Close & Son*, Camberley (for the beneficiaries).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

WILLCOCK v. MUCKLE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Sir Raymond Evershed, M.R., Somervell and Jenkins, L.JJ., and Hilbery, Lynskey and Devlin, JJ.), June 12, 13, 25, 26, 1951.]

Emergency Legislation—National registration—Identity card—Right of police to require production—National Registration Act, 1939 (c. 91), s. 6 (4).

A The appellant was convicted by justices of failing to produce his national registration identity card to the respondent, a police officer in uniform, when required to do so, contrary to s. 6 (4) of the National Registration Act, 1939, and was discharged absolutely under the Criminal Justice Act, 1948, s. 7 (1).
 B On appeal he contended that the Act of 1939 was no longer in force because it was provided by s. 12 (4) that it should continue "... until such date as His Majesty may by Order in Council declare to be the date on which the emergency that was the occasion of the passing of this Act came to an end ..." and that several orders (which terminated other Emergency Acts) contained declarations to that effect, the first having been made on Feb. 19, 1946.

C HELD (SIR RAYMOND EVERSLED, M.R., and DEVLIN, J., *dubitantes*): on the true construction of s. 12 (4) it was contemplated that to bring any of the Emergency Acts to an end there must be an Order in Council dealing with the particular Act; there was no such order terminating the National Registration Act; and, therefore, the Act was still in force and the appellant was rightly convicted.

D Observations on the use by the police of powers derived from Acts which were passed during the war for security purposes.

FOR THE NATIONAL REGISTRATION ACT, 1939, s. 6 (4), s. 8 (4) and s. 12 (4), see HALSBURY'S STATUTES, Second Edn., Vol. 20, pp. 1228, 1229, and 1231, respectively.

Cases referred to:

- E (1) *Cape Brandy Syndicate v. Inland Revenue Comrs.*, [1921] 2 K.B. 403; 90 L.J.K.B. 461; 125 L.T. 108; 12 Tax Cas. 358; 42 Digest 666, 765.
 (2) *Re MacManaway*, [1951] A.C. 161.

CASE STATED by Middlesex justices.

F At a court of summary jurisdiction sitting at Hornsey an information was preferred by the respondent, a police officer, alleging that the appellant failed to produce his national registration identity card when required to do so by the respondent, contrary to s. 6 (4) of the National Registration Act, 1939. At the hearing the following facts were proved or admitted. While the appellant was driving a motor vehicle he was stopped by the respondent, who was in uniform. The respondent requested the appellant to produce to him his national registration identity card, but the appellant refused to do so. The respondent told the
 G appellant that he would issue to him a form to produce his identity card at any police station, and the appellant replied: "I will not produce it at any police station and I will not accept the form." The respondent gave the form to the appellant who threw it on the pavement, from which another police constable picked it up and placed it in the appellant's motor vehicle. The appellant did not produce his identity card within the prescribed period.

H It was contended for the appellant that by s. 12 (4) the National Registration Act, 1939, was to

"continue in force until such date as His Majesty may by Order in Council declare to be the date on which the emergency that was the occasion of the passing of this Act, came to an end;"

that, by the Courts (Emergency Powers) (End of Emergency) Order, 1950, it was declared that Oct. 8, 1950, was the date on which the emergency which was

the occasion of the passing of the Courts (Emergency Powers) Act, 1939, came to an end; that the emergency which was the occasion of the passing of both Acts, was the same; and that, therefore, the right of a police constable in uniform to request the production of a national registration identity card no longer existed, because the statute creating that right had ceased to be in force on Oct. 8, 1950. The justices were of the opinion that no Order in Council or other enactment had been passed repealing s. 6 (4) of the National Registration Act, 1939; that under reg. 20AB of the Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927, as amended), para. (4) of that regulation was substituted for s. 6 (4) of the National Registration Act, 1939; that para. (4) repeated the relevant provisions of s. 6 (4); and that pursuant to the Emergency Laws (Continuance) Order, 1950 (S.I., 1950, No. 1770), reg. 20AB was to continue in force for a further period of one year until Dec. 10, 1951, unless previously revoked. The justices, therefore, convicted the appellant, but they discharged him absolutely under s. 7 (1) of the Criminal Justice Act, 1948.

The appeal was first heard on June 12 and 13, 1951, before LORD GODDARD, C.J., LYNSEY and DEVLIN, JJ., and it was then adjourned to be heard before a specially constituted court, and to give the Attorney-General an opportunity to appear as *amicus curiae*. At the adjourned hearing it was contended for the appellant that all the Emergency Acts which were passed at the outbreak of the war and which used a formula similar to that in s. 12 (4) of the National Registration Act, 1939, came to an end on Feb. 19, 1946, which His Majesty by Order in Council declared to be the date on which the emergency that was the occasion of the passing of the Regional Commissioners Act, 1939, the first Act so to be dealt with, came to an end.

Marshall, K.C., E. O. Roberts and Wigoder for the appellant.

Vernon Gattie for the respondent.

The Attorney-General (Sir Frank Soskice, K.C.) and J. P. Ashworth appeared as amici curiae.

LORD GODDARD, C.J.: The judgment I am about to pronounce is the judgment of myself, **SOMERVELL, L.J., JENKINS, L.J., HILBERY, J.,** and **LYNSEY, J.** [His LORDSHIP stated the facts and continued:] The question we have to decide is whether the National Registration Act, 1939, is any longer in force. The question is one of very great public importance, and that is sufficiently indicated by the fact that this court of seven judges has been specially constituted to deal with the matter. The Act was passed on Sept. 5, 1939, two days after the outbreak of the war. It provides for people being registered and giving certain particulars. The Act and regulations made thereunder provide for the production of an identity card to police officers in uniform on demand by them, and a penalty for refusing to do so is prescribed. Section 12 (4) provides:

“ This Act shall continue in force until such date as His Majesty may by Order in Council declare to be the date on which the emergency that was the occasion of the passing of this Act came to an end, and shall then expire except as respects things previously done or omitted to be done.”

In the opinion, I think, of all the members of the court, the question raised is essentially one of construction. It was argued for the appellant that there was only one emergency which, in respect of other Acts passed at or about the same time as this Act and in which the same formula is used, has been declared by various Orders in Council to be at an end, and, accordingly, that the emergency which occasioned the passing of this Act must be deemed to be ended at the time when the first of those Orders in Council came into force. On the other hand, it was argued that there can be different aspects of the same emergency, and that, if the Crown considered that a particular aspect no longer existed, so that the

emergency which occasioned that particular Act to be passed was ended, it would not follow that all the Acts dealing with other aspects of the same emergency were terminated. In my opinion, and that of the judges who agree with me on this point, the latter argument is correct, and on the true construction of this formula, used in so many of the Acts passed at the outbreak of war, it is contemplated that to bring any one of those Acts to an end there must be an Order in Council dealing with that particular Act. It follows that Orders in Council are required to terminate each of the Acts in which this formula is used, and may do so on different dates. Accordingly, in our opinion, this Act has not been terminated by reason of the first Order in Council which was passed so long ago as Feb. 19, 1946—the Regional Commissioners Act (Expiry) Order, 1946 (S.R. & O., 1946, No. 164)—and, as there is no Order in Council terminating the National Registration Act, 1939, we cannot say that the Act has been terminated.

Before I part with the matter I should like to say two things. First, I think the justices should be congratulated on the fact that their decision has been upheld by a court specially constituted to hear this appeal. Secondly, the court wishes to express its emphatic approval of the way the justices dealt with this case by granting an absolute discharge for, although the police may have powers, it does not follow that they ought to exercise them on all occasions or as a matter of routine. From what we have been told by counsel for the respondent it is obvious that the police now, as a matter of routine, demand the production of national registration identity cards whenever they stop or interrogate a motorist for whatever cause. Of course, if they are looking for a stolen car or have reason to believe that a particular motorist is engaged in committing a crime, that is one thing, but to demand a national registration identity card from all and sundry, for instance, from a lady who may leave her car outside a shop longer than she should, or some trivial matter of that sort, is wholly unreasonable. This Act was passed for security purposes, and not for the purposes for which, apparently, it is now sought to be used. To use Acts of Parliament, passed for particular purposes during war, in times when the war is past, except that technically a state of war exists, tends to turn law-abiding subjects into law-breakers, which is a most undesirable state of affairs. Further, in this country we have always prided ourselves on the good feeling that exists between the police and the public and such action tends to make the people resentful of the acts of the police and inclines them to obstruct the police instead of to assist them. For those reasons I hope that, if a similar case comes before any other bench of justices, they will deal with the case as did the Hornsey bench and grant an absolute discharge. In the Road Traffic Acts, 1930 and 1934, Parliament dealt with the matter of endorsements on licences and so forth, and, if the police do not think that those Acts give them sufficient powers or think that the administration of those Acts is difficult, they can go to Parliament and ask for further powers. They ought not to use a security Act, which was passed for a particular purpose, as they have done in this case. For these reasons, although the court dismisses the appeal, it gives no costs against the appellant.

SIR RAYMOND EVERSLED, M.R.: Although I do not dissent from the conclusion my Lord has expressed I think that, having regard to the importance of the case and the arguments delivered, it is right that I should briefly state the difficulties that I have felt in concurring with the judgment which has been delivered.

For my part, when regard is had to the measures which appeared on the statute book between the end of August and the middle of September, 1939, I feel great difficulty in accepting the view that Parliament intended to deal with these matters on the footing that there were numerous and distinct emergencies, and I feel equal difficulty in accepting the proposition that, though there was but one emergency, Parliament intended to deal distinctly with several manifestations of it. That, however, is not, in my judgment, the end of

the matter, for, as my Lord has said, there falls to be considered a point of construction which may be briefly stated thus: whether what has been called the "usual formula" which is found in these Acts means that any particular Act ceases to operate at the time stated by a declaration by His Majesty in Council following a particular form and referable to the particular Act whatever may be the extraneous circumstances, or whether the formula, as counsel for the appellant has contended, is merely a periphrastic statement of the words "the present emergency." I confess that on that point, if the matter rested with me alone, I should feel a strong inclination towards the latter view. I have placed some reliance in this respect on the language of the first of the Acts, the Emergency Powers (Defence) Act, 1939, and on the circumstance that there was available, and there was used by Parliament, a formula which would have exactly expressed the intention of Parliament if the former view had been intended.

But, for reasons which I can very briefly state, I do not think the matter entirely rests with that point of construction. Having regard to the view taken by the majority of the court it would be impertinent to assert that the matter of construction was not one which was (within the language of LORD STERNDALE, M.R., in *Cape Brandy Syndicate v. Inland Revenue Comrs.* (1), in the passage cited in *Re MacManaway* (2) ([1951] A.C. 177)) "fairly and equally open to divers meanings . . ." If that be so, then there would, as it seems to me, be strong ground at least for saying that reference could be had to later legislation, and that reference seems plainly to indicate that Parliament thereafter consistently thought that the meaning of the earlier Acts had been that for which the Attorney-General has contended. I have further been deterred from expressing any final conclusion on the point of construction by the further consideration that, if the view for which counsel for the appellant has contended be right, I am far from satisfied that the conclusion would not rightly be that none of the Orders in Council so far made and purporting to put an end to particular Acts has had any effect at all, on the ground, as the Attorney-General stated, that they would have been made *alio intuitu*. For these reasons I propose to say no more than to give expression to the difficulties I have felt. But with regard to that part of the judgment my Lord has delivered dealing with the exercise of the police powers as distinct from their existence I would like to express my emphatic affirmation.

DEVLIN, J.: I share the doubts which have been expressed by SIR RAYMOND EVERSHED, M.R., on the construction of this statute, and I entertain also doubts on other points that were discussed in the course of the argument. In ordinary circumstances I should have taken time to resolve them, but as this is a point of great importance on which it is desirable that a speedy decision should be given, and as the majority of the court has reached a clear conclusion on it, I think that no public advantage would be served by any elaboration of the doubts at present in my mind. I also wish to say, in relation to the concluding observations of LORD GODDARD, C.J., that I entirely agree with them. I think it would be very unfortunate if the public were to receive the impression that the continuance of the state of emergency had become a sort of statutory fiction which was used as a means of prolonging legislation initiated in different circumstances and for different purposes.

Appeal dismissed.

Solicitors: *Lucien Fior* (for the appellant); *Solicitor for the Metropolitan Police* (for the respondent); *Treasury Solicitor* (for *amici curiae*).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

STUDHOLME v. MINISTER OF FUEL AND POWER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Birkett, L.JJ.), June 14, 15, 18, 1951.]

Gas—Nationalisation—Compensation—Unquoted securities—Assessment of value—Relevant date—Effect of impending nationalisation—Relevancy of agreement as to value of other securities—Gas Act, 1948 (c. 67), s. 25 (2), s. 25 (10).

- A The applicant was the stockholders' representative appointed under s. 27 (1) of the Gas Act, 1948, to represent the interest of the holders of securities of a nationalised gas company in connection with the determination of the amount of compensation payable in respect of those securities. The securities were not quoted on the Stock Exchange and their value had to be determined in accordance with the provisions of s. 25 (10) of the Act.
- B It was agreed between the Minister of Fuel and Power and the applicant that the value of the company's ordinary stock was £121 per cent., but there was no evidence showing how that figure was arrived at. The parties failed to reach agreement on the value of three other classes of securities and the applicant applied to the Gas Arbitration Tribunal for a determination of their value. The tribunal decided that the value of the securities should be assessed by reference to the value of comparable securities as determined by s. 25 (2) and not by reference to their values on May 1, 1949, *i.e.*, the vesting date. Being dissatisfied with the tribunal's determination, the applicant appealed by way of a Special Case in which the tribunal set out the following questions for the opinion of the court (i) whether the values for compensation of the securities in question were to be assessed on May 1, 1949; (ii) whether the values were to be assessed on the basis that the gas industry was about to be nationalised; and (iii) whether the fact that the value for the company's ordinary stock had been agreed was a "relevant factor" within the meaning of s. 25 (10).
- C
- D

E HELD: (i) on the true construction of s. 25 (10) of the Act of 1948, the value of the securities had to be determined by reference to the matters specified in s. 25 (2) and the value on the vesting date was, therefore, irrelevant.

(ii) since the basis of valuation prescribed by s. 25 (10) related the matter back to a period before the depressing effect of nationalisation had made itself felt, no special allowance should be made for the effect of nationalisation.

F

(iii) since there was no evidence as to how the value of the company's ordinary stock was arrived at, that was not a "relevant factor" within s. 25 (10) and should not be taken into account.

G FOR THE GAS ACT, 1948, s. 25 (2) and s. 25 (10), see HALSBURY'S STATUTES, Second Edn., Vol. 10, pp. 892 and 894.

SPECIAL CASE stated by the Gas Arbitration Tribunal under the Gas Act, 1948, s. 64 (3).

H The applicant, who was the stockholders' representative of the Dudley Brierley Hill and District Gas Co., applied to the tribunal for the determination of the values of the five per cent. consolidated preference stock, four per cent. perpetual debenture stock, and 4½ per cent. perpetual debenture stock of the company. By a decision dated Nov. 11, 1950, the tribunal made an award in alternative form, first, in the form of a Special Case, and, secondly, in the form of a final and conclusive decision subject to the opinion of the Court of Appeal on the points of law raised in the Case. For the applicant it was contended (i) that the relevant date for the valuation of the securities under s. 25 (10) of the Gas Act, 1948, was May 1, 1949, the date on which the property of the company vested in the West Midland Area Gas Board; (ii) that between 1945 and the vesting date the threat

of nationalisation consequent on the result of the general election in 1945, depressed the prices of the company's securities and comparable securities, and that this was a relevant factor within the meaning of s. 25 (10), to which the tribunal should have regard, and that the values for compensation should be the value which the securities would have had on the vesting date, but for the impending nationalisation of the gas industry; (iii) that the fact that the applicant and the Minister had agreed a figure of £121 per £100 of stock as the compensation value of the company's consolidated ordinary stock under s. 25 (10) of the Act was a relevant factor to be taken into account in determining the value of the company's other securities under the same sub-section. The tribunal decided that the value of the securities within s. 25 (10) must be assessed primarily by reference to the value of comparable securities as determined by s. 25 (2) and not by reference to their value on the vesting date, and that sub-s. (10) required the tribunal to take into account other factors if satisfied that they were relevant, but that the agreement on the value of the company's ordinary stock was not a relevant factor within the meaning of sub-s. (10).

Mocatta, K.C., and Templeman for the applicant.

Upjohn, K.C., J. P. Ashworth and R. J. Parker for the Minister of Fuel and Power.

SIR RAYMOND EVERSHERD, M.R.: This is an appeal, the first of its kind, by way of Special Case stated by the Gas Arbitration Tribunal pursuant to s. 64 (3) of the Gas Act, 1948. The tribunal was appointed with the object of determining the values, for the purposes of s. 25 (1) of the Act, of certain securities. The securities in question are five per cent. consolidated preference stock, four per cent. perpetual debenture stock, and $4\frac{1}{2}$ per cent. perpetual debenture stock of the formerly existing Dudley Brierley Hill and District Gas Co. Pursuant to the Act, the applicant, Mr. Richard Home Studholme, has been duly appointed stockholders' representative, and has, therefore, been concerned on behalf of the stocks he represents to argue certain points with a view to increasing the compensation payable in respect of these stocks, amounting to £82,275, £2,500, and £9,500, respectively.

The purpose of the Gas Act, 1948, was, to quote from the preamble of the Act,

"... to provide for the establishment of area gas boards and a Gas Council, and for the exercise and performance by those boards and that council of functions relating to the supply of gas and coke and certain other matters; for the transfer to such boards as aforesaid and to the said council of property, rights, obligations and liabilities of gas undertakers and other persons; for co-ordinating the activities of area gas boards and the National Coal Board relating to carbonisation; to amend the law relating to the supply of gas; to make certain consequential provision as to income tax; and for purposes connected with the matters aforesaid."

The object of the Act was to nationalise the gas industry in England, Wales and Scotland. For that purpose provision was made, among other things, for the acquisition of the various gas undertakings, of which the Dudley Brierley Hill and District Gas Co. was one. That particular company falls within the description contained in s. 15 (1) (a) of the Act and within the definition in s. 15 (2) (a) as a "statutory undertaker"—that is "every person who carries on a gas undertaking authorised by any enactment." In s. 15 (1) (b) reference is made to

"every person who carries on a gas undertaking not authorised by any enactment but providing supplies of gas the whole or main part of which was, during the year 1947, consumed by persons other than the undertaker, any subsidiary or holding company of the undertaker, and any subsidiary of a holding company of the undertaker."

Such person is referred to in sub-s. (2) (b) as a "non-statutory undertaker." There are other types of gas undertakers, including an ancillary gas undertaker,

where the person concerned is also comprised within sub-s. (2) (b), but where the gas is not the whole or main part of his business. For the purposes of the acquisition process, a vesting date is referred to in s. 17 (1) of the Act, which, by the Gas (Vesting Date) Order, 1949 (S.I., 1949, No. 392) has been fixed as May 1, 1949. On that date the undertaking of the particular statutory undertaker with which we are concerned vested in the West Midland Area Board. The problem concerns the ascertainment of the amount of compensation which was to be payable in respect of the various stocks of this particular undertaker which I have described. In addition to the preference and debenture stocks, there was also an issue of ordinary stock, and that fact will have a significance to be presently noticed.

Section 25 (1) provides:

"Every holder of securities of any undertaker to whom this Part of this Act applies . . . shall be entitled to be compensated by the issue to him by the Gas Council, in accordance with the provisions of sched. II to this Act, of British gas stock of such amount as in the opinion of the Treasury is at the vesting date of a value equal to the value of the said securities held by him, regard being had (in estimating the value of the stock so issued) to the market value of government securities at or about the vesting date . . ."

That sub-section admittedly means that whatever be the value of the securities held by the stockholder, and however that value be ascertained, he will receive by way of compensation, not a sum of cash, but an amount of British gas stock which will be of a value equivalent to the value of the stocks of the holder on May 1, 1949. That date relates to the value of the British Gas Council's stock when transferred. By way of illustration, let it be supposed that the value of the securities held by a particular holder is ascertained, in accordance with the other provisions which are applicable, to be £98. The amount of gas stock which that holder is entitled to receive is such an amount of British gas stock as on May 1, 1949, shall be worth £98. If the value of British gas stock is £98, for every £100 on that date he will, therefore, receive £100 nominal of British gas stock. It will be observed from what I have said that the question at what date, if at any particular date, the securities to be compensated are valued, has not been stated. Counsel for the applicant has said that, if the matter stood merely in accordance with the provisions of sub-s. (1), it would follow as a matter of ordinary sense that that value would also be ascertained at the same date, being the date that the transaction of transfer is to take place. I think that, if there were nothing more relevant to the question than is found in that sub-section, it may well be that the answer counsel suggests would be correct. The remainder of the first ten sub-sections of s. 25, however, deal with the way in which one does arrive at the value of the securities of the particular holder. Sub-section (2) provides:

"Where securities of any class were quoted in the Stock Exchange Official Daily List on all six of the following dates [*i.e.*, Oct. 13, 14, 15, 16, 17 and 20, 1947], and were also quoted in the said list or in the Stock Exchange Daily Supplementary List on any of the following dates [*i.e.*, Feb. 15, Mar. 15, Apr. 16, May 15, June 15, and July 16, 1945] the value of securities of that class for the purposes of this section shall, subject to the provisions of this section and the next following section, be deemed to be either—(a) the average of the mean of the quotations for securities of that class appearing in the said Stock Exchange Official Daily List on the said dates in the year 1947, or (b) the average of the mean of the quotations for securities of that class appearing in the said Stock Exchange Official Daily List or the said Stock Exchange Daily Supplementary List on the said dates in the year 1945 on which a quotation therefor so appeared, whichever is the higher . . ."

Plainly the effect of those provisions in the case of the "quoted securities" is twofold. First, the value is to be arrived at by looking at dates on which it

may be said the securities were unaffected either by the immediate prospect of nationalisation—*i.e.*, in 1947—or by the more distant picture of nationalisation—*i.e.*, in 1945. The point of taking those dates is, clearly, that the existence of pending nationalisation had an effect, which was perceptible on the Stock Exchange, on the value of these types of security. In fact, they fell during the period from October, 1947, until the vesting date, whereas other industrial securities during the same period rose. That phenomenon is described, no doubt, accurately, by counsel for the applicant as being “the depressing effect” of the proposed gas nationalisation. From that particular depression, therefore, this method of arriving at the value was designed to protect the stockholders. The second effect of the provisions was to give an option to the stockholders to take whichever was the better of the two figures, one determined by reference to 1947 figures and the other determined by reference to 1945 figures.

Sub-section (3) deals with a special class of case, namely, the case of securities falling within sub-s. (2), but where there has been a fresh issue of securities of the particular class after the last relevant quotation. In such a case the sub-section provides:

“... the value ... shall be deemed to be the average of the values of all the securities of that class calculated on the basis that—(a) the value of each of the securities comprised in that issue is the price at which it was issued, and (b) the value of the remaining securities is the value which those securities had or would have had for the purposes of this section immediately before the issue took place.”

The effect of that sub-section is to fix the price of these new issues by reference to a calculation which, so far as the old part of the issues was concerned, is to be determined in accordance with these “pre-depression” dates of quotation. Sub-section (4) deals with cases where the stocks have been converted into securities of “a different nominal value.” The sub-section adheres to the main plan which is discernible in what I have read, namely, the fixing of the value of these securities by reference to dates prior to the date when the pendency of the Gas Act would be likely to affect the value one way or the other. Sub-section (5) relates to issues of a new class after Oct. 20, 1947. The value of such securities is to be deemed to be the issue price. Sub-section (6) states that the preceding sub-sections (2), (3) and (5) do not apply to securities issued after Dec. 31, 1945, “on terms and conditions approved by the Minister” for specific purposes, and the value of such securities shall again be deemed to be the issue price. Sub-section (7) deals with cases where under the last two preceding sub-sections the securities have been disposed of by public auction or tender. In such a case the price is deemed to be (a) where the holder of the securities is the person who originally acquired them, or his successor, not being a purchaser for value, the price which he originally paid for them, and (b) in any other case, the average gross price arrived at as indicated previously. Sub-section (9) provides:

“If any question arises under any of the last seven preceding sub-sections as to the value of any securities, it shall be settled by agreement between the Minister and the stockholders’ representative appointed under the following provisions of this Part of this Act, or, in default of such agreement, determined by arbitration under this Act.”

Counsel for the applicant stated that the *catena* of sub-sections which I have read has in it the possible hiatus that securities issued after Dec. 31, 1945, without the consent of the Minister, but before Oct. 20, 1947, would be covered neither by sub-s. (5) nor sub-s. (6). His reason for making that point will appear shortly.

So far, the provisions of the section have dealt exclusively with “quoted securities.” Sub-section (10), the sub-section particularly in question, deals with other securities than quoted securities. It provides:

“For the purposes of this section, the value of any securities, not being securities to which sub-s. (2), (3), (4), (5) or (6) of this section applies, shall

be such value as may be agreed between the Minister and the said stockholders' representative or, in default of such agreement, as may be determined by arbitration under this Act, and the arbitration tribunal, in determining the value of those securities, shall have regard to all relevant factors including, as far as may be, the value of securities to which sub-s. (2) of this section applies (as determined under that sub-section), being securities which, as respects all matters affecting their value, are most nearly comparable to the first mentioned securities, and if, in relation to any class of securities to which this sub-section applies, such a fresh issue or conversion of securities as is mentioned in sub-s. (3) or sub-s. (4) of this section has occurred, the arbitration tribunal shall also have regard, as far as may be, to the manner in which the value of securities is to be determined in cases to which the said sub-s. (3) or sub-s. (4) applies."

It is under that sub-section that the various securities including the ordinary stock of the Dudley company fell to be ascertained. So far as the ordinary stock is concerned, agreement was reached between the Minister and the stockholders' representative, on a value of £121 per cent., but, as regards the other three types of stock, no agreement was found possible, and the matter, accordingly, came before the arbitration tribunal.

No question arises, if any of the methods of calculation for which counsel for the applicant has contended be the correct ones, of impossibility of arriving at the resultant figure, because in each case the tribunal did arrive at a figure which would be appropriate on the various hypotheses stated. Subject to this court's determining to the contrary, however, the tribunal decided that the real values for the three classes of stock which I have mentioned were, per £100 of stock, £115 in the case of the preference stock, £102 15s. in the case of the four per cent. debenture stock, and £113 10s. in respect of the $4\frac{1}{2}$ per cent. debenture stock. The tribunal found as a fact that in the case of the preference stock and the four per cent. debenture stock there were certain stocks which fell within the description of securities "most nearly comparable" to the particular security in question, and they took the figure that would be appropriate for those comparable stocks in accordance with the provisions of sub-s. (2) as their guide, but they appear to have made some slight addition to the values at which they thus arrived. There was no stock which the tribunal thought "most nearly comparable" to the $4\frac{1}{2}$ per cent. debenture stock of this undertaker other than the four per cent. stock of the same company, and, therefore, the figure at which they arrived in respect of the $4\frac{1}{2}$ per cent. stock was in a sense arrived at by proceeding from their conclusion on the four per cent. stock to their conclusion on the $4\frac{1}{2}$ per cent. stock. It follows that the basis of the tribunal's valuation in each case was a figure arrived at, not in relation to the vesting date, but in relation to the earlier 1947 or 1945 dates, and they rejected the argument which had been put forward on behalf of the applicant that in the case of non-quoted securities—that is a case falling under sub-s. (10)—the right date on which to arrive at a value was the vesting date. I have already stated that between 1947 and the vesting date stocks of this character declined, whereas other industrial stocks generally rose, the rise being capable of expression by saying that there was a four to six point rise in such stocks. From this, it is said, it may be assumed that, had it not been for the shadow of this impending legislation, gas stocks would also have risen from four to six points between 1947 and 1949.

In approaching this problem, there has been some play made of the use which is found in the Special Case of the adjectives "real" and "artificial." Counsel for the applicant has been accused of applying an artificial value as distinct from a real one. He has rejoined that the adjective "real" has no better applicability to the method of the Minister of Fuel and Power than his own method. I wish to avoid in this matter the bandying of words, and I shall try to avoid suggesting that the words "real" and "artificial" have any particular importance in

determining the question in issue. From what I have said, however, it will be seen that, if the value of these securities is to be ascertained, not by reference to some 1947 or 1945 figure, but by reference to a figure at the vesting date, counsel for the applicant is faced with a serious difficulty in that the value, in fact, went on declining, and the price of gas stocks on May 1, 1949, was lower than it was in 1945 or 1947. To avoid that, for him, unsatisfactory result, counsel has claimed that according to the true reading of sub-s. (10) the tribunal, in making its valuation, must exclude any effects that the Gas Act had on these later securities. It is because of that submission that he has been accused of using an "artificial" value.

The precise questions which are formulated by the tribunal are three in number, but, for the reasons which I have just stated, numbers one and two must be taken together. They are these:

"(i) whether the values for compensation of the Dudley securities under s. 25 of the Gas Act, 1948, are to be assessed on May 1, 1949; (ii) whether the values for compensation of the Dudley securities under s. 25 of the Gas Act, 1948, are to be assessed on the basis that the gas industry was not about to be nationalised; (iii) whether the fact that the respondent had determined by agreement with the applicant under s. 25 (10) of the Act a value for compensation of £121 per cent. for the consolidated ordinary stock of the company is a relevant factor within the meaning of s. 25 (10) of the Act."

I propose to deal with those three questions in reverse order. First, then, I consider whether the agreement between the applicant and the Minister of £121 for the ordinary stock is a relevant factor in considering particularly the value of the preference stock. The tribunal stated that they regarded it as irrelevant, and, in my judgment, they were right so to do. As they stated:

"No evidence was given to us showing how the figure of £121 was arrived at, the circumstances in which the agreement was made, or the considerations which prompted it."

They go on to state one fact which was before them, *viz.*, that the ordinary stock during the last sixty-eight years paid regularly a dividend at five per cent., *i.e.*, the same dividend as the preference stock was entitled to receive, and it further appears that by statute they were unable to receive a higher figure. Counsel for the applicant submits that it is absurd, if the ordinary stock (which can be treated for this purpose as a fixed five per cent. stock), is valued at £121, that the five per cent. preference stock, which had priority over the ordinary stock, should be of a value, not greater, but less by the difference between £121 per cent. and £115 per cent. He says that that shows that there must be something wrong with the method of calculation. I am not for a moment suggesting that, in arriving at the figure of £121 per cent. for ordinary stock, the Minister was so persuaded by the arguments of the applicant that he did not properly apply the provisions of sub-s. (10), or otherwise was extravagant in his price. I assume that it was arrived at by a proper application of the principles to be applied. As the Special Case states, however, no evidence was given how it was arrived at or as to the circumstances or the considerations relevant to it. For all we know, or the tribunal knew, there may have been special circumstances which attached this particular price quite properly to the ordinary stock. Unless all the facts were known which bear on the arriving at the £121 per cent. per £100 of stock, it must, in my judgment, be right to say that it is not a relevant factor, and, indeed, it would be liable to be a most misleading factor if it were taken into account. I am unable to accept the view that, because of the one circumstance limiting the dividend on the ordinary stock which I have already stated, that must be necessarily reflected in the price of the preference stock. Counsel for the applicant will, I hope, forgive me if I say no more about it than that. For the reasons which

they themselves state, the tribunal is plainly right in regarding as irrelevant the fact that this price had been agreed between the Minister and the stockholders' representative.

I now come to the more difficult problem of the first two questions. I have stated that I will deal with them in reverse order not only because unless counsel for the applicant succeeds on his second point the first is worse than useless to him, but because I think the consideration of the second point assists in arriving at the proper conclusion of the meaning of sub-s. (10) not only in relation to this point but in relation to the first point. I approach the construction of this sub-section as a matter of English with the view that where one talks of "relevant factors" one is referring to facts as they are, or circumstances as they are, which may have a bearing on the problem to be solved. No doubt, the pendency of the passing of the Gas Act was a factor which would have a bearing on the values, and, in so far as it did, it had, in fact, the effect of reducing their value. If it was intended to exclude from consideration some matter of fact which was there and which plainly did affect the subject-matter under consideration, I should most certainly expect that Parliament would deliberately and expressly so provide, as, indeed, it frequently does. Examples were given to us by counsel for the Minister by reference to other legislation: *e.g.*, under the Coal Industry Nationalisation Act, 1946, s. 13 (4), where the formula was that, in arriving at particular values, the person or body charged with the calculation was to proceed as if "this Act had not been passed." It is a common formula in legislation. Indeed, and—which seems to me of great significance—it is to be found in this very Act of 1948 where it is appropriate. In s. 31 (1), for example, provision is made for compensation to ancillary gas undertakers and others, those being persons the definition of whom I have already stated. In the case of ancillary gas undertakings not being bodies corporate, provision is made that compensation is to be arrived at by valuing the undertaking and seeing what it would have been expected to realise if it had been sold on the vesting date in the open market by a willing seller to a willing purchaser. The hypothesis of a willing vendor or a willing purchaser is in conflict, of course, with the actual facts of the case, because, so far from there being a willing sale, the effect of the Gas Act, 1948, was to acquire compulsorily the undertaking. Therefore, in this section, dealing with the valuation of this type of asset, one finds that the formula I have mentioned is used as follows:

"... such amount as the gas undertaking of the undertaker might have been expected to realise if ... (c) this Act had not been passed."

Another instance of the same type of provision is in s. 26 (1). That provides for the case of gas undertakings which have suffered various kinds of war damage so that the value of their securities may fairly be said to have been affected adversely by the war damage they have suffered. In such a case provision is made for compensating the holder by offsetting the depreciation due or attributable to the war damage. The formula there used is

"... the Minister shall direct that the values of those securities for the purposes of the last preceding section shall be increased by such amount as may be agreed between him and the stockholders' representative to be necessary to offset the said depreciation [in the securities]."

The same conception is found also in s. 26 (4). It is, therefore, clear that the framers of this Act had in mind that, in certain circumstances, it would be necessary to make provision in order that the depreciation in the values due to war damage, or, in certain circumstances, to the pendency of the passing of the Act, would have to be offset. When we look at s. 25 (10), however, there is no hint of any such notion as a relevant factor to be taken into account by the tribunal in arriving at the value of the securities concerned. Therefore, if this were the only point, I would feel compelled to say that there is no basis, in the

language of this sub-section, for saying that there was to be any such offsetting operation in arriving at the value of the securities with which we are concerned.

The matter, however, has been argued also on the question, at what date should these values be taken? I think the question "at what date" is really an irrelevant one. One is arriving at the value by a particular process and one is not called on, so far as I understand and interpret the language, to do that at any particular or specific date. The question being: How much is £100 nominal of the Dudley company's preference stock to be treated as worth for the purposes of the acquisition of the undertaking?, the sub-section provides how the tribunal shall arrive at that figure, *viz.*, by having regard to all the relevant factors, and then come the important words

"including, as far as may be, the value of securities to which sub-s. (2) of this section applies (as determined under that sub-section), being securities which, as respects all matters affecting their value, are most nearly comparable to the first mentioned securities . . ."

Something has been said about the precise significance to be given to the words "as far as may be." I find it unnecessary to say whether their effect is equivalent to "primarily." It is sufficient to say that one of the relevant factors, and the only one in point of fact specified, is the value of what are called, in short, "comparable securities." That is an abbreviation which, I think, does less than justice to the point. It does not suppose that one will find, necessarily, securities which are strictly comparable, that is to say, really similar. What one has to do is to find what securities there are of the quoted stocks which are "most nearly comparable," and to see what the value of those securities is, determined by reference to the dates and the methods specified in sub-s. (2). It seems to me, as a matter of English, plain enough that, if the price of the quoted securities most nearly comparable, valued in the way specified in sub-s. (2), is a relevant circumstance, then that negatives the notion that, in the case of unquoted securities, you are starting from that terminus to arrive at a value on the vesting date in May, 1949. It appears to me that that would have been a most circumlocutory, almost a deceptive, way to arrive at the conclusion, if that were Parliament's intention.

It is, I think, proper to approach a problem of this kind by assuming that the persons who are to receive compensation will be compensated broadly on the same basis whether their securities happen to have been quoted on all the relevant dates or whether the securities the stockholder holds happen not to have been quoted. It would be a capricious and unjust result if the holder of securities in the Dudley company, which happened not to have been quoted securities, was to receive compensation for the depressing effect of the pending gas nationalisation, but the holder of some other stocks, such as the Bristol or Tottenham companies (for they were looked on by the tribunal as comparable) were not to receive any such compensation, particularly where the difference was, as has been shown to be the case here, as much as four to six points. I do not want it to be thought that I am interpreting the minds of the legislators in 1948 by reference to something which happened afterwards, and which nobody could then have known. I take it that it was regarded as exceedingly probable that the effect of the pending legislation would be to depress these stocks. Whether, however, it depressed or elevated them, the point is the same, namely, that it would be surprising if some different treatment were meted out to a holder of stocks which were not quoted from that which was given to a holder of stock which was quoted. Counsel for the applicant has sought, at any rate in part, to meet that argument by saying that sub-s. (10), on the basis of the interpretation he has so far tried to state, is not universal, and that there might be stocks of an undertaker company of a non-quoted variety as to which no other stocks could be found which fell within the description "most nearly comparable." I have already referred to one instance which counsel's ingenuity extracted from a

comparison of the terms of sub-s. (5) and sub-s. (6). Counsel also gave as an instance stock in respect of which the particular enactment permitted a payment of ten per cent. dividend. He told us that that was something so unusual that he could not find any other stock like it, yet it did exist. I will assume in counsel's favour (though I must not be taken as necessarily accepting it) that there may be cases in which the particular stock is so much *sui generis* that the tribunal, A when seeking for the most comparable stock, would give up the pursuit as hopeless and say that there was nothing that is in the least comparable. What in such circumstances would be the method they would adopt is, fortunately, a matter which we are not called on to decide, but, in fairness to counsel's argument, I could not pass it over entirely in silence. I ventured to suggest in the course of argument that any such stocks might be so unlike anything B liable to be affected by market symptoms that the question of difference in value between 1945 and 1949 might be purely academic. It may be that a case might arise in which the tribunal would have to arrive at a figure which was not tied to the 1945 or 1947 figures, yet by a proper application of the language of the sub-section. It would be an unusual case—so unusual that I think that it could not be treated as constituting any discrimination between that type of C stockholder and stockholders of the more usual type. Assuming all that I have said in counsel's favour, however, I still find the language of sub-s. (10) too compelling to enable me to say that one must so construe it as necessarily to be of universal application, and that the only way one can achieve that result is to arrive by a very tortuous and steep climb at May 1, 1949, as the date to which the valuation relates, the more particularly since in the course of this ascent D one would have to go up the last few steps with one eye closed, so as to exclude from consideration the most obvious feature which the view would present, namely, the passing of the Gas Act, 1948. Certainly for what seems to me clearly was regarded in the contemplation of the draftsman of this sub-section as the ordinary case, the route adopted by the Gas Arbitration Tribunal was the correct method, the method laid down by Parliament. I, therefore, would answer E questions one and two, as I have answered question three, in the negative. I think the Gas Arbitration Tribunal rightly arrived at their result.

I think it would be very dangerous and wrong if this court now attempted to make a complete and exhaustive category of the particular factors which, in any given case, the tribunal ought to take into account. It is plain that the discovery of the most nearly comparable stock or securities may well require F other matters to be taken into account. Though the securities chosen may be the most nearly comparable, there may be circumstances which in truth distinguish them in certain respects, circumstances relating for example to the modernity or antiquity of the plant owned and the area supplied and matters of that kind, which would cause the tribunal to qualify by addition or subtraction the figure they first derive from the most nearly comparable stock. All that the G tribunal here seems to me to have done. They have considered all those matters as appears from their own statement of the case. In para. (m) of the Case Stated the tribunal said:

H “ We have been supplied with a list of the dealings in the Dudley five per cent. consolidated preference stock for the years 1937-49. The list showed that during that period there were fifty-two separate transfers covering in all £19,023 of stock. Of those transfers, twenty-nine took place after July 26, 1945, and these covered in all £13,249 of stock. We agree that those dealings are a relevant factor in estimating the value for compensation of the said preference stock. After scrutiny of this list we find that there is only one dealing, namely, a small parcel of £350 of stock for which £120 for £100 of stock was paid on Apr. 28, 1947, that exceeds the amount of £115 offered [by the Minister].”

The question was raised: Is it legitimate, and, if so, how, to have regard to particular dealings, and, especially, to the one referred to as occurring on Apr. 28, 1947, where the price paid was £120. If it is legitimate, have the tribunal drawn the proper, or, indeed, any conclusions from it? In my judgment, that paragraph is free from criticism. I think what the tribunal was saying was this. "We have found the figure of £115 to be the right figure for the preference stock based on the most comparable securities after consideration of other relevant factors and some very slight adjustment as a consequence. We have looked through these dealings to see whether the prices actually paid indicate that there is anything wrong with the figure that we have arrived at in that way, and we think there is not because we find that, with one exception, the actual prices paid were not above, but the same as or below, the figure which we have taken. The one particular instance we have mentioned is of so small an amount that it may be disregarded as not having any real bearing on the point. It was correct for them to have considered these transactions as a check, and, although it was negative, the conclusion that they drew from that examination was the correct conclusion. For the reasons I have stated, I think that the questions posed for the determination of this court should all be answered in the negative, and the appeal fails.

JENKINS, L.J.: I agree. I find it impossible to dissent from the passage of the Special Case in which the tribunal answers the relevant question of construction in these terms:

"Subject to the opinion of the Court of Appeal we find and decide that on the true construction of s. 25 (10) of the Act the values of securities within that sub-section (and, in particular, the values of the Dudley securities) must be assessed primarily by reference to the values of the comparable securities as determined by s. 25 (2) and not by reference to their values on May 1, 1949. The words 'shall have regard to all relevant factors' in sub-s. (10) do, however, require us to take into account other factors if we are satisfied that they are relevant."

Once this construction of sub-s. (10) is accepted, it necessarily follows that the first and second questions raised by the Case must be answered in the negative. The contention that May 1, 1949, should be taken as the date of valuation is expressly rejected, and the contention that allowance should be made for the depressing effect of impending nationalisation must also fail, because the basis of valuation prescribed by sub-s. (10) relates the matter back to a period before the depressing effect of nationalisation had made itself felt, that is to say, the date or dates in 1945 by reference to which the values of the comparable securities were fixed. Further, I entirely agree with the view expressed by the tribunal that, even if the effect of impending nationalisation had not been excluded by the date to which the sub-s. (10) valuation is related, it could not have been a relevant factor to be taken into account for this purpose. As my Lord has said, the hypothesis that the Gas Act, 1948, had not been passed and that there was not going to be any nationalisation is not a "factor" in any ordinary sense of the word. I agree that there is no justification whatever on the language of the section to import into the calculation the hypothetical assumption suggested. As regards the agreement reached as to the value of the ordinary shares, I entirely agree that on the evidence before the tribunal, it could not be regarded as a relevant factor. Accordingly, I agree with the result stated by my Lord.

BIRKETT, L.J.: I agree.

Appeal dismissed.

Solicitors: *Linklaters & Paines* (for the applicant); *Treasury Solicitor* (for the Minister of Fuel and Power).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

BURTON AND ANOTHER v. HOLDSWORTH.

[COURT OF APPEAL (Jenkins and Birkett, L.JJ.), June 22, 1951.]

Legal Aid—Remittance of action in tort to county court unless security given by plaintiff for defendant's costs—Legal aid certificate issued to plaintiff—Jurisdiction to remit action—County Courts Act, 1934 (c. 53), s. 46 (1), (2).

A In an action for damages for negligence the defendant applied to the court under the County Courts Act, 1934, s. 46 (1), to transfer the action to the county court in default of the plaintiffs giving security for his costs. His application was supported by an affidavit showing that the plaintiffs had no visible means of paying his costs should they be unsuccessful. The plaintiffs contended that the court had no jurisdiction to transfer the action under s. 46 (2) of the Act of 1934, as one of the plaintiffs had been granted a legal aid certificate under the Legal Aid and Advice Act, 1949.

B HELD: the right given to a defendant by s. 46 of the Act of 1934 was one which, particularly in view of s. 1 (7) (b) of the Act of 1949, could not be taken away by the Act of 1949 or the regulations made thereunder unless some provision in the Act or the regulations either expressly or by necessary implication had that effect, and, as there was no such provision, the exercise of the discretion of the court under s. 46 (2) of the Act of 1934 was not precluded by the fact that a legal aid certificate under the Act of 1949 had been granted to one of the plaintiffs.

C *Conway v. George Wimpey & Co., Ltd.* ([1951] 1 All E.R. 56), distinguished. *Decision of STREATFEILD, J. (ante, p. 148), affirmed.*

D FOR THE LEGAL AID AND ADVICE ACT, 1949, see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 532.

Cases referred to:

- (1) *Conway v. George Wimpey & Co., Ltd.*, [1951] 1 All E.R. 56.
(2) *Willé v. St. John*, [1910] 1 Ch. 701; 79 L.J.Ch. 239; 102 L.T. 383; 16 Digest 185, 911.
E (3) *Perry v. London General Omnibus Co.*, [1916] 2 K.B. 335; 85 L.J.K.B. 1609; 115 L.T. 101; 42 Digest 783, 2136.
(4) *Cook v. Imperial Tobacco Co.*, [1922] 2 K.B. 158; 127 L.T. 474; 13 Digest 485, 352.

F INTERLOCUTORY APPEAL by the plaintiffs in an action for damages for negligence from an order of STREATFEILD, J., dated May 11, 1951, and reported *ante*, p. 148, allowing an appeal by the defendant from a decision of Master LAWRENCE, dated Apr. 16, 1951, whereby the master refused to make an order under the County Courts Act, 1934, s. 46 (2), that, unless the plaintiffs gave security for the defendant's costs, the action should be transferred to the Ilford County Court.

G The master held that, as one of the plaintiffs had received a legal aid certificate under the Legal Aid and Advice Act, 1949, he was precluded by the decision of the Court of Appeal in *Conway v. George Wimpey & Co., Ltd.* (1) from making an order under s. 46 (2) of the Act of 1934. STREATFEILD, J., held that *Conway v. George Wimpey & Co., Ltd.* (1) did not govern the case of a statutory right to the transfer of an action to the county court in default of security for costs, as distinct from a right to such security by itself, which s. 46 of the Act of 1934 did not confer; that the exercise of the discretion of the court under s. 46 (2) was not precluded by the fact that a legal aid certificate had been issued to one of the plaintiffs; and that, in the circumstances of the case, the discretion should be exercised in the defendant's favour. The facts appear in the judgment of JENKINS, L.J.

Craske for the plaintiffs.

N. Lawson for the defendant.

JENKINS, L.J.: This is an appeal from an order of **STREATFEILD, J.**, allowing an appeal from an order of Master **LAWRENCE** refusing an application by the defendant in the action, under the County Courts Act, 1934, s. 46 (1), to have the action transferred to a county court on the ground of the impecuniosity of the plaintiffs. The case is one of some general interest and importance inasmuch as it raises a question as to the effect of the Legal Aid and Advice Act, 1949, on the power of a court or a judge to make an order of transfer under s. 46 (2) of the County Courts Act. The question is, in brief, whether the circumstance that a plaintiff has become an assisted person under the Act of 1949 ousts the jurisdiction of the court to make an order of transfer.

To appreciate the point in issue it is necessary to state briefly, the facts, and to refer, also briefly, to the main relevant provisions of the Legal Aid and Advice Act, 1949, as well as to s. 46 of the County Courts Act, 1934. The action is for damages for personal injuries and is brought by two brothers as plaintiffs, William Ronald Burton and Leslie Glenfield Burton. They sustained injuries when riding a motor bicycle of the plaintiff, William, which came into collision with the defendant's motor lorry, the collision being allegedly caused by the defendant's negligence. The learned master refused to make the order under s. 46 of the Act of 1934 applied for by the defendant on the ground that, in his view, he had no power to make it once the plaintiffs, or one of them, had become an assisted person. The position as to that was as follows. On the matter originally coming before Master **BAKER**, he was informed of the fact that an application had been made by the plaintiff, William, to be admitted as an assisted person. There was then an adjournment. By the time the matter came on again, this time before Master **LAWRENCE**, William had been granted a certificate for legal aid. Leslie, the other plaintiff, had not yet obtained a certificate, but it is conceded that the matter can be dealt with as if both were assisted persons, that is to say, the objection taken to the jurisdiction (on the assumption that it is otherwise well founded) applies if one of the two joint plaintiffs is an assisted person. The master, taking the view that he had no power to make the order, did not deal with the merits of the case, but the learned judge, having decided the question of law adversely to the plaintiffs, went on to hold that in all the circumstances of the case it was a proper one for a transfer. No complaint is made that the learned judge exercised his discretion on a wrong principle assuming (contrary to the plaintiffs' submission) that he had any jurisdiction in the matter.

The County Courts Act, 1934, s. 46, provides:

"(1) Where any action founded on tort is commenced in the High Court, the defendant may, on an affidavit made by himself or by any person on his behalf showing that the plaintiff has no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff, apply to the High Court or a judge thereof for an order to transfer the action to a county court. (2) On any such application, the High Court or judge, unless the plaintiff satisfies the court or judge that he has such means as aforesaid, may, if the court or judge having regard to all the circumstances of the case thinks fit so to do, make an order that, unless the plaintiff within a time to be limited in the order gives security for the defendant's costs to the satisfaction of the court or a judge, the action shall be transferred to such county court, to be named in the order, as the court or judge may deem the most convenient to the parties."

There are two points to be noted about that section. First, an essential condition of its application is that the plaintiff should be shown on affidavit to have no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff. Secondly, the order to be made under the section in a proper case is not, in the ordinary sense, an order for security for costs to be given by the plaintiff, but an order for transfer, which the plaintiff, if he elects to do so, may

avoid by giving the security for costs stipulated by the order. No question being raised as to the principle on which the learned judge exercised his discretion, one must take it that, apart from the Legal Aid and Advice Act, 1949, and the regulations made thereunder, there is no doubt but that the order for transfer was properly made.

A One of the provisions of the Legal Aid and Advice Act to which we were referred as being material for the purposes of the argument in the present case was s. 1 (7), the relevant provision of that sub-section being para. (b). The sub-section provides:

B “Save as expressly provided by this Part of this Act or by regulations made thereunder . . . (b) the rights conferred by this Part of this Act on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised.”

C That provision is relied on by the defendant. It is contended on his behalf that s. 46 of the Act of 1934 confers on him a valuable right, which should not be deemed to have been taken away from him by the Act of 1949 or the regulations made thereunder unless there is something amounting to an express provision to that effect. The next reference was to s. 2 (2) of the Act of 1949 which provides:

D “Where a person receives legal aid in connection with any proceedings . . . (e) his liability by virtue of an order for costs made against him with respect to the proceedings shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.”

E Use is made of that paragraph by counsel for the plaintiffs. He says, in effect, that, to find out for the purposes of s. 46 of the Act of 1934 whether a plaintiff has visible means of paying the defendant's costs, regard must be had, if he is an assisted person, to the limitation of his liability for costs under the Act of 1949 and the regulations made thereunder, and that, inasmuch as an assisted person's liability for costs is in effect measured by reference to his ability to pay, it can never be said that he has no visible means of paying the defendant's costs if, as is contended, the reference in s. 46 of the Act of 1934 to the defendant's costs should be construed as meaning such costs as the plaintiff, as an assisted person, will or may be ordered to pay to the defendant. Section 2 (3) of the Act of 1949 provides for the making of regulations in regard to the ascertainment of the amount referred to in s. 2 (2) (e). Section 12 (1) provides:

G “The Lord Chancellor may make such regulations as appear to him necessary or desirable for giving effect to this Part of this Act or for preventing abuses thereof.”

G Section 12 (2) enumerates a number of matters for which regulations may provide, and, in particular, s. 12 (2) (b) provides that regulations may be made to

H “regulate the procedure of any court or tribunal in relation to legal aid, and in particular make provision—(i) as to the taxation of costs incurred in connection with proceedings not actually begun; and (ii) as to the cases in which and extent to which a person receiving legal aid may be required to give security for costs, and the manner in which it may be given.”

So far as I know, no regulations have yet been made as to the cases in which, or the extent to which, a person receiving legal aid may be required to give security for costs, or the manner in which it may be given. Therefore, even if s. 12 (2) (b) (ii) could be held to refer to the security to be fixed in an order under s. 46 of the Act of 1934, as an alternative to transfer to the county court, as security within the meaning of this provision in the Legal Aid and Advice Act, nothing

has yet been done under that Act purporting to affect the provisions of s. 46 of the Act of 1934 as to security. It was not contended by counsel for the plaintiffs, as I understood him, that s. 12 (2) (b) (ii) of the Act of 1949, was, in fact, referring to security under s. 46 of the Act of 1934, for, as I have said, an order under s. 46 is not, in the ordinary sense, an order requiring security to be given. Security, as fixed, may be given at the option of the plaintiff as an alternative to the transfer otherwise ordered. The order is an order for transfer unless such security is given. I think it is reasonably plain that, by making regulations purporting to regulate the procedure of the court as to requiring security for costs, under s. 12 (2) (b) (ii) of the Act of 1949 the rule-making authority could not take away the right conferred on defendants by s. 46 of the Act of 1934.

We were referred to s. 17 of the Act of 1949 for the definition of "order for costs":

"the expression 'order for costs' includes any judgment, order, decree, award or direction for the payment of the costs of one party to any proceedings by another party, whether given or made in those proceedings or not."

The Legal Aid and Advice Act, 1949 (Commencement) Order, 1950 (S.I., 1950, No. 1357), art. 1, brought the Act into operation, *inter alia*, in relation to cases which have been remitted or transferred by the Supreme Court of Judicature to a county court, and, therefore, it is clear that the transfer in the present case will not deprive the plaintiffs of their rights as assisted persons, that is to say, it will not deprive the plaintiff, William, who is already an assisted person, or the plaintiff, Leslie, on the assumption that he obtains a certificate. The Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 17, deals with costs awarded against an assisted person and provides for the method of determining the amount of the liability for costs in accordance with s. 2 (2) (e) of the Act of 1949. Regulation 17 (1) (d) provides:

"The court may order the assisted person to pay, by instalments or otherwise, either—(i) such amount, if any, as the court thinks reasonable having regard to all the circumstances; or (ii) an amount to be determined on taxation not exceeding such amount as the court thinks reasonable having regard to all the circumstances . . ."

Then there are two provisos of which proviso (ii) is:

"The party in whose favour the order is made may, within six years from the date thereof, apply to the court for the order to be varied on the grounds that there has been a change in the assisted person's circumstances since the date of the order, and on any such application the order may be varied as the court thinks fit."

When the matter came before the learned master, he held himself precluded from making the order for transfer by the decision of this court in *Conway v. George Wimpey & Co., Ltd.* (1). In that case the plaintiff had been ordered to give security for the costs of the appeal under R.S.C., Ord. 58, r. 15. After the order for security was made, he became an assisted person and obtained an emergency certificate under the Act of 1949. He applied for a discharge of the order for security and this court held that the order should be discharged. After citing the decision of this court in *Willé v. St. John* (2), where similar circumstances arose in the case of a person who had been admitted as a poor person under the old Poor Persons Rules (R.S.C., Ord. 16, r. 22 to r. 31H), COHEN, L.J., referred to the provisions as to the making of regulations contained in s. 12 of the Act of 1949 and, in particular, to the power to regulate the procedure of any court with respect to security for costs, and came to the conclusion that in the case then before the court, as no special circumstances were shown and there had been no guidance in the form of regulations made under s. 12 as to the circumstances in which security should be ordered, the order ought to be discharged. Counsel for the plaintiffs admits, as the learned judge held, that this case is not governed

by *Conway v. George Wimpey & Co., Ltd.* (1), and I entirely agree. The security there in question was a security of a different order. It was security of the kind which the court as a matter of procedure can direct a plaintiff or appellant to give in certain circumstances as a condition of prosecuting his action or appeal. Orders of that kind are orders for security in the strict sense, and, if they are not complied with, the action or appeal in question is stayed or dismissed. In a case in which an appellant had obtained a certificate as an assisted person for the purpose of prosecuting an appeal, an order putting him on terms which required him to give security, or otherwise be shut out from prosecuting his appeal, might well be regarded, in the absence of special circumstances, as inconsistent with the intention of the Act of 1949. The matter here in question is entirely different. As I have said, s. 46 of the Act of 1934, admittedly, is not a section which orders security and, in default, dismisses or stays the action. It is a section under which the court, if in all the circumstances of the case it appears right to do so, may make an order transferring the action to the county court. The plaintiff, if dissatisfied with that, is given the opportunity of preventing the transfer by providing for the stipulated security. Therefore, I think that *Conway v. George Wimpey & Co., Ltd.* (1) has no bearing on the present case.

Other authorities, cases under the old Poor Persons Rules, were to some extent relied on by the learned judge. Counsel for the plaintiffs says (and again I agree with him) that those cases cannot be regarded as authorities governing the situation under the entirely different Legal Aid and Advice Act and regulations made thereunder. They are, however, of some assistance by way of analogy. In *Perry v. London General Omnibus Co.* (3) and *Cook v. Imperial Tobacco Co.* (4), under the provisions then corresponding to s. 46 of the Act of 1934 the defendants applied for the transfer to the county court of actions brought by poor persons in the High Court. In both those cases orders were made although, as the Poor Persons Rules then stood, the effect of such transfer would be to preclude the plaintiffs from prosecuting their actions in the county court as poor persons, inasmuch as the poor persons' procedure did not provide for litigation in county courts. Thus it may be said that the transfers there made were transfers which did entail some hardship on the plaintiffs, inasmuch as they prejudiced the plaintiffs' rights to sue as poor persons. Nevertheless, the court thought that this hardship was no sufficient ground for denying the defendants their rights under what corresponded to s. 46 of the Act of 1934. Those two decisions do, therefore, afford some analogy, and I think that this case is one in which, on general principles, it seems that, *a fortiori* those cases, an order for transfer ought to be made.

I now come to what was really the essential argument of counsel for the plaintiffs. It turns on the reference in s. 46 (1) of the Act of 1934 to an affidavit

"... showing that the plaintiff has no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff ..."

"The costs of the defendant," says counsel for the plaintiffs, "must mean such costs as the plaintiff will become liable to pay in the event of the defendant successfully defending the action". It follows, in his submission, that it cannot ever be said of an assisted person that such a person has no visible means of paying the defendant's costs, because the provisions of s. 2 (2) (e) of the Act of 1949 and reg. 17 (1) (d) of the regulations of 1950 ensure that the costs payable by the assisted person shall be limited to such amount as, in the judgment of the court, is within the assisted person's means or capacity to pay. Thus, says counsel for the plaintiffs, in effect, although s. 46 of the Act of 1934 has not been repealed or abrogated by the Legal Aid and Advice Act or the regulations made thereunder, as a matter of construction its provisions cannot be applied to an assisted person. The learned judge rejected that argument, and, in my judgment, he was perfectly right in doing so. Section 46 of the Act of 1934 is designed to protect defendants. The relevant costs to which it refers are the costs which

the defendant will incur in defending the action. Those are the costs in which he is interested and the relevant matter for the purpose of s. 46 is the absence of any visible means by the plaintiff to pay the defendant's costs in that sense, *viz.*, the costs incurred by him, subject, of course, to taxation, or, in other words, the costs which ordinarily an unsuccessful plaintiff would be ordered to pay to the defendant in the event of the usual order for taxation and payment of those costs being made. Judging by that standard, the learned judge held, and, in my view, there was ample ground on which he could so hold, that in the present case the plaintiffs had no visible means of paying the defendant's costs. In my judgment, it cannot be said that their ability to pay the defendant's costs in that sense was one whit increased by the fact that the plaintiff, William, became an assisted person. Indeed, I should have thought that the very fact that he became an assisted person to some extent argues inability to pay the defendant's costs. By way of elaboration of the same argument, counsel for the plaintiffs sought to demonstrate, by reference to the assessment of William's contribution and the provision that he should pay that contribution of £70 10s. by instalments of 30s. per week, that visible means were shown, inasmuch as it seemed probable that, after satisfaction of his contribution of £70 10s. by the instalments of 30s. per week, he would be able to satisfy any costs awarded to the defendant by like instalments. In my judgment, that in no way amounts to showing that the plaintiff has visible means of paying the costs of the defendant within the meaning of s. 46 of the Act of 1934.

In conclusion, I would observe that s. 46 is designed to protect defendants from being put to expenses which they cannot recover from the opposite party in High Court actions brought against them in tort by impecunious plaintiffs. It is a valuable right and a valuable protection to defendants against whom such actions are brought. In my judgment, particularly in view of s. 1 (7) (b) of the Act of 1949, that right should not be held to have been taken away either by the Act of 1949 or by the regulations made thereunder unless something is found in that Act or in those regulations which either expressly or, at least, by necessary implication has that effect. I find no such feature either in the Act or in the regulations. For these reasons, in addition to those given by the learned judge, whose careful judgment in this matter I might well have adopted without adding any reasons of my own, I am of opinion that he came to a right conclusion, and that the appeal fails and should be dismissed.

BIRKETT, L.J.: I should be content to adopt the observations made by JENKINS, L.J., and add nothing, as I agree most fully with the reasons which he has given for his decision, but, as the point is one of general importance, I will add a few words.

The case came before the learned judge, and it comes before this court, on a misinterpretation of a decision of this court in *Conway v. George Wimpey & Co., Ltd.* (1). The distinction between the facts in that appeal and the circumstances which arise when the County Courts Act, 1934, s. 46, is invoked was not clearly kept in mind. The learned master, with other learned masters, took the view that the decision in *Conway v. George Wimpey & Co., Ltd.* (1) was such that they could not make the order prayed for under s. 46 (1) of the Act of 1934. It is enough for me to say, by way of supplement to what JENKINS, L.J., has already said, that a reading of *Conway's* case (1) shows that it dealt with an absolutely separate matter—where an order for security for costs had been properly made before the plaintiff became an assisted person, under the Legal Aid and Advice Act, 1949. The court held that, in the absence of the regulations which were indicated in s. 12 (2) (b) (ii) of the Act of 1949, an order for security for costs should not be made against a litigant in that position. In the case now before us, the learned judge in the court below pointed out that an order under s. 46 (2) of the Act of 1934 was not an order for security for costs in the strict sense, but was

an order transferring the action to the county court if the plaintiff did not give security for the defendant's costs.

A Counsel for the plaintiffs admitted frankly that he could not support the decision of the learned master on the ground on which it was put, as *Conway v. George Wimpey & Co., Ltd.* (1) has no application to the facts of the present case. He contended, however, that, by reason of the provisions of the Legal Aid and Advice Act, 1949, and the regulations made thereunder, an order under s. 46 (2) of the Act of 1934 could not be made against an assisted person, as it was not possible to say that a plaintiff who had received a legal aid certificate under the Act of 1949

"... has no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff ..."

B He then said that the cases which were cited to the learned judge, and which, admittedly, dealt with the procedure under the old Poor Persons Rules, were no longer applicable, because the conditions had been entirely changed by the Act of 1949, the principle change, in his submission, being that, whereas, under the old Poor Persons Rules, the decision of the judge was completely unfettered, under s. 2 (2) (e) of the Act of 1949 and the Legal Aid (General) Regulations, 1950, reg. 17 (1) (d), it was a fettered discretion. While, however, it may be true C that the earlier cases are no longer strictly applicable, nevertheless, I think, as JENKINS, L.J., has said, that they are of great importance in the present case as showing that the defendant's right, in a proper case, to an order transferring the action to the county court, unless the plaintiff gave security for the defendant's costs, was maintained, and the order was made, even where it was known D that the transfer would mean that the plaintiff, who was suing as a poor person under the old Poor Persons Rules, could not prosecute the action in the county court as a poor person: see, for example, *Cook v. Imperial Tobacco Co.* (4).

Section 1 (7) of the Act of 1949 provides:

E "Save as expressly provided by this Part of this Act or by regulations made thereunder ... (b) the rights conferred by this Part of this Act on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised."

Neither the Act of 1949 nor the regulations made thereunder contain any express provision that s. 46 of the Act of 1934 shall no longer have any application, and it is not contended by counsel for the plaintiffs that they do. His contention is F that, as s. 2 (2) (e) of the Act of 1949 and reg. 17 (1) (d) of the regulations of 1950 provide that an assisted person is only required to pay such costs as the court thinks that he can reasonably pay, it is impossible to make an order under s. 46 (2) of the Act of 1934 against an assisted person, as the conditions required to be fulfilled before an order can be made would not exist. Therefore (he says), s. 46 of the Act of 1934 has virtually been repealed by the Act of 1949 and the regulations made thereunder. In support of his contention, counsel for the plaintiffs G submits that the words "no visible means of paying the costs of the defendant" in s. 46 (1) of the Act of 1934, must now be interpreted as "no visible means of paying such costs as should be determined by the court, having regard to s. 2 (2) (e) of the Act of 1949 and reg. 17 (1) (d) of the Legal Aid (General) Regulations, 1950." I cannot think that that interpretation ought to prevail. H The "costs of the defendant," in s. 46 (1) of the Act of 1934, are, I think, the costs which, in the ordinary way, the defendant will incur, or his taxed costs, and I do not think that they are the costs which an assisted person may be ordered to pay under the Act of 1949 and the regulations made thereunder, as contended by counsel for the plaintiffs. Therefore, I agree with the judgment of JENKINS, L.J., that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Stocken, May, Sykes & Dearman* (for the plaintiffs); *A. E. Wyeth & Co.* (for the defendant). [Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

SLATCHER AND ANOTHER v. GEORGE MENCE SMITH, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Devlin, JJ.), June 14, 15, 28, 1951.]

Trade Mark—False trade description—Short measure given by servant—Liability of master—No finding of inadvertence or mistake—Merchandise Marks Act, 1887 (c. 28), s. 2 (2) (a), (b), (c).

By the Merchandise Marks Act, 1887, s. 2 (2): "Every person who sells ... any goods ... to which any ... false trade description is applied ... shall, unless he proves—(a) That having taken reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the ... trade description; and (b) That on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods ...; or (c) That otherwise he had acted innocently; be guilty of an offence against this Act."

An inspector of weights and measures entered the shop of the respondents, a company carrying on business at many branches, and asked for two gallons of paraffin. He was given a quantity which was nearly a pint and a half less than two gallons and a receipt for the purchase price which stated that he had been supplied with two gallons. Justices dismissed an information charging the respondents with selling goods to which a false trade description had been applied, contrary to the Merchandise Marks Act, 1887, s. 2 (1), on the ground that the respondents had proved that they had acted in good faith and had done all that was reasonably possible in the way of the supply of accurate measures and the supervision of their servants to prevent the commission by their servants of offences against the Act.

HELD: para. (a) and para. (b) of s. 2 (2) only applied where goods were sold with a false trade description already stamped on them or otherwise applied to them and not in circumstances like those of the present case where the false trade description had been applied on the occasion, and as part of the terms, of sale; the words in para. (c), "otherwise he had acted innocently" were not satisfied by proof that the accused had acted in good faith and had taken all precautions against committing an offence against the Act, but must be construed as meaning that he had acted inadvertently or under a misapprehension or mistake of fact; there was no finding of inadvertence or mistake, and, therefore, the case must go back to the justices with a direction to convict.

Dictum of LORD RUSSELL OF KILLOWEN, C.J., in Coppen v. Moore (No. 2) ([1898] 2 Q.B. 314), not followed.

Stone v. Burn ([1911] 1 K.B. 927), applied.

AS TO FALSE TRADE DESCRIPTION, see HALSBURY, Hailsham Edn., Vol. 9, pp. 421-424, paras. 721-723; and FOR CASES, see DIGEST, Vol. 43, pp. 241, 242, Nos. 852-861, and 2nd Digest Supp.

Cases referred to:

- (1) *Coppen v. Moore (No. 2)*, [1898] 2 Q.B. 306; 67 L.J.Q.B. 689; 78 L.T. 520; 62 J.P. 453; 43 Digest 244, 877.
- (2) *Stone v. Burn*, [1911] 1 K.B. 927; 80 L.J.K.B. 560; 103 L.T. 540; 74 J.P. 456; 43 Digest 241, 858.
- (3) *Christie, Manson & Woods v. Cooper*, [1900] 2 Q.B. 522; 69 L.J.Q.B. 708; 83 L.T. 54; 64 J.P. 692; 43 Digest 240, 849.
- (4) *Allard v. Selfridge & Co.*, [1925] 1 K.B. 129; 94 L.J.K.B. 374; 132 L.T. 377; 88 J.P. 204; 43 Digest 240, 850.
- (5) *Mercer v. Pyramid Sand & Gravel Co.*, (1944), 109 J.P. 54; 2nd Digest Supp.
- (6) *Kat v. Diment*, [1950] 2 All E.R. 657; [1951] 1 K.B. 34; 114 J.P. 472.

CASE STATED by Kent justices.

On Jan. 4, 1951, informations were preferred by the appellant, an inspector of weights and measures, before justices sitting at Ashford, alleging that the respondents sold certain goods, namely paraffin, to which a false trade description was applied contrary to s. 2 (2) of the Merchandise Marks Act, 1887.

A On Dec. 5, 1950, the manager of one of the respondents' shops at Ashford purported to sell to an inspector of weights and measures two gallons of paraffin and gave a receipt for the purchase price in which it was stated that that quantity had been sold, although, in fact, the amount sold was nearly a pint and a half less than two gallons. The respondents supplied their manager with suitable measures and funnels for measuring oil and filling customers' receptacles and representatives visited the premises frequently for inspection. The manager had been B in the respondents' employ for thirty-five years and had been instructed as to the proper use of measures.

For the respondents it was contended that a master was not liable for the actions of his servants or agents in contravention of the Merchandise Marks Act, 1887, if the master has acted in good faith and done all that was reasonably C possible to prevent the commission of offences against the said Act, and that the respondents had proved a defence under either para. (a), para. (b), or para. (c) of s. 2 (2) of the Act. For the appellant it was contended that the defences under paras. (a) and (b) of s. 2 (2) were not applicable and that the respondents had not proved that they had a defence under para. (c).

The justices, being of opinion that, although paraffin had been sold by the respondents to which a false trade description had been applied, the defence D set up by the respondents had been proved, dismissed the information.

Vernon Gattie for the appellant.

Arthian Davies, K.C., and *M. J. Morris* for the respondents.

Cur. adv. vult.

June 28. **LORD GODDARD, C.J.**, read the following judgment of the court.

E This is an appeal by way of Case Stated from the justices for the petty sessional division of Ashford, Kent. Two informations were preferred by the appellant, William John Slatcher an inspector of weights and measures, against the respondents, George Mence Smith, Ltd. Each information charged that on Dec. 5, 1950, at Ashford the respondents sold paraffin to which a certain false trade description was then applied, contrary to s. 2 of the Merchandise Marks Act, 1887. The F informations were by consent heard together on Jan. 4, 1951, when the justices dismissed both the informations. Section 3 (1) of the Merchandise Marks Act, 1887, provides:

"For the purposes of this Act . . . The expression 'trade description' means any description, statement, or other indication, direct or indirect, (a) as to the number, quantity, measure, gauge, or weight of any goods . . ."

G The false description alleged in the informations was as to the quantity or measure of the paraffin sold.

On the hearing the following facts were proved or admitted. The respondents carry on business at more than one hundred branches, one of which is at a shop in Bank Street, Ashford. On Dec. 5, 1950, Dennis Webb, an assistant inspector of weights and measures, entered the shop carrying an empty one-gallon can H and asked the manager for a gallon of paraffin. The manager took the can away and brought it back containing paraffin. At Webb's request the manager wrote out and gave to him a receipt which read "Oil, 1s. 9d." Webb remained in the shop. Frederick Smart, another inspector of weights and measures, then entered the shop carrying an empty five-gallon can and asked the manager for two gallons of paraffin. The manager took the can away and brought it back containing paraffin. At Smart's request the manager wrote out and gave him a receipt which read "2 gall. oil, 3s. 0d." The appellant then entered the shop and in the

presence of the manager the paraffin in each of the cans was measured. The quantity in the one-gallon can was seventeen fluid ounces (nearly a pint) short of a gallon, and the quantity in the five-gallon can was twenty-nine fluid ounces (nearly a pint and a half) short of two gallons. The justices further found that the respondents supplied their manager with suitable measures and funnels for the purpose of measuring oil and filling customers' receptacles; that representatives of the respondents visited the premises once a week or once a fortnight for the purposes of inspection; and that the manager had been in the respondents' employ for thirty-five years and had been instructed as to the proper use of measures. The justices decided that in both cases paraffin had been sold by the respondents to which a false trade description had been applied and that the proceedings were properly brought under the Act of 1887. They found, however, that the statutory defence set up by the respondents under s. 2 (2) had been proved and, therefore, dismissed both informations.

The first information related to the sale of one gallon of paraffin to Webb. The statement relied on as constituting the false trade description was that contained in the receipt given to him. This receipt, which read "Oil, 1s. 9d.", contained no statement as to the measure or quantity of the oil sold, and the appellant did not pursue the appeal in the case of this information. The second information related to the sale of two gallons of paraffin to Frederick Smart. The statement relied on as constituting the false trade description was that contained in the receipt given to him, which read "2 gall. oil, 3s. 0d." As the paraffin sold was twenty-nine fluid ounces (nearly a pint and a half) short of two gallons, this was a false trade description applied to the goods sold, and the respondents did not seek to challenge the justices' finding to this effect in relation to this information.

The question we have to decide is whether, on the facts found by the justices, it was open to them to hold that the statutory defence set up by the respondents under s. 2 (2) had been established. So far as it is material, s. 2 (2) provides:

"Every person who sells . . . any goods or things to which any forged trade mark or false trade description is applied . . . shall, unless he proves—
(a) That having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark, or trade description; and (b) That on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or (c) That otherwise he had acted innocently; be guilty of an offence against this Act."

The justices find generally that the defence in s. 2 (2) has been established without specifying whether that defence was under paras. (a) and (b) or under the alternative para. (c). It seems clear that the defence provided under paras. (a) and (b) was not open to the respondents on the facts of this case. Paragraphs (a) and (b) apply to cases where the goods in question are sold with the forged trade mark or false trade description already stamped on them or otherwise applied to them and not to a case like the present where the false trade description is applied on the occasion, and as part of the terms, of sale. In the latter case the accused must rely for his exculpation on para. (c), namely, by showing "that otherwise he had acted innocently."

The respondents' contention before the justices was that, if they had acted in good faith and had done all that it was reasonably possible to do to prevent the commission by their agents of offences against the Act, they were entitled to be acquitted. The justices appear to have accepted this contention as good in law and to have dismissed the information on the ground that the respondents had established that they had "otherwise acted innocently". We have to consider what is the true construction of these words in their context. In

Coppen v. Moore (No. 2) (1), a Divisional Court of six judges, including SIR FRANCIS JEUNE, P., and CHITTY, L.J., had to consider the question whether the Act made a master criminally liable for acts done by his servants in contravention of the section when acting in the general scope of their employment although contrary to their master's orders. The judgment of the court was delivered by LORD RUSSELL OF KILLOWEN, C.J., who, in the course of his judgment, said ([1898] A 2 Q.B. 313):

"In our judgment it was clearly the intention of the legislature to make the master criminally liable for such acts, unless he was able to rebut the *prima facie* presumption of guilt by one or other of the methods pointed out in the Act."

B Having dealt with the question before the court, LORD RUSSELL added *obiter* (*ibid.*, 314):

"... the master or principal may be relieved from criminal responsibility where he can prove that he had acted in good faith and had done all that it was reasonably possible to do to prevent the commission by his agents and servants of offences against the Act."

C This interpretation of the words "otherwise he had acted innocently" does not seem to have been followed in any of the later reported decisions of this court.

We must pay the greatest respect to the *obiter dicta* of such a strongly constituted court, but the particular question was not before the court for decision and it is difficult to believe that, if it had been, the court would have come to this conclusion. Section 2 (2) provides two alternative defences, the first under paras.

D (a) and (b), and an alternative defence under para. (c). To establish his defence under (a) and (b) the defendant must prove (i) that he had taken all reasonable precautions against committing an offence under the Act, (ii) that at the time of committing the alleged offence he had no reason to suspect the genuineness of the trade description, and (iii) that on demand he gave all information within his power with respect to the person from whom he obtained such goods or things.

E If he fails to establish any one of these things his defence fails. If the alternative defence in para. (c) is interpreted as meaning that he acted *bona fide* and had taken all reasonable precautions against committing an offence, then, although his defence might fail under (a) and (b), he could still avail himself of the defence of (c). Such an interpretation is to ignore the presence of the word "otherwise" in (c). Looked at from the other point of view, if (c) is construed as suggested,

F paras. (a) and (b) are surplusage and unnecessary, as any person who could satisfy the requirements of (a) and (b) must have been acting *bona fide* and taking all reasonable precautions against committing an offence under the Act. In our view, the words in their context cannot be construed as having the meaning conceived in *Coppen v. Moore* (No. 2) (1).

G The section again came before this court in *Stone v. Burn* (2). In the course of his judgment LORD ALVERSTONE, C.J., said ([1911] 1 K.B. 931):

"Then arises the question whether the conviction can be quashed on the ground that the appellant proved that he had acted innocently. I cannot say that the justices ought as a matter of law to have held that the appellant had acted innocently and therefore had committed no offence. Mere ignorance of the provisions of the statute does not amount to innocence for this purpose. The words 'acted innocently' point to some misapprehension of fact. And here the appellant did not labour under any mistake of fact, for he did what he did with full knowledge, and claiming that he had a right to do it."

H In the same case LORD COLERIDGE, J., said (*ibid.*, 933):

"The only defence could be that he was acting innocently. But, as was said by CHANNELL, J., in *Christie, Manson & Woods v. Cooper* (3) ([1900]

2 Q.B. at p. 528), 'The innocence contemplated by the Act is innocence of any intention to infringe the Act of Parliament . . . ' Such innocence can only exist where the infraction was committed by inadvertence or mistake of fact."

The effect of the decision in *Stone v. Burn* (2) is that the words "that otherwise he had acted innocently" mean that he had acted by inadvertence or under misapprehension or mistake of fact. In *Allard v. Selfridge & Co.* (4) the passage set out above from the judgment of LORD COLERIDGE is quoted with approval by LORD HEWART, C.J. ([1925] 1 K.B. at p. 135) and by SHEARMAN, J. (*ibid.*, 139).

In *Mercer v. Pyramid Sand & Gravel Co.* (5) VISCOUNT CALDECOTE, C.J., said (109 J.P. 56):

"The defence raised was that 'otherwise' they had acted innocently, which means, in my opinion that they had acted in some way, as LORD COLERIDGE, J., said in *Stone v. Burn* (2), by inadvertence or mistake of fact. The respondents have done no more than satisfy the justices, whose finding of fact bind us, that they had acted innocently in the sense that they had no intention to infringe the statute, but that, according to the decision of the court in *Allard v. Selfridge & Co.* (4), is not the meaning of the words."

In the same case BIRKETT, J. (*ibid.*, 57), quoted the passage from the judgment of LORD COLERIDGE, J., in *Stone v. Burn* (2), again with approval. The section was last considered in this court in *Kat v. Diment* (6) where LORD GODDARD, C.J., cited the passages both from the judgment of LORD ALVERSTONE, C.J., and LORD COLERIDGE, J., with approval ([1950] 2 All E.R. at p. 660).

In this state of the authorities it seems to us that we must construe the words "that otherwise he had acted innocently" as meaning that he had acted inadvertently or under some mistake of fact. The fact that he had acted in good faith and had taken all precautions against committing an offence against the Act will not amount to proof that the defendant had otherwise acted innocently. This is all that the justices have found proved in this case. There is no finding of inadvertence or mistake. The case must go back to them with a direction that the statutory defence set up before them by the respondents has not been proved and that they should convict the respondents.

Case remitted.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *W. L. Platts, County Solicitor*, Maidstone (for the appellant); *Lovell, White & King*, agents for *Swann & Co.*, Ashford (for the respondents).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

affirmed. H.L. [1952] 2 All E.R. 548. *LITTMAN v. BARRON (INSPECTOR OF TAXES).*

[COURT OF APPEAL (Cohen, Singleton and Jenkins, L.J.J.), April 30, May 1, 2, 3, June 15, 1951.]

Income Tax—Sched. D—Relief in respect of losses—Set-off against profits—Excess rent of immediate lessor—“Profits”—Leasehold properties sub-let at rents exceeding head rents and net annual values—Other properties sub-let at rents below head rents or not sub-let—Finance Act, 1927 (c. 10), s. 27 (1)—Finance Act, 1940 (c. 29), s. 15 (1).

The taxpayer, a dealer in property, held a number of leasehold properties, some of which he had sub-let at rents which exceeded both the respective head rents and the respective net annual values, and others of which he had sub-let at rents which were below the head rents and the net annual values, still others being not sub-let. For the year 1942-43 he was assessed to tax under case VI of sched. D by virtue of the Finance Act, 1940, s. 15 (1), on the excess rents arising from the properties sub-let at rents exceeding the head rents and the net annual values. It was not disputed by the taxpayer that he was liable to be assessed in respect of the excess rents, but he claimed to be entitled, under the Finance Act, 1927, s. 27 (1), to set against them the deficiencies in rent which he had suffered during the same year in respect of the properties which he had sub-let at rents below the head rents and the net annual values and of those which were not sub-let.

HELD (JENKINS, L.J., *dissentiente*): section 15 of the Act of 1940 directed a tax on profits under case VI of sched. D; the word “profit” in s. 27 (1) meant a profit ascertained as directed by Parliament, and it was immaterial, in considering the application of that sub-section to the present facts, that part of the commercial profit might be taxable under sched. A; and, therefore, the acquisition and management of each of the properties in question was to be regarded as a transaction of such a nature that, if profits had arisen therefrom, the taxpayer would have been liable to be assessed in respect thereof under case VI of sched. D, and he was entitled to set-off his losses under s. 27 (1).

Decision of WYNN-PARRY, J. ([1951] 1 All E.R. 701), reversed.

Per COHEN, L.J.: The principle that in case of ambiguity a taxing statute should be construed in favour of the taxpayer does not apply to a provision giving a taxpayer relief in certain cases from a section clearly imposing liability.

AS TO DEDUCTION OF LOSSES, see HALSBURY, Hailsham Edn., Vol. 17, p. 207, para. 425; and FOR CASES, see DIGEST, Vol. 28, pp. 46, 47, Nos. 233-236.

Cases referred to:

(1) *Fry v. Salisbury House Estate, Ltd.*, [1930] A.C. 432; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; Digest Supp.

(2) *Coman v. Rotunda Hospital, Dublin (Governors)*, [1921] 1 A.C. 1; 89 L.J.P.C. 162; 123 L.T. 529; *sub nom. Rotunda Hospital, Dublin (Governors) v. Coman*, 7 Tax Cas. 517; 28 Digest 82, 462.

(3) *Ryall v. Hoare. Ryall v. Honeywill*, [1923] 2 K.B. 447; 92 L.J.K.B. 1010; 129 L.T. 505; 8 Tax Cas. 521; 28 Digest 81, 453.

(4) *Lyons v. Couchner*, (1926), 10 Tax Cas. 438; Digest Supp.

(5) *Harling v. Celynne Collieries Workmen's Institute*, [1940] 3 All E.R. 446; [1940] 2 K.B. 465; 109 L.J.K.B. 756; 163 L.T. 137; 23 Tax Cas. 558; 2nd Digest Supp.

(6) *Tamplin & Son's Brewery Brighton, Ltd. v. Nash (Inspector of Taxes)*, [1950] 2 All E.R. 93.

APPEAL by the taxpayer from an order of WYNN-PARRY, J., dated Feb. 28, 1951, and reported [1951] 1 All E.R. 701, made on a Case stated by the Special Commissioners of Income Tax.

The Special Commissioners held that "excess rents" within the Finance Act, 1940, s. 15 (1), did not constitute "profits" within the Finance Act, 1927, s. 27 (1), so that the taxpayer was precluded from claiming an allowance under s. 27 (1) in respect of losses suffered by him in relation to certain of his leasehold properties which were either sub-let by him in the course of his business as property dealer at rents less than those payable by him, or not sub-let. WYNN-PARRY, J., affirmed the decision of the Special Commissioners.

Millard Tucker, K.C., and Mustoe for the taxpayer.

The Attorney-General (Sir Frank Soskice, K.C.) and R. P. Hills for the Crown.

Cur. adv. vult.

June 15. The following judgments were read.

COHEN, L.J.: The appellant is an owner of properties. In the three financial years in question he owned twenty-eight leasehold properties. He had sub-let twenty-three of them at a profit rental. Two were let at rents lower than the rents payable by him to the respective head lessors. He had failed to sub-let the remaining three although he had tried to do so. He was assessed to income tax under sched. A on the annual value of the properties and also as regards the twenty-three properties in respect of what may be conveniently, though not entirely accurately, referred to as the excess rents derived therefrom under case VI of sched. D pursuant to the Finance Act, 1940, s. 15. Sub-section (1) of that section provides:

"If, as respects any year of assessment, the immediate lessor of a unit of assessment is entitled in respect of the unit to any rent payable under a lease or leases to which this section applies, he shall be chargeable to tax under case VI of sched. D in respect of the excess, if any, of the amount which would have been the amount of the assessment of the unit for the purposes of sched. A, as reduced for the purpose of collection, if the annual value of the unit had been determined (in accordance, in whatever part of the United Kingdom the unit is situated, with the rules applicable to sched. A set out in sched. I to the Income Tax Act, 1918) by reference to that rent and the other terms of the lease or leases, over whichever is the greater of—
(a) the actual amount of the assessment of the unit for the purposes of sched. A, as reduced for the purpose of collection; or (b) the amount of any rent payable by the immediate lessor in respect of the unit under any short lease or short leases."

The appellant did not dispute the Crown's right to assess him in respect of those excess rents, but he claimed to be entitled to a deduction in respect of losses which he said he had sustained in respect of the other five properties. He claimed that deduction under the Finance Act, 1927, s. 27 (1), which provided as follows:

"Where in any year of assessment a person sustains a loss in any transaction, whether he was engaged therein solely or in partnership, being a transaction of such a nature that, if any profits had arisen therefrom, he would have been liable to be assessed in respect thereof under case VI of sched. D, he may claim that the amount of the loss sustained by him shall, as far as may be, be deducted from or set-off against the amount of any profits or gains arising from any transaction in respect of which he is assessed for that year under the said case VI, and that any portion of the loss for which relief is not so given shall, as far as may be, be carried forward and deducted from or set-off against the amount of any profits or gains arising from any transaction in respect of which he is assessed under the said case VI for any of the six following years of assessment."

The contentions advanced on behalf of the taxpayer before the Special Commissioners are set out in the Case as follows:

"(1) That the appellant was engaged in a transaction within s. 27 of the Finance Act, 1927, namely, the acquisition and management of the

properties listed in para. 4. (2) Alternatively, that the appellant was engaged in five such transactions, namely, in respect of each of the said properties. (3) That in respect of each of the first two of the said properties the appellant sustained a loss in an amount represented by the excess of the rent paid by him over the supposed annual value computed according to s. 15 of the Finance Act, 1940. (4) That in respect of each of the remaining said properties the appellant sustained a loss in an amount equal to the rent paid by him. (5) That if sums in excess, in each instance, of the net sched. A assessments had been received by the appellant in respect of the said properties, those sums would have been profits in amounts computed in accordance with s. 15 of the Finance Act, 1940 (there called an excess), and those profits would, by the express terms of the said s. 15, have been assessable under sched. D, and under case VI thereof. (6) That the sums in question in this appeal were the amounts of losses sustained by the appellant in transactions of such a nature that, if profits had arisen therefrom, the appellant would have been liable to be assessed in respect thereof under case VI of sched. D. (7) That the appellant was entitled to carry forward the sums in question in this appeal, and to deduct them from, or set them off against, the amounts of the profits or gains forming the subjects of the assessments under appeal."

Before us his counsel admitted that the dealing with each property must be regarded as a separate transaction. I need not, therefore, trouble further with the first contention.

The Crown's contentions are stated in the Case as follows:

"(1) That the holding by the appellant of the properties described in para. 4 hereof some of which he sub-let and some of which remained void was not a transaction or transactions. (2) That even if there were in this case any such transactions they were not of such a nature, as is described in s. 27 (1) of the Finance Act, 1927, that 'if any profits had arisen therefrom, he would have been liable to be assessed in respect thereof under case VI of sched. D...' because such profits, if any, would have been covered by the sched. A assessment. (3) That s. 15 of the Finance Act, 1940, did not charge profits as such, but a sum described as the excess of an amount calculated in accordance with the provisions of the section, and was therefore inapplicable in considering what relief should be given under s. 27 of the Finance Act, 1927."

The Special Commissioners and WYNN-PARRY, J., both decided in favour of the Crown in substance on the ground that, whether or no there was a transaction within the meaning of s. 27, it was not a transaction of such a nature that, if any profits had arisen therefrom, the taxpayer would have been liable to be assessed in respect of those profits. They took the view that s. 27 contemplated loss and profit ascertained in the commercial sense and that excess rents ascertained in the artificial way required by s. 15 of the Act of 1940 could not be said to be profits within the meaning of s. 27.

From the decision of WYNN-PARRY, J., the taxpayer now appeals to this court. The subjects debated before us were as follows: (i) What was the nature of the excess rents which were subjected to tax by s. 15 of the Act of 1940? Were they, as the Attorney-General contended, merely an addition to the annual value of the land retaining the characteristics of income from property in land but brought into charge for the purposes of administrative convenience under case VI of sched. D, or were they, as counsel for the taxpayer argued, annual profits and gains taxable under sched. D? (ii) As regards the properties in respect of which the taxpayer suffered a loss, could he be said to have incurred that loss in a transaction of such a nature that if any profits had arisen therefrom he would have been liable to be assessed in respect thereof under case VI of sched.

D? The second question raised two subsidiary points: (i) What was the transaction from which the profits could be said to be derived? (ii) What was the meaning of the expression "profits" in s. 27?

In support of his argument on the first point, the Attorney-General went shortly through the history of income tax and pointed out that from the beginning until 1940 the only method of taxing income from the ownership of land was under sched. A on the annual value. When, in the 1920's, the Crown sought to tax a property company under sched. D the claim was at once rejected by the House of Lords in *Fry v. Salisbury House Estate, Ltd.* (1). LORD ATKIN said ([1930] A.C. 454):

"My Lords, I think that this case should be decided in favour of the respondents upon the simple ground that annual income derived from the ownership of lands, tenements and hereditaments can only be assessed under sched. A and in accordance with the rules of that schedule. In my opinion it makes no difference that the income so derived forms part of the annual profits of a trading concern. For the purpose of assessing such profits for the purpose of sched. D the income so derived is not to be brought into account. The option of the revenue authorities to assess under whichever schedule they prefer in my opinion does not exist, and is inconsistent with the provisions of the Income Tax Acts throughout their history."

The decision was only of importance to the revenue as regards London properties the annual value of which was fixed under the Valuation (Metropolis) Act, 1869. The annual value of other properties is measured by r. 1 of the rules applicable to sched. A and is the actual rent if the hereditaments were let at a rackrent within seven years of the assessment, or, if not, the rackrent which they were actually worth subject to the statutory allowances. Under this rule, there could not be substantial divergence between annual value as ascertained under the rule and the true rackrent. The trouble as regards London properties was met by the Finance Act, 1930, s. 31, which in effect made the rules for ascertaining annual value theretofore applicable to the rest of England applicable also in London. The sanctity of sched. A was, however, maintained and all income from the ownership of land continued to be taxed under that schedule. Section 15 of the Act of 1940 was, said the Attorney-General, introduced for a different reason. The war was on, and it was anticipated that it would be impossible to carry out the quinquennial valuation of properties due to be carried out in 1941. If that were so and nothing were done, it would necessarily mean that the Crown would suffer a substantial loss of revenue. This, said the Attorney-General, was the reason for s. 15. That reason did not require an infringement of the sanctity of sched. A and we ought not so to construe s. 15 as to involve that sacrilege. He sought to reinforce this argument by a reference to the language of s. 15 itself. Sub-section (1) made assessment under sched. A the basis of ascertainment of the higher figure in the subtraction sum by which the amount of the excess was to be ascertained.

Counsel for the taxpayer replied that we must construe the section from its language and not by a research into ancient history. He took us at length through the provisions of the Income Tax Act, 1918, and pointed out that (a) no matter what be the schedule under which the tax is levied, it is always a tax on income and that annual value is merely the prescribed method of measuring that income in the case of tax levied under sched. A (see *per* LORD ATKINSON in *Coman v. Rotunda Hospital, Dublin (Governors)* (2)); (b) the terms "profits", or "profits and gains", are used indiscriminately in a number of sections of the Income Tax Act, 1918, and the amending Acts, and in contexts in which they must include excess rents taxed under s. 15 of the Act of 1940—e.g., s. 100 of the Act of 1918, for, if not, the amount of the excess rents would not have to be included in the statement required under that section. He also pointed out that in 1940 Parliament had drawn a purely artificial distinction between

short and long leases, the latter, under s. 13, being leases for a term exceeding fifty years other than a lease for a term of years determinable after the death or marriage of a person. So far as long leases are concerned, Parliament had made a drastic alteration as regards the method of taxation of income derived from properties, for s. 17 of the Act of 1940 provided:

A “(2) Rules 1 and 4 of No. VIII of sched. A shall not apply to any payment to which this section applies, but any such payment shall, so far as it does fall under any other Case, be charged with tax under case VI of sched. D and be treated for the purposes of such of the provisions of the Income Tax Acts as apply to royalties paid in respect of the user of a patent as if it were such a royalty.”

B That being so, there was no reason for refusing to give to s. 15 the meaning which its language *prima facie* bore. That section directed that the taxpayer should be assessed in respect of the excess, if any, as therein defined under case VI of sched. D. Looking at the relevant provisions of the Act of 1918, they define case VI as covering

C “tax in respect of any annual profits or gains not falling under any of the foregoing cases, and not charged by virtue of any other schedule.”

Anything assessed under case VI, said counsel for the taxpayer, must, therefore, be a profit, and the true effect of s. 15 is that it directs a tax on profits, the amount of such profits being ascertained by working out the arithmetic prescribed by the section.

D I have come to the conclusion that up to this point counsel for the taxpayer is right, but it does not, however, necessarily follow that the taxpayer is entitled to the relief he seeks under s. 27. He can only deduct the loss he suffered in respect of his dealings with any particular property if the second question is also answered in his favour, *i.e.*, if the loss he seeks to set-off arises from a transaction of such a nature that, if any profits had arisen therefrom, he would have been liable to be assessed in respect thereof under case VI of sched. D. The Attorney-General

E says that there is nothing which can be said to be a transaction. He asks: “What is the transaction?” Not, he says, the acquisition, for that does not *per se* involve profit or loss, and so far as the sale and purchase of land is concerned s. 15 is irrelevant. Not the letting of the property, since that will not help the taxpayer, at any rate in cases where the property is unlet. He pointed out by reference to the list of subjects of charge brought into case VI by amending Acts, which appear on p. 169 of the Stationery Office reprint of the Act, that there are a number of such subjects of charge which cannot be said to have arisen from a transaction which was of a commercial nature or give rise to loss or profit in the commercial sense—for example, excessive housekeeper relief resulting from apportionment of a double claim. He submitted that s. 27 had been introduced

F as a result of such decisions as *Ryall v. Hoare*. *Ryall v. Honeywill* (3) and *Lyons v. Coucher* (4). The effect of these decisions was to make the profits of isolated transactions of a commercial nature taxable under case VI, and without s. 27 the taxpayer would have been without redress if in a subsequent year a similar transaction resulted in a loss. I am prepared to accept the Attorney-General’s explanation of the origin of s. 27, but it does not seem to me necessarily to lead to the conclusion that s. 27 does not apply in the present case. Counsel

G H for the taxpayer submitted that the transaction is the acquisition of the property and the subsequent management of it. Plainly, as counsel points out, the transaction need not be in the year of assessment. The only question is whether in the year of assessment loss or profit results from it. There is, therefore, no reason for not looking back to the original acquisition as part of the transaction. The transaction as a whole covers a number of acts: (i) the acquisition of the property, (ii) payment of the head rent, (iii) the attempt to sub-let, (iv) in three cases the actual sub-letting, (v) the receipt of the rent from the sub-tenant.

I have come to the conclusion that on this point also counsel for the taxpayer is right, and that the losses in question arose in the case of each property from a transaction consisting, as it is put in the Case, in the acquisition and management of the property concerned.

A more difficult point, however, is as to the meaning to be put on "loss" and "profit" in s. 27. The argument of the Attorney-General may be stated as follows. Both words must be used in their ordinary commercial sense. If that be so, it is clear that s. 27 cannot apply, since, using the formula prescribed by s. 15, it is quite possible that, although there is in a given year a commercial profit, no assessment could be made under case VI because the sched. A assessment was higher than the rent receivable from the sub-tenant. In such a case it could not be truly said that the transaction was of such a nature that if any profit had arisen therefrom the immediate lessor would have been liable to be assessed under case VI of sched. D. Counsel for the taxpayer suggested that this argument was based on a misreading of the word "assessed." "To be assessed" meant, according to him, "to have his liability calculated," and a taxpayer would have been assessed even though the result might be a nil assessment. In support of his argument, counsel relied on *Harling v. Celynen Collieries Workmen's Institute* (5), but I do not think that case affords any assistance, as the court was considering the meaning of the expression "year of assessment," not of the word "assessed." A year may well be a year of assessment, though owing to the result of the year's trading being a loss no assessment is actually made on the taxpayer. I think junior counsel for the Crown gave the right answer to this argument when he said that although the Inland Revenue authorities may at times issue a "nil assessment," that is merely a convenient method of informing the taxpayer that no charge is being made. In its literal meaning "nil assessment" is a contradiction in terms. Alternatively, counsel for the taxpayer argued that although there cannot be a loss unless there is a commercial loss, the reference to profit is not a reference to commercial profit, but to a profit taxable under case VI. In considering, therefore, whether a particular transaction gives rise to a profit liable to be taxed under case VI of sched. D, you must apply the rules to be found in the Act of 1918 and the amending Acts in order to ascertain as regards any particular transaction whether there is such a profit. The fact that in some cases there may be a commercial profit and yet no assessment under case VI is *nihil ad rem*. The Attorney-General also submitted that s. 27 could not apply because the taxpayer was taxed as regards rents partly under sched. A and partly under case VI. Both sources of income, said the Attorney-General, arose from the same transaction. Therefore, it was impossible to say that if there had been a profit the taxpayer would have been liable to be assessed in respect thereof under case VI.

The answer to this point, I think, is that, if Parliament chooses, as it has done, to split the income arising from ownership of property into separate subjects of tax, the taxpayer who has made a loss is entitled to say that, although part of his income from the transaction is taxed under sched. A, he would still be liable, if there had been a profit ascertained as directed by Parliament, to be taxed on that profit under case VI, and it is immaterial that part of the commercial profit may have been taxable under sched. A. On the whole, though not without hesitation, I have come to the conclusion that this argument is well founded, and that the taxpayer is entitled to succeed.

In view of an argument addressed to us by junior counsel for the Crown, I would add that I agree with him that the principle that in case of ambiguity a taxing statute should be construed in favour of a taxpayer does not apply to a provision giving a taxpayer relief in certain cases from a section clearly imposing liability. None the less, I arrive at the conclusion I have reached all the more gladly because it is manifest that the Crown's argument, if successful, might involve that the taxpayer would have to pay income tax and possibly surtax on excess rents from one or more properties, although his income from properties

as a whole and possibly from all sources was nil. As SINGLETON, L.J., put it in the course of the argument, the taxpayer would be worse off than he would have been if the Crown had won the *Salisbury House* case (1). The Crown's argument would also involve an unfortunate distinction between an owner of the unexpired portion of a lease for fifty years (a long lease to which s. 17 of the Act of 1940 applies) and the owner of the unexpired portion of a lease for forty-nine years (a short lease within s. 15), since it is common ground between the parties that in the case of excess rents under long leases the intermediate lessor by virtue of s. 17 gets the relief which the taxpayer seeks to have in this appeal. In conclusion, I would add that it seems to me reasonable to suppose that Parliament, when it placed excess rents within case VI of sched. D, intended the taxpayer to be entitled to any relief attaching to that Case, including s. 27 of the Act of 1927. Such an intention would be in conformity with what the Attorney-General said was the reason for the original introduction of s. 27. I would allow the appeal.

SINGLETON, L.J.: The taxpayer is described in the Case as a dealer in property. That, we were told, means that he is one who acquires leases of property and, thereafter, endeavours to let the properties comprised in the various leases on terms advantageous to himself. At all material times, he held short leases of twenty-eight properties. The leases were short leases as defined in the Finance Act, 1940, s. 13. The taxpayer is not assessable under case I or under case II of sched. D to the Income Tax Act, 1918. That follows from the decision in *Fry v. Salisbury House Estate, Ltd.* (1). In that case it was sought to assess the company in respect of excess rents under sched. D, though the property was already assessed under sched. A, and it was held that the rents were profits arising from the ownership of land in respect of which the assessment under sched. A was exhaustive, and that they could not be included in the assessment under sched. D as trade receipts of the company.

If a company, or an individual, could be regarded as a trader, trade losses would be a proper and legitimate deduction, and, if the nature of the trade consisted of taking leases and re-letting, a loss on one would be set-off against profits on others in order to arrive at the annual profits or gains from the trade or business.

Under s. 15 of the Act of 1940 excess rents of immediate lessors arising under certain short leases are made subject to tax. The immediate lessor is chargeable to tax under case VI of sched. D in respect of the excess. Leaving out any question of allowances, the excess is the amount by which the rent received exceeds the rent paid under a short lease, or by which it exceeds the sched. A assessment if that is greater than the rent paid. It is thus profit to the immediate lessor. The liability to tax is in respect of the excess, and to bring it within the framework of the Income Tax Act, 1918, it is put, and rightly put, under sched. D and embraced under case VI of that schedule—tax in respect of any profits or gains not falling under any of the foregoing Cases, and not charged by virtue of any other schedule. The section was dealing with excess rents: it was designed to enable tax to be collected in respect of profit rentals. Thus, from the passing of, or from the coming into force of, the Act of 1940, if profits arose from the transaction the taxpayer was liable to be assessed in respect of them, *i.e.*, in respect of the excess rents. He was brought in under sched. D, which covers annual profits or gains, but he was brought under case VI and not under case I.

The claim of the Crown in this appeal is that the taxpayer is in a far worse position than he would be if he was to be regarded as a trader. They say that s. 15 of the Act of 1940 ought not to be regarded as undoing the effect of the *Salisbury House* case (1), but that it goes much further, and that its effect in the case of short leases is that a man who engages in this business of taking short leases and re-letting must pay tax on each case in which he makes a profit, but can never deduct, or set-off, a loss which he makes on another property. The

position is shown by the figures given on document A attached to the Case:—on twenty-three properties the taxpayer receives excess rents amounting to £4,830, whereas on five other properties he incurs a loss of £3,575. The claim of the Crown is that he is chargeable to tax in respect of the £4,830, and that he is not entitled to any deduction in respect of the other properties on which he lost £3,575—and this involves a considerable sum in income tax and surtax. It would strike one as surprising if this should be the true position in regard to short leases, for it is agreed that in the case of excess rents under long leases the position is otherwise, and the immediate lessor, by virtue of the provisions of s. 17, is given the relief which the taxpayer seeks to have in this appeal. And no one can suggest any reason why the taxpayer should be differently treated according to whether he held short leases or long leases. (A long lease might be approaching its end while a short lease might have many years to run.)

I do not think that I have encountered anything more complicated than the Act of 1940. This court spent much time on *Tamplin & Son's Brewery Brighton, Ltd. v. Nash (Inspector of Taxes)* (6) last year in considering the true meaning and effect of s. 17 (long leases), and we have now spent some days on s. 15 (short leases), and these are not the only troublesome sections. I cannot believe that it was the intention of the legislature to make the position of the taxpayer in this case worse than it would have been if the *Salisbury House* case (1) had been decided the other way, nor can I see any reason why he should be better off if he held long leases than he would be if he held short leases.

The whole question depends on whether the Finance Act, 1927, s. 27, applies to this case. I have come to the conclusion that it does apply. The Act of 1940 does not interfere with the incidence of sched. A tax. If the excess rent is the difference between the rent received and the rent paid it is profit to the taxpayer: if the excess rent is the difference between the rent received and the sched. A assessment it is part of the profit made by the taxpayer. In either case, it is profit within the words "profits or gains not falling under any of the foregoing Cases." They are profits in fact, and they are so treated for the purpose of the Income Tax Act, 1918. The taxpayer is chargeable to tax under case VI of sched. D in respect of the excess. That I read in the same way as "liable to be assessed in respect thereof under case VI of sched. D" in s. 27 of the Act of 1927. Was there a "transaction" of such a nature that, if profits had arisen therefrom, the taxpayer would have been liable to be assessed in respect thereof under case VI of sched. D? If so, the provisions of s. 27 of the Act of 1927 apply. Now the legislature has said by s. 15 of the Act of 1940 that in respect of excess rents therein mentioned the taxpayer shall be chargeable to tax under case VI of sched. D—which excess, as I have said, is profit to the taxpayer. How did the taxpayer become entitled to the excess rent? Surely the answer is, by the transaction of acquiring the lease, managing and sub-letting. That is the transaction. It was argued on behalf of the Crown that the original taking by the taxpayer was not a transaction within the section, even if it could be said that a letting by the taxpayer was, and, further, that it could not be said that the failure to let a property was a transaction which resulted in a loss. It is necessary to consider the taxpayer's activities. He acquired leases of properties for the purpose of obtaining profit in the way of increased rent. Each acquisition by him was for him a transaction out of which profit or loss might result, perhaps a profit in one year and a loss in another, or the following, year. In my view, the transaction ought to be regarded as being the acquisition of the lease, and if a loss occurs it matters not for the purposes of the section whether the loss results from letting at a smaller rent than that paid or from failure to let at all. This, I believe, provides the right answer to the problem. Any other view would be placing too narrow a construction on the word "profits" in s. 27 of the Act of 1927, and would result in injustice and in a wholly unexplained distinction between the position of the taxpayer in regard to short leases as against long leases. I am in favour of allowing the appeal.

JENKINS, L.J.: This is an appeal from a judgment of WYNN-PARRY, J., affirming a decision of the Special Commissioners in favour of the Crown on a question arising under the Finance Act, 1927, s. 27, and the Finance Act, 1940, s. 15, in the following circumstances.

The taxpayer, who is described in the Stated Case as a dealer in property and appears to have made a practice of acquiring leasehold properties with a view to re-letting them at a profit, had on hand during the year ended Apr. 5, 1943 (which has been taken as typical for the purpose of deciding the question of principle involved in the case), twenty-eight such properties. Of these, twenty-three had been re-let by him at rents exceeding those at which he took them, and also exceeding the amounts of their respective assessments under sched. A of the Income Tax Act, 1918, the aggregate excess of rents receivable over sched. A assessments amounting in these twenty-three cases to £4,830. Of the remaining five properties, two had been let by him at rents lower than those for which he was himself liable and three had not been let at all, the aggregate deficiency of rents receivable as compared with rents payable in respect of these five properties amounting to £3,575. It will thus be seen that, according to the ordinary acceptation of the expressions "profit" and "loss," the taxpayer had made a profit for the year on the twenty-three properties, represented by the excess of the rents he received over the rents he paid for them, but had made a loss for the year on the remaining five properties represented by the excess of the rents he paid over the rents (if any) he received in those five cases. His actual profit on the twenty-three properties would in fact be greater than the £4,830 excess over the aggregate amount of their respective sched. A assessments if, as would seem to have been the case, the rents he paid for them were below the amounts of those assessments, but, as will be seen hereafter, the excess of rent receivable over the sched. A assessment, not the actual profit, is the relevant figure for the present purpose in any case in which the sched. A assessment exceeds the rent payable. On the other hand, the deficiency of £3,575 of rents receivable as compared with rents payable does represent his actual loss, in the ordinary or business sense of that expression, on the remaining five properties for the year in question. In these circumstances, the taxpayer admittedly became liable, by virtue of the Finance Act, 1940, s. 15, to be assessed to income tax under case VI of sched. D on the £4,830 representing the excess of the rents received for the twenty-three properties over the aggregate amount of their respective sched. A assessments. But, while not contesting this liability, he claimed by virtue of the Finance Act, 1927, s. 27, to be entitled to set-off against or deduct from this excess of £4,830 the loss of £3,575 sustained on the remaining five properties. That claim was rejected by the Special Commissioners. Their decision was affirmed by the learned judge, and the present appeal results.

As the law stood before the Finance Act, 1940, s. 15, came into operation, the income tax liability in respect of the twenty-three houses would have been limited to tax at the standard rate on the amounts of their sched. A assessments notwithstanding that they had in fact been let at rents exceeding those amounts, so that in effect the taxpayer would have enjoyed tax-free so much of the profit rental received by him in respect of each property as represented an excess over and above the amount of its sched. A assessment. I will assume by way of illustration that, in a year when the standard rate of tax was 10s. in the £, the taxpayer held at a rent of £100 a property with a sched. A assessment of £300 and had re-let it to an occupying tenant at a rent of £400. In such a case the occupier would in the first instance have paid tax at the standard rate of 10s. in the £ on the sched. A assessment of £300=£150. Having so paid, the occupier would have been entitled to deduct the £150 tax from the rent of £400 payable by him to the taxpayer, who would thus have received £400 less £150=£250. The taxpayer, in his turn, on paying the rent of £100 to his superior landlord, would have been entitled to deduct the tax thus suffered by him up to 10s. in

the £ on the amount of rent payable by the taxpayer, the superior landlord thus receiving £100 less £50=£50. In the result, therefore, the taxpayer would have borne tax on the rent of £400 received by him only to the extent of £100 (that is, £150 less £50 recovered by deduction from the superior landlord), or, in other words, tax at the standard rate of 10s. in the £ on so much only of his profit rental as represented the difference (i.e., £200) between the rent payable by him (that is, £100) and the sched. A assessment (i.e., £300), and would thus in effect have enjoyed tax-free the remaining £100 of his profit rental, representing the excess of the rent receivable by him over the sched. A assessment. On the other hand, if, with rents payable and receivable of £100 and £400 respectively as above, the sched. A assessment had been £400 instead of £300, the occupying tenant would have paid and deducted from the rent payable to the taxpayer £200, and the taxpayer would have deducted as before £50 from the rent payable by him, and would thus have been left to bear himself tax amounting to £150, or, in other words, tax at the full standard rate of 10s. in the £ on the whole of the profit represented by the £300 by which the rent he received exceeded the rent he paid. Moreover, although charged with tax at the full standard rate on the whole of the surplus of £300 realised by him in this imaginary example, there would have been no question of his setting-off against that figure any amount he might have been out of pocket over some other property which he had only been able to re-let at a lower rent than the rent he had himself to pay for it, or had been unable to re-let at all.

To summarise the position as it stood before the Finance Act, 1940, s. 15, came into operation:—(i) The charge of tax at the standard rate on the amount of the assessment made under sched. A by reference to the annual value of a property ascertained in accordance with the provisions of that schedule exhausted the liability to tax of the income derived from the letting of that property even though the rent actually derived from it might exceed the amount of the sched. A assessment; (ii) Schedule A was not concerned with profit and loss in the sense of excess or deficiency of receipts as compared with outgoings, but simply with the annual value ascertained in accordance with its terms, which was presumed for tax purposes to represent the income derived from the property and served as the statutory measure of such income: see, for the first proposition, *Fry v. Salisbury House Estate, Ltd.* (1) and, for the second, *Coman v. Rotunda Hospital, Dublin (Governors)* (2), per LORD ATKINSON.

The group of sections in which s. 15 of the Finance Act, 1940, appears (comprising s. 13 to s. 18 of that Act) has, undoubtedly, displaced the first of these propositions. The question in this case is, in effect, how far, if at all, these sections in conjunction with the Finance Act, 1927, s. 27, have displaced the second. There is no doubt that the primary object of this group of sections in the Finance Act, 1940, was to bring into effect charge to tax the amounts by which rents received for properties assessable to tax under sched. A exceed the amount of their sched. A assessments, or, to be strictly accurate, to subject rents received for properties to the same amount of tax as they would have attracted if the sched. A assessment had been made in each case by reference to the rent actually received for the property during the relevant period.

The Finance Act, 1940, s. 13, contains a number of definitions:

“ ‘ immediate lessor ’ means in relation to any premises—(a) if different parts of the premises are the subject of separate tenancies or separate occupations, a lessor of the whole or any part of the premises whose estate or interest extends to the entirety of the premises and is not subject, immediately or mediately, to a lease of the entirety thereof; and (b) in any other case, a lessor whose immediate tenant is occupying or entitled to occupy the entirety of the premises: Provided that if, in any case to which para. (a) of this definition applies, there is more than one lessor satisfying the conditions set out in that paragraph, one of those lessors shall be deemed

to be the immediate lessor whose estate or interest is not reversionary on the estate or interest of any of the others; 'long lease' means a lease granted for a term exceeding fifty years, other than a lease which is or takes effect as a lease for a term of years determinable after the death or marriage of any person; 'short lease' means a lease which is not a long lease; 'unit of assessment' means any land which forms a unit of assessment for the purposes of sched. A."

The leases with which this appeal is concerned are all short leases, and the taxpayer is in each case the immediate lessor. The section directly applicable is, therefore, s. 15, which provides:

"(1) If, as respects any year of assessment, the immediate lessor of a unit of assessment is entitled in respect of the unit to any rent payable under a lease or leases to which this section applies, he shall be chargeable to tax under case VI of sched. D in respect of the excess, if any, of the amount which would have been the amount of the assessment of the unit for the purposes of sched. A, as reduced for the purpose of collection, if the annual value of the unit had been determined (in accordance, in whatever part of the United Kingdom the unit is situated, with the rules applicable to sched. A set out in sched. I to the Income Tax Act, 1918) by reference to that rent and the other terms of the lease or leases, over whichever is the greater of—
(a) the actual amount of the assessment of the unit for the purposes of sched. A, as reduced for the purpose of collection; or (b) the amount of any rent payable by the immediate lessor in respect of the unit under any short lease or short leases . . . (3) Where for any year an assessment has been made on an immediate lessor by virtue of this section, the amount of any relief which may be claimed by him under r. 8 of No. V of sched. A shall be such amount as could have been claimed by him if the annual value of the unit had been determined in the manner described in sub-s. (1) of this section. (4) A lease shall be deemed to be a lease to which this section applies if, and only if, the following conditions are fulfilled with respect to it—(a) that it is a short lease; (b) that the land comprised in it is or forms part of a single unit of assessment; (c) that the rent under it is payable to the immediate lessor of that unit; (d) that the estate or interest of the immediate lessor of that unit is not, as respects any part of that unit, subject to any short lease which comprises also land not wholly within that unit, being a lease the rent under which is payable to that immediate lessor."

It will be seen that the method of charging tax on rents in excess of actual sched. A assessments prescribed in cases to which s. 15 applies is to make the "excess" ascertained as therein provided chargeable to tax under case VI of sched. D.

For the taxpayer, it is in effect contended that this is a new departure in the method of taxing rents which, while making him liable to tax on the excess admittedly realised as regards the twenty-three properties, does so, not by treating the excess as rent to be brought into effective charge to tax by means of an upward revision of the sched. A assessments, but by treating it as a profit taxable under a different schedule, namely, sched. D, case VI, and that, as he is thus made liable to assessment under case VI on the footing that the excess is a profit arising from his lettings of the twenty-three properties, it follows that he must be entitled by virtue of the Finance Act, 1927, s. 27, to deduct from or set-off against such profit the loss he has sustained with respect to the five properties which he has either let at rents lower than those he had to pay or failed to let at all.

The Finance Act, 1927, s. 27, is in these terms:

"(1) Where in any year of assessment a person sustains a loss in any transaction, whether he was engaged therein solely or in partnership, being a transaction of such a nature that, if any profits had arisen therefrom, he

would have been liable to be assessed in respect thereof under case VI of sched. D, he may claim that the amount of the loss sustained by him shall, so far as may be, be deducted from or set-off against the amount of any profits or gains arising from any transaction in respect of which he is assessed for that year under the said case VI, and that any portion of the loss for which relief is not so given shall, as far as may be, be carried forward and deducted from or set-off against the amount of any profits or gains arising from any transaction in respect of which he is assessed under the said case VI for any of the six following years of assessment."

There was some argument on the meaning of the word "transaction" in s. 27, and it was suggested on the part of the Crown that while the taking on lease and re-letting of premises might be a "transaction," a mere failure to let leasehold premises could hardly be so described. Examples were given, such as the case of a legatee of a leasehold house who fails to find a tenant for it, or the case of the owner of a leasehold house acquired as his own residence who goes to live elsewhere and makes abortive attempts to sub-let. It was asked whether it could be said that in cases such as these there was a "transaction" from which a loss arose in the shape of the rent which had to be paid without any return from the property? The answer, I think, is that the facts supposed in the hypothetical cases put are far removed from those of the present case. As I have said above, the taxpayer here appears to have made a practice of acquiring leasehold properties with a view to making a profit by re-letting them. That being so, I think each acquisition by him of a leasehold property with this object in view, being in the nature of a business venture or investment, is on the whole rightly to be regarded as a transaction giving rise to a profit in any year in which income derived from re-letting exceeds outgoings under the superior lease and wherein he sustains a loss in any year in which the reverse is the case, whether through re-letting at an inadequate rent or through failure to re-let at all. I am at all events prepared to assume this much in the taxpayer's favour for the purposes of the present case.

The main argument centred on the question whether, given a "transaction" within the meaning of s. 27 with respect to each of the five properties in respect of which the taxpayer, within the meaning of the section, sustained a loss in the relevant year through failing to re-let at all or failing to re-let at an adequate rent, the transaction was within the meaning of the section "of such a nature that if any profits had arisen therefrom" the taxpayer "would have been liable to be assessed in respect thereof under case VI of sched. D."

The answer to this question depends largely on the meaning to be given to the words "loss" and "profits" in s. 27 (1) of the Act of 1927 when considered in relation to the "excess" which s. 15 of the Act of 1940 makes chargeable to tax under sched. D, case VI. It is to be observed that what s. 15 of the Act of 1940 makes chargeable to tax under case VI of sched. D is not the profit made by the immediate lessor in the shape of the excess of the rent he receives over the rent he pays (in other words, his "profit" on the property for the year in the ordinary or business sense of that expression), but the excess of a notional sched. A assessment based on the rent actually received by him over whichever is the greater of two amounts, namely, (a) the actual sched. A assessment of the property, and (b) the amount of the rent paid under any short lease by the immediate lessor.

We were provided by the Crown in the course of the argument with a number of examples to show, as is, indeed, manifestly the case, that the "excess" charged with tax under the formula prescribed by s. 15 (1) bears no necessary relation to the immediate lessor's profit for the year in the ordinary or business sense (which may conveniently be termed "the commercial profit"). If the three elements in the formula are in the following ascending order of magnitude, *viz.* (i) rent paid by the immediate lessor under a "short" lease; (ii) notional

shed. A assessment based on rent received; (iii) actual sched. A assessment; the commercial profit is represented substantially by the excess of (ii) over (i), yet there is no "excess" for the purposes of s. 15, the reason why the formula is framed so as to exclude any statutory "excess" in such a case presumably being that where the rent received, while exceeding the rent paid, is less than the actual amount of the sched. A assessment, the assessment under sched. A effectively brings into charge to tax at the standard rate the whole of the rent actually received. Again, if the items in the ascending order of magnitude are: (i) rent paid by the immediate lessor under a "short" lease; (ii) actual sched. A assessment; (iii) notional sched. A assessment, the commercial profit is represented substantially by the excess of (iii) over (i), but the statutory excess is limited to the excess of (iii) over (ii), the reason for so limiting the statutory excess presumably being that in such a case the excess of rent received over rent paid up to the actual sched. A assessment is effectively brought into charge to tax at the standard rate by means of the actual sched. A assessment. Finally, the ascending order of magnitude might be: (i) actual sched. A assessment; (ii) rent paid by the immediate lessor under a "short" lease; (iii) notional sched. A assessment. In such a case the statutory excess does, no doubt, approximate to the commercial profit, though it does not exactly coincide with such profit on account of the adjustments, and in particular the conventional allowance for repairs, involved in the notional assessment made in accordance with the rules applicable to sched. A on the basis of an annual value determined in accordance with the provisions of that schedule by reference to the rent actually received by the immediate lessor. It may be noted that in this instance the difference between the rent paid by the immediate lessor and the actual amount of the sched. A assessment would under s. 16 be brought into account against the superior landlord for the purpose of determining the excess which that section makes chargeable to tax in his hands under case VI of sched. D.

As was pointed out in the course of the argument, it is for practical purposes true to say that where the lease under which the immediate lessor holds is a "short" lease the s. 15 formula at all events produces no "excess" unless there is in fact a commercial profit, *i.e.*, unless the rent received exceeds the rent paid. But in any case in which the rent paid exceeds the rent received the whole of the rent paid, if less than the actual sched. A assessment, is fully charged to tax at the standard rate under sched. A, while if it exceeds the actual sched. A assessment such excess is brought into account for the purpose of determining the "excess" in respect of which the superior landlord is himself made chargeable to tax under case VI of sched. D by virtue of the provisions of s. 16. Moreover, it should be noted that rent payable by an immediate lessor under a long lease is ignored for the purposes of the s. 15 calculation. This I take to be because any rent payable by the immediate lessor under a long lease would be payable under deduction of tax at the standard rate by virtue of the provisions of s. 17. It appears to follow that if an immediate lessor holding under a long lease at a rent of £300 per annum let the property on short lease at a rent giving a notional sched. A assessment of £200 per annum and the actual sched. A assessment of the property was £100, there would be an "excess" under s. 15 of £100, although in fact the immediate lessor had sustained a commercial loss of £100. The immediate lessor in such a case would, I take it, be entitled under s. 17 to deduct tax at the standard rate on the £200 rent payable by him and to retain the tax on £100 of it, and would thus in fact be recouped the tax with which he was charged on the s. 15 excess. But this example, if it be right, affords yet another illustration of the absence of any necessary relation between the s. 15 excess and the commercial profit realised by the immediate lessor.

Bearing in mind these considerations as to the character of the "excess" which s. 15 of the Act of 1940 makes chargeable to tax under case VI of sched. D, I return to s. 27 (1) of the Act of 1927. Does s. 15 have the effect of making the transaction of acquiring a leasehold property and re-letting it at a lower rent or

failing to re-let it at all, and thereby sustaining a loss on income account, a transaction which is, within the meaning of s. 27 (1), a transaction of such a nature that, if a profit had arisen therefrom, the person concerned would have been liable to be assessed in respect thereof under case VI of sched. D? In the submission of the Crown, which has so far prevailed, s. 15 has no such effect. The word "loss" in s. 27 (1) must (it is argued) obviously mean "loss" in the ordinary commercial sense, and the word "profits", used as it is in contradistinction to "loss", must likewise mean "profits" in the ordinary commercial sense. As has been seen above, the s. 15 "excess" bears no necessary relation to commercial profit. There may be a commercial profit without any "excess," or again the "excess," if any, may be only a fraction of the commercial profit. The nature of a transaction of the kind here in question is not such as to attract tax under case VI of sched. D on any profits arising therefrom. Its nature is such that by virtue of s. 15 of the Act of 1940 it attracts tax under case VI of sched. D if, and only if (irrespective of any profit in the commercial sense), the amount of a notional sched. A assessment based on the actual rent received exceeds both the actual amount of the sched. A assessment and the amount of the rent paid by the immediate lessor under any short lease, and in such case the subject of tax is not the amount of any commercial profit but simply the excess of the amount of the notional sched. A assessment over whichever is the greater of the other two factors in the calculation prescribed by s. 15. Moreover (it is argued) the "excess," if any, cannot be said to "arise" from the transaction in the sense of being the product of the transaction like the simple commercial profit represented by the excess of rent received over rent paid. It arises by virtue of the application of the statutory formula, and is the product, not of the transaction, but of the calculation which s. 15 enjoins.

Counsel for the taxpayer argued that the word "profits" in s. 27 (1) means profits in the income tax sense, that is, taxable income of any amount which under the income tax legislation is treated as taxable income, and he referred us to a number of passages in the Acts in which the expressions "profits," "gains", and "income" are used in this sense. He invited us, therefore, to hold that inasmuch as the "excess" ascertained in accordance with s. 15 had been made by that section chargeable to tax under case VI of sched. D, it followed that, no matter how ascertained, it became "profits" for all income tax purposes, and in particular "profits" within the meaning of s. 27 (1). He supported this contention by reference to the scope of case VI of sched. D itself, which is expressed to extend to

"tax in respect of any annual profits or gains not falling under any of the foregoing Cases, and not charged by virtue of any other schedule."

This reasoning enabled him in effect to substitute "excess" for "profits" in s. 27 (1) and to claim that the taxpayer was entitled to the benefit of that section with respect to the five transactions in which he had sustained "losses." He agreed, as I understood him, that "loss" in s. 27 (1) must mean "loss" in the commercial sense and not (in relation to s. 15 cases) a notional "deficiency" representing the converse of the s. 15 "excess." He contended, in effect, that there was no inconsistency in this if the "excess" computed as provided in s. 15 was regarded as the measure for income tax purposes of the actual profit, whatever it might be. He met the possible case of a commercial profit without any s. 15 excess by pointing out that liability to assessment could exist even though the statutory measure of the relevant profit might be such that the assessment was nil. He relied strongly on the apparent unfairness of the result contended for by the Crown, which meant that a man who had an "excess" on one such transaction while sustaining a loss on another would be liable to tax on the "excess" although the two transactions taken together had in fact brought him in no profit or even left him out of pocket. He pointed out that a person holding two properties under "long" leases at rents of £500 each, sub-letting one at a

A rent of £1,000 and failing to let the other at all, would under the provisions of s. 17 of the Act of 1940 be entitled, in paying his rent of £500 in the unprofitable case, to deduct and retain tax equivalent to the tax he had paid in the profitable case (*i.e.*, tax on £500), thus in the result bearing no tax at all in respect of two transactions which taken together had brought him no profit. Counsel argued from this example that if s. 27 of the Act of 1927 did not have the effect for which he contended, the alterations in the law brought about by s. 13 to s. 18 of the Act of 1940 would involve what appeared on the face of it to be a wholly unreasonable discrimination in favour of the holders of "long" as opposed to "short" leases.

B While by no means insensible to the attractions of these arguments, I find it impossible to place on s. 27 of the Act of 1927 and s. 15 of the Act of 1940 the construction for which counsel for the taxpayer contends. I agree with the Special Commissioners and with the learned judge that the references to "loss" and "profits" in s. 27 are directed to profit and loss in the commercial sense. I also agree with them that the "excess" computed in accordance with s. 15 of the Act of 1940 in relation to a transaction of the kind here in question, bearing as it does no necessary relation to any commercial profit, is not "profits" within the meaning of s. 27 of the Act of 1927. If "any profits" (that is, commercial profits) "had arisen" from such a transaction, those profits would not necessarily have been assessable under case VI of sched. D. They might have been wholly covered by the sched. A assessment (there being no "excess"). Again, they might have been partly covered by the sched. A assessment. Substantial correspondence between the "excess" chargeable to tax under sched. D, case D VI, by virtue of s. 15 and the commercial profit arising from the transaction would only have been achieved on the assumption that the rent paid and the higher rent received both exceeded the actual amount of the sched. A assessment, and even then the liability to tax under case VI of sched. D on a figure of "excess" substantially corresponding to the commercial profit would have been due, not to the nature of the transaction, but to the inadequacy of the actual sched. A assessment in the particular case.

E The truth, as I think, is that s. 15 of the Act of 1940 is directed, not to taxation of commercial profits, but to more effective taxation of annual values. This is, to my mind, implicit in the formula adopted, with its introduction of a notional sched. A assessment based on the actual rent as an essential factor in the computation of the "excess" to be charged with tax. The use of case VI of F sched. D for the purpose of charging the "excess" with tax lends colour to the argument that s. 15 is for the first time introducing considerations of commercial profit and loss into the taxation of income derived from the ownership of land, but I agree with the submission made on behalf of the Crown that the use of this Case is mere machinery for effecting the adjustment considered necessary in the liability to tax on annual values, and should not be regarded as involving the substitution, *quoad* the "excess," of commercial profit for annual value as the measure of liability. As was pointed out for the Crown, this is not the only instance of recourse to assessment under case VI of sched. D for the purpose of adjusting tax liability.

G As to the distinction made by the Act of 1940 between "long" and "short" leases and the difference in the treatment accorded to them by s. 17, on the one H hand, and s. 15 and s. 16, on the other, no satisfactory explanation was advanced in argument, and I confess my own inability to provide one. But I cannot regard the anomaly suggested by counsel for the taxpayer as between cases under s. 15 and cases under s. 17 as sufficient ground for departing from the conclusion I have stated. Moreover, as it seems to me, counsel's argument would produce yet another anomaly, based on the accidental circumstance of the adequacy or inadequacy of sched. A assessments instead of the arbitrary distinction between long and short leases. A man who acquired a "short" leasehold and re-let it at

a profit would be entitled to set-off against that profit losses sustained in other similar transactions if a notional sched. A assessment based on the rent he received exceeded the actual amount of the sched. A assessment, but he would have no such right if such notional sched. A assessment was less than the actual amount of the sched. A assessment, although the commercial profit represented by the excess of rent received over rent paid might in either case be precisely the same. For the reasons I have stated, being in substance the same as those which commended themselves to the Special Commissioners and the learned judge, I would, for my part, dismiss this appeal.

Appeal allowed.

Solicitors: *Tobin & Co.* (for the taxpayer); *Solicitor of Inland Revenue.*

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

R. v. WEISZ AND ANOTHER. *Ex parte* HECTOR MacDONALD, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Devlin, JJ.), June 19, 20, 28, 1951.]

Contempt of Court—Action prohibited by statute—Feigned issue raised by endorsement of writ—Gaming debt—Claim for account stated—Liability of solicitor.

With a view to recovering money which he alleged he had won on bets made by him with the applicants, a firm of bookmakers, W. instructed his solicitor, M., to take proceedings, although he was aware that such an action was not maintainable at law. The endorsement on the writ, which was settled by counsel and which was not seen by W., was in the following terms: "The plaintiff's claim is for the sum of £373 13s. 4d. being the balance found to be due from the defendant to the plaintiff on accounts stated between them in writing and contained in a letter . . . dated Sept. 26, 1950." In fact, there never had been an account stated between the parties. The applicants moved for a writ of attachment against W. and M. on the ground that the endorsement was fictitious and merely a device to conceal from the court that the action was prohibited by the Gaming Act, 1845, and, therefore, was a contempt of court.

HELD: an action to recover money which was prohibited by statute was an abuse of the process of the court, and, although it was not necessarily a contempt of court to bring such an action, to attempt to deceive the court by disguising the true nature of the claim and putting forward a feigned issue was a contempt, and, therefore, since the endorsement was made in the name of M.'s firm and he was the partner having charge of the proceedings, although he had not seen the endorsement on the writ, the matter having been left to a managing clerk, he was guilty of contempt, but W., who was only instrumental in bringing the action and did not know of the terms of the endorsement, was not guilty.

Coxe v. Phillips (1736) (Lee temp. Hard. 237) and *Re Elsam* (1824) (3 B. & C. 597), applied.

AS TO ABUSING THE PROCESS OF THE COURT, see HALSBURY, Hailsham Edn., Vol. 7, p. 19, para. 28; and FOR CASES, see DIGEST, Vol. 16, pp. 36, 37, Nos. 374-393.

Cases referred to:

- (1) *Laycock v. Pickles*, (1863), 4 B. & S. 497; 33 L.J.Q.B. 43; 9 L.T. 378; 122 E.R. 546; 12 Digest 165, 1207.
- (2) *Coxe v. Phillips*, (1736), Lee temp. Hard. 237; 95 E.R. 152; 16 Digest 36, 380.

- (3) *Re Elsam*, (1824), 3 B. & C. 597; 3 L.J.O.S.K.B. 75; 107 E.R. 855; 16 Digest 37, 384.
- (4) *Gugenheim v. Ladbrooke & Co., Ltd.*, [1947] 1 All E.R. 292; 177 L.T. 74; 2nd Digest Supp.
- (5) *Willis v. Lovick*, [1901] 2 K.B. 195; 70 L.J.K.B. 656; 84 L.T. 713; 13 Digest 496, 466.
- A (6) *North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.*, [1914] A.C. 461; 83 L.J.K.B. 530; 110 L.T. 852; 12 Digest 303, 2496.
- (7) *Phillips v. Copping*, [1935] 1 K.B. 15; 104 L.J.K.B. 78; 152 L.T. 175; Digest Supp.

MOTION for a writ of attachment.

- B The applicants, Hector MacDonald, Ltd., a firm of bookmakers, claimed that the respondents, Norman Weisz and Harold William Martin, his solicitor, were guilty of contempt of court in being concerned in issuing a writ in the High Court claiming a sum of money as due from the applicants to Mr. Weisz on an account stated. The grounds of the motion were that the endorsement on the writ was fictitious, that there never had been an account stated between the parties, and that the action was one to recover money won by betting which
- C was prohibited by the Gaming Act, 1845.

Gardiner, K.C., and *Quass* for the applicant.

Fox-Andrews, K.C., and *J. C. G. Burge* for the respondent Weisz.

Maude, K.C., and *Wishart* for the respondent Martin.

D

Cur. adv. vult.

- June 28. **LORD GODDARD, C.J.**, read the following judgment of the court. Counsel moves on behalf of the applicants, Hector MacDonald, Ltd., a company carrying on the business of bookmakers, for a writ of attachment against Mr. Norman Weisz and Mr. Harold William Martin, a solicitor, for contempt in being concerned in issuing a writ in this court claiming a sum of money as due from the applicants to Mr. Weisz on an account stated. Shortly stated, the grounds of the motion are that the endorsement was fictitious, that there never had been any account stated between the parties, and that, in fact, it was a naked claim to recover money won by betting, so that the endorsement was a device to conceal from the court the true nature of the action, which was, in truth, one prohibited by the Gaming Act, 1845.
- E The facts which it is necessary to state leading to the issue of the writ are that in the summer of 1950 Mr. Weisz claimed to have placed bets with the applicants and to have won from them some £380. This the latter disputed. We do not propose to refer to the details of the dispute as they are wholly irrelevant to the present proceedings. Suffice it to say that it was referred to Tattersalls committee which, as is well known, is the recognised tribunal for the settlement of disputes
- G between betting men, and, after both parties had attended before them, the committee decided in favour of the bookmakers. Mr. Weisz thereupon consulted his solicitor, Mr. Martin, with a view to bringing an action against the bookmakers. Mr. Martin advised him that such an action was hopeless, and, indeed, it was not disputed that Mr. Weisz knew perfectly well that such an action was not maintainable at law. However, he insisted that one should be brought, obviously
- H in the hope that the threat of publicity would induce the bookmakers to pay, or, if they did not, to "show them up". It is only fair to Mr. Martin to say that he did his best to dissuade his client from taking these proceedings, but, being reluctant to offend him by declining to act, he at length agreed and sent the correspondence to counsel with instructions to settle the endorsement for the writ. The endorsement having been received from counsel, a letter was sent to the applicants in the name of Mr. Martin's firm on Jan. 18, 1951, saying that they had been instructed and that, as it did not appear to be of any use to request

payment, they were issuing a writ and asking for the name of the applicants' solicitor who would accept service. As no reply was received, a writ was issued and served on the applicants on Jan. 22. The endorsement was in these terms:

"The plaintiff's claim is for the sum of £373 13s. 4d. being the balance found to be due from the defendant to the plaintiff on accounts stated between them in writing and contained in a letter from the plaintiff to the defendant dated Sept. 26, 1950. Particulars: 1950. Sept. 26. Balance due by defendant to plaintiff on this date, £373 13s. 4d. (Signed) Campbell, Hooper & Todd."

On Jan. 29 the applicants' solicitor applied for particulars of the debt or claim in respect of which the accounts were alleged to have been stated, indicating whether such debts or claims were alleged to have been on both sides or one side only. This request was acknowledged on Feb. 1, Mr. Martin's firm saying that they were getting counsel to settle the particulars and they extended the time for the defence. There seems to have been some delay in getting counsel to settle particulars, and on Feb. 14 the applicants' solicitor wrote saying that he would issue an application for particulars unless he received them in three days. On Feb. 15 the particulars were promised in a day or so, and they were received by Mr. Martin's firm from counsel on Feb. 23. Those particulars no longer attempted to disguise the nature of the claim and disclosed that the debt related to betting transactions, and counsel sent an opinion with them saying that they were fatal to Mr. Weisz's claim and would lead to it being struck out, adding: "Mr. Weisz probably knows this as well as a lawyer". The court has not been informed whether either before or after the receipt of those particulars there had been any conference with counsel, but the subsequent history is certainly somewhat curious, though it has not any direct bearing on the matter that we have to decide. Those particulars were not sent to the applicants, no doubt because they rendered the claim hopeless, and on Feb. 26 the applicants' solicitor issued and served a summons for their delivery returnable on Mar. 8. On March 1 Mr. Martin's firm wrote saying that they were sorry it should have been thought necessary to issue a summons "after our having informed you that the papers are with counsel for the purpose of settling the particulars." This is surely a very regrettable letter. The particulars had then been in their possession for a week, and it looks to the court very much as though some effort was still being made to avoid serving those fatal particulars or in some way to keep matters alive and to postpone or avoid the inevitable application to strike out the action as an abuse. Mr. Martin, through his counsel, told us that not only was he unaware of this correspondence, but that he had not even seen or been aware of the endorsement on the writ. He had, apparently, left the matter to his managing clerk, but he must, of course, take responsibility for what was done. On Mar. 6 he was shown by one of his partners an article in the LAW SOCIETY'S GAZETTE which obviously caused him anxiety. The particulars had still not been served, and, in fact, they never were, but this article caused him to consult counsel, with the result that on Mar. 7, the day before the summons for particulars was returnable, a notice of discontinuance was served.

The gravamen of the case against Mr. Martin is that the endorsement on the writ was wholly fictitious and was designed to conceal from the court the true nature of Mr. Weisz's claim. It is abundantly clear that there never had been any account stated between the parties, even in respect of betting transactions. The account is said to be contained in a letter of Sept. 26, 1950, and it is in issue whether that letter was ever sent to or received by the applicants. Assuming that it was, however, it is nothing but an allegation by Mr. Weisz that money was due to him and threatening to take proceedings to obtain it. Anything further removed from a stated account cannot well be imagined. As it was not attempted by anyone to contend that there ever was an account stated between these parties we need not deal with what is necessary to support such a cause

of action. Its nature will be found fully discussed by BLACKBURN, J., in *Laycock v. Pickles* (1). What we have to consider does not depend in the least degree on any technical question as to the nature of an account stated. This was simply a naked action for the recovery of money alleged to have been won by betting which the Gaming Act, 1845, prohibits. Such an action is, therefore, an abuse of the process of the court, but it is not necessarily a contempt to bring it. To attempt, however, to deceive the court by disguising the true nature of the claim is a contempt. It is putting forward what the old cases called a feigned issue, that is to say, not the true, but a fictitious cause, of action. That this is a contempt is well illustrated by *Coze v. Phillips* (2) and *Re Elsam* (3). The latter case, indeed, is a strong illustration of the necessity of being frank with the court. An executor desired to obtain the opinion of the court on a question of title, a matter which in modern times would be effected by means of an originating summons, a procedure unknown in 1824 when the case was heard. Accordingly, he caused a Special Case to be stated, consisting of an elaborate story which, in fact, was wholly fictitious. His good faith was unchallenged, and it was not suggested that he had any motive other than to obtain a decision on an obscure point of law, but he was, nevertheless, fined for bringing a fictitious case before the court.

Counsel for Mr. Martin did not seek to justify the endorsement or to dispute that it, in fact, disclosed a fictitious case. He sought to mitigate what had been done, and it is, no doubt, matter of mitigation, and for myself I would say strong mitigation, that there are many cases to be found in the books in which this endorsement has been used in betting cases, and so far there has been at least no reported case in which it has been suggested that such a thing is a contempt, though the actions have been struck out as an abuse of process. Indeed, in *Gugenheim v. Ladbrooke & Co., Ltd.* (4), the Court of Appeal allowed the action to proceed, apparently on the ground that the plaintiff was a foreigner who would, they thought, not understand the position and be aggrieved if the action were to be summarily dismissed, and this in spite of the great doubt expressed by TUCKER, L.J., as to this course being allowed. I think that case should be regarded as wholly exceptional. It does appear from its subsequent history that a very serious issue of fraud had been raised which the foreign plaintiff was anxious to have determined, and when the case came to trial before HUMPHREYS, J., the judge allowed that issue to be left to a jury, though he entered judgment against the plaintiff on the ground that it was a betting claim and without regard to the verdict.

The very fact that on many previous occasions resort has been had to this particular form of endorsement in cases which are brought simply for the recovery of money won at betting or gaming is what gives importance to this present motion. It is time that this practice should be stopped, and in no uncertain manner. The mischief is obvious. Parliament has ordained that the courts are not to be used for this purpose. Many people may be deterred from defending such actions, if brought, for fear of publicity. If the writ were truthfully endorsed, for money won at betting, it would be wholly improper to allow a default judgment to be entered. The duty of the Central Office would be to bring the matter before the practice master, and he, in his turn, ought not, and I am sure would not, allow a judgment to be signed which would, in effect, be contrary to the provisions of the statute. If a writ is endorsed for a fictitious, but apparently legal, cause of action, a default judgment could be signed, as of course, and, accordingly, in our opinion, this leads to an interference with or distortion of the course of justice.

In this connection I ought to refer to the extract from the March, 1951, issue of the LAW SOCIETY'S GAZETTE exhibited to Mr. Martin's affidavit, in which it is stated at p. 105 that, if a defendant to proceedings issued in respect of a gaming debt is to succeed, the statute must be pleaded, and *Willis v. Lovick* (5)

is cited as authority. This is too wide a statement. The true rule is to be found in *North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.* (6), and is succinctly stated in the headnote, thus:

"Where an action is brought on a contract which is *ex facie* illegal . . . the court will decline to enforce the contract . . . whether illegality is pleaded or not; but, where the question of illegality depends upon the surrounding circumstances, as a general rule, the court will not entertain the question unless it is raised by the pleadings."

SCRUTTON, L.J., put it tersely in *Phillips v. Copping* (7) ([1935] 1 K.B. 21), saying:

" . . . it is the duty of the court when asked to give a judgment which is contrary to a statute to take the point although the litigants may not take it."

Willis v. Lovick (5) was an illustration of the second part of the rule stated in the *North Western Salt Co., Ltd.* case (6). In *Willis v. Lovick* (5) an agent sued his principal for commission on money received by the principal from persons introduced by the agent. The court held that if the defendant wished to say that the money had been received from persons betting with the defendant the Gaming Act, 1892, must be pleaded. *Phillips v. Copping* (7), however, shows that if A sues B for money won by betting it is the duty of the court to refuse to give judgment for him as soon as it appears that the action is one prohibited by the Gaming Acts, whether or not the Acts are pleaded, and this shows how important it is that the claim should not be preferred under a feigned issue.

We do not think it necessary to go through the many cases cited in argument dealing with contempts of different kinds, nor is it necessary to remind the court that the summary jurisdiction to punish contempts is one to be exercised with caution. It is, in our opinion, beyond question that to disguise a cause of action so as to conceal its true nature, when, in truth, it is one prohibited by statute, is a contempt, and, as the endorsement here was signed in the name of Mr. Martin's firm, and he admits that he was the partner having charge of the proceedings, he must take responsibility and be held guilty of a contempt.

I now turn to the position of the respondent Weisz. The court accepts his evidence that he was abroad when the writ was actually issued and that he did not know of its terms. That he insisted on an action being brought which was an abuse of the process of the court is clear, and as it is admitted that he knew that betting debts could not be recovered by action it follows that he knew that the action for which he gave instructions was an abuse. It has never yet been held, however, that merely to bring, or cause to be brought, an action which is an abuse can be treated as a contempt, even though it may have been brought for the purpose of pressure or what may be called "showing up." If it were held that to bring an action prohibited by the Gaming Acts was punishable, it would mean that the court was treating as criminal something for which Parliament had not provided a penalty. As a general rule stopping the action *in limine* and awarding costs against the plaintiff must be regarded as the appropriate sanction. There may be exceptions, and, to give one instance, if a person who brought an action which was struck out as an abuse again brought exactly the same action, the court might deal with him for contempt, but that would be because his conduct in bringing the second action amounted to a defiance of the court. It is necessary to emphasise that the contempt in the present case lies, not in bringing an action forbidden by the Gaming Acts, but in bringing it as a feigned issue so as to conceal its true nature from the court. For this we cannot hold Mr. Weisz responsible. He instructed his solicitor to bring an action for the bets. Had the writ been endorsed for money due to the plaintiff on bets won by him the action would have been struck out, but it would not have amounted to contempt.

We have now to consider what penalty, if any, should be imposed on Mr. Martin. We do not overlook the fact that he sent the papers to counsel who settled the endorsement. We have not been asked to hear any application against counsel, and, therefore, only say this. No doubt, had counsel been asked to explain his action he would have said, as Mr. Martin has said, that this form of endorsement has been often used in these cases without it ever having been said to be a contempt, and he might well have pointed particularly to *Gugenheim v. Ladbrooke & Co., Ltd.* (4). We recognise there is considerable force in this, and, as we have already said, in regard to Mr. Martin, it ought to be regarded as strong mitigation. We hope, however, that counsel as well as solicitors will always bear in mind that they owe a duty to the court as well as to their clients, and that a main object in requiring the signature of counsel or a solicitor to pleadings settled by them is to prevent issues, whether called feigned or fictitious, being presented to the court. Henceforward there will be no excuse for using this form of endorsement, or, we would add, one such as "money due under a contract in writing made between the parties" when the claim is simply in respect of gaming or wagering. While holding Mr. Martin guilty of a contempt, we acquit him of any intention to act in contempt of the court, and he has, by his counsel, offered a full apology. We, therefore, impose no penalty on him. *No order for attachment.*

Solicitors: *R. M. Simons* (for the applicant); *Campbell, Hooper & Todd* (for the respondents). [*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

NOTE.

BROOKSBANK v. J. L. RAWSTHORNE & CO. (a firm).
[COURT OF APPEAL (Singleton and Morris, L.J.J., and Harman, J.), June 25, 1951.]

Court of Appeal—Reinstatement of dismissed appeal—No appearance of appellant—Appeal dismissed with costs—Application to reinstate—Jurisdiction.

MOTION to set aside an order of the Court of Appeal dated May 30, 1951. On May 29, 1951, an appeal by the plaintiff from an order of LYNSEY, J., made at Liverpool Assizes on November 10, 1950, was called on, but, the appellant having failed to appear, the appeal was dismissed with costs, the court directing that the order should not be drawn up until the following day to give the appellant an opportunity to communicate with the court. The case had been included in the cause list on five days before the day on which it was called on. The appellant now moved for the appeal to be reinstated. The defendants opposed the motion, contending that the appeal had been heard and determined within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 27 (1), and that the court had no jurisdiction to hear the application.

Cases referred to:

- (1) *Flower v. Lloyd*, (1877), 6 Ch.D. 297; 46 L.J.Ch. 838; 37 L.T. 419; Digest, Practice, 626, 2607.
- (2) *Hession v. Jones*, [1914] 2 K.B. 421, 425; 83 L.J.K.B. 810; 110 L.T. 773; Digest, Practice, 554, 2133.
- (3) *Rackham v. Tabrum*, (1923), 129 L.T. 24; Digest, Practice, 554, 2134.

H. G. Garland for the appellant.

Caulfield for the defendants.

The COURT OF APPEAL held that the appeal had not been heard and determined by the court on May 29, and that they had jurisdiction to hear the application, but that, on the facts, the court ought not to interfere with the order already made.

Solicitors: *McKenna & Co.*, agents for *G. H. Mossop*, Liverpool (for the appellant); *Hair & Co.*, agents for *Laces & Co.*, Liverpool (for the defendants).

J.D.P.

Re MACLAREN'S SETTLEMENT TRUSTS. ROYAL EXCHANGE
ASSURANCE *v.* MACLAREN AND OTHERS.

[CHANCERY DIVISION (Harman, J.), June 7, 12, 13, 28, 1951.]

Settlement—Capital or income—Tenant for life and remainderman—Apportionment—Capital profits dividend—Profit on sale of company's assets—Application of dividend with other funds in purchase of house—Right of tenant for life to equitable charge on house.

On Nov. 8, 1948, Thomas Tilling & Co., Ltd., announced that, having sold their interests in road transport to the British Transport Commission in consideration of the allotment of a large holding of British Transport three per cent. stock, they would pay to stockholders as a special capital profits dividend £5 of transport stock in respect of every unit of stock of Thomas Tilling & Co., Ltd., held. On Nov. 20, 1948, the trustees of a settlement, having wide powers of investment with the consent of the tenant for life, proposed to the tenant for life that certain capital moneys should be invested in the purchase of stock of Thomas Tilling & Co., Ltd. The tenant for life agreed, and on Dec. 1, 1948, the purchase was effected. In March, 1949, Thomas Tilling & Co., Ltd., distributed the British Transport stock as proposed. The trustees later sold both the Thomas Tilling stock and the British Transport stock, receiving in the aggregate for both holdings less than the amount of capital moneys originally invested in Thomas Tilling stock. The proceeds were applied (under a power given by the settlement) together with other capital moneys in the purchase of a house as a residence for the tenant for life. In reliance on the decision in *Re Sechiari* ([1950] 1 All E.R. 417) the tenant for life claimed to be entitled to an equitable charge on the house or the proceeds of its sale of an amount equivalent to the proceeds of sale of the British Transport stock.

HELD: the tenant for life had assented to the purchase of the transport stock as a capital investment and to the sale of that stock and the re-investment of the proceeds as capital in real estate for his benefit knowing that the trustees would not have embarked on the transaction if they had been aware of the possibility that the capital distribution by Thomas Tilling & Co., Ltd. would be income in their hands, and, in the circumstances, there was no equity in the tenant for life that he should be given a charge on the house or its proceeds of sale or be recouped the value of the transport stock.

Per curiam: The jurisdiction exercised in special circumstances to apportion between capital and income seems to be only the exercise of a right to make a more exact distinction of income from capital. As a matter of convenience, the practice is in the ordinary case that no apportionments are made, with the result that capital sometimes gets what, on a more exact scrutiny, would prove to be income and *vice versa*. Where this produces a glaring injustice, the court will cause a more exact calculation to be made, but it does not treat as income that which is capital, or as capital that which is income.

Dictum of VAISEY, J., in *Re Kleinwort's Settlement Trusts*, *ante*, p. 330, considered.

AS TO APPORTIONMENT BETWEEN TENANT FOR LIFE AND REMAINDERMAN, see HALSBURY, Hailsham Edn., Vol. 29, pp. 653-655, paras. 935-939; and FOR CASES, see DIGEST, Vol. 40, pp. 677-680, Nos. 2132-2157.

Cases referred to:

- (1) *Re Sechiari*, [1950] 1 All E.R. 417.
- (2) *Plymouth (Countess Dowager) v. Archer (Lady Dowager)*, (1782), 1 Bro. C.C. 159; 28 E.R. 1052; 2 Digest 82, 621.

- (3) *Burges v. Lamb*, (1809), 16 Ves. 174; 33 E.R. 950; 2 Digest 91, 723.
 (4) *Londesborough (Lord) v. Somerville*, (1854), 19 Beav. 295; 23 L.J.Ch. 646; 52 E.R. 363; 43 Digest 913, 3540.
 (5) *Bulkeley v. Stephens*, (1863), 3 New Rep. 105; 10 L.T. 225; 43 Digest 618, 584.
 (6) *Bulkeley v. Stephens*, [1896] 2 Ch. 241; 65 L.J.Ch. 597; 74 L.T. 409; 40 Digest 678, 2145.
 (7) *Re Winterstoke's Will Trusts*, [1937] 4 All E.R. 63; [1938] Ch. 158; 107 L.J.Ch. 122; 158 L.T. 404; Digest Supp.
 (8) *Re Firth*, [1938] 2 All E.R. 217; [1938] Ch. 517; 107 L.J.Ch. 251; 158 L.T. 489; Digest Supp.
 (9) *Re Kleinwort's Settlement Trusts*, p. 328, *ante*.

ADJOURNED SUMMONS to determine whether on the true construction of the trusts of a settlement and in the events which had happened the tenant for life was entitled to an equitable charge on a dwelling-house, or the proceeds of sale thereof, of an amount equivalent to the proceeds of sale of a holding of British Transport stock received by the trustees as a capital profits dividend as the holders of ordinary stock of Thomas Tilling & Co., Ltd., which proceeds of sale had been used by the trustees (together with capital moneys) in the purchase of the said dwelling-house.

L. J. M. Smith for the plaintiffs, the trustees.

E. I. Goulding for the first defendant, the tenant for life.

J. A. Brightman for the second and third defendants, remaindermen.

Plowman for the fourth and fifth defendants, other remaindermen.

Cur. adv. vult.

June 28. **HARMAN, J.**, read the following judgment. William Frederick de Bois Maclaren, the settlor in this matter, by an indenture of Nov. 18, 1919, made between himself and a bank as trustee, after reciting that he was desirous of making a settlement for the primary benefit of his nephew, the first defendant, and that he had for that purpose transferred, or was about to transfer, into the name of the trustee certain securities specified in the schedule, provided that the trustee should either retain or sell the securities, and should with the consent of the nephew invest the proceeds in manner thereafter authorised, and stand possessed of the trust fund on trust to pay the income to the nephew during his life (with power to him after his death to appoint the income to his widow) and in remainder for his children or issue as there provided, with divers gifts over under which, in the events which have happened, the only persons at present interested in the corpus of the fund are the remaining defendants, or some of them.

The settlement contained a clause imposing protective trusts on any income beneficiary, and the trustee was empowered to invest moneys in its hands in

"the ordinary or other stock or fully paid shares . . . of any . . . public company in the United Kingdom . . . or in the purchase . . . of freehold property,"

and in other ways not here relevant. The trustee was empowered to allow any tenant for life to occupy any purchased hereditaments rent free. Clause 9 of the settlement empowered the trustee among other things

"to distinguish trust funds and capital from income to settle questions of fact law or equity and to determine the special object of any trust and the value of any property and [its] decisions shall be binding on all parties interested."

Clause 10 empowered the trustee to employ and pay professional persons. Clause 11 conferred on the bank as trustee certain powers to delegate its duties and to

take remuneration. This last clause does not apply to the plaintiffs, who are now trustees of the settlement, having been appointed so to act in 1945.

As the result of the sale of a house purchased as a residence for the first defendant under the powers in the settlement, the plaintiffs had in their hands, in November, 1948, a sum of rather less than £4,000 of capital moneys due to be invested, and they, taking the view that part of the funds should be invested in gilt-edged securities were on the look out for an advantageous investment of that kind for a part of the available moneys. At this time the plaintiffs through their officers became aware of a proposal then recently made by the chairman of Thomas Tilling & Co., Ltd., which is contained in a document dated Nov. 8, 1948. By this document the chairman of that company announced the conclusion by his company of an agreement with the British Transport Commission for the sale to the commission of the company's interests in road transport, passenger and haulage undertakings. The consideration for this sale was a very large sum to be satisfied by the allotment of British Transport guaranteed stock 1958-73 at 101 per cent., the current price of that stock on the previous Sept. 30. The announcement went on to disclose that the company proposed to call a meeting to sanction the issue on Apr. 1, 1949, among the shareholders by way of what was called capital distribution of £5 of British Transport stock in respect of each £1 of the company's stock held. The plaintiffs' officers were advised (or conceived the notion) that a purchase of Thomas Tilling stock in these circumstances would, if the proposals went through, result in the acquisition by the trust of British Transport stock at less than the price at which that stock could then be bought in the open market, and they determined to embark on this speculation and by a letter of Nov. 20, 1948, wrote to the first defendant to obtain his consent. The relevant part of this letter reads as follows:

"I would suggest that these moneys be invested in two hundred Thomas Tilling & Co., Ltd., ordinary stock units of £1 each at £6 2s. 3d., £1,000 British Controlled Oilfields 4½ per cent. secured loan stock 1953-58 at 102, one thousand Powell Duffryn & Co., Ltd., 4½ per cent. preference shares at 22s. 6d., and the balance can be added to British Transport three per cent. guaranteed stock 1978-88 at 101 cum the January dividend. Thomas Tilling & Co. have, as you know, recently announced that they will pay out to stockholders £5 of British Transport three per cent. wagon stock, which stands at 101, for every share held, and that the company will remain in being as a holding company of their various other investments. It is considered that when this takes place, a dividend of five per cent. can be paid on the company's shares and that the assets will be worth more than the market price."

The first defendant did not answer this letter in writing, but he had a conversation on the telephone with the officer concerned as a result of which he agreed to the purchase of £350 of Thomas Tilling stock, and this purchase was effected as appears by letter written to him by the plaintiffs on Dec. 1, 1948. The price paid was, apparently, £6 2s. 3d. per unit, and the total cost £2,193 16s. 9d. In accordance with its chairman's proposals, a meeting of Thomas Tilling & Co., Ltd., was held on Mar. 17, 1949, the result of which was that a resolution was passed in accordance with his proposals, and the plaintiffs, before the end of that month, received in respect of their holding of £350 ordinary stock of the company £1,750 of British Transport stock.

To complete the facts, the two stocks, viz., the Thomas Tilling ordinary stock and the British Transport stock were, in the course of 1949, sold with the nephew's consent for sums of £391 9s. 3d. and £1,642 8s. 3d. This, on the footing that both were capital, showed a capital loss of about £160. If, however, as is now claimed, the transport stock be income, the loss of capital was over £1,800. The aggregate proceeds, together with other capital cash, were at the nephew's request applied

in the purchase of a freehold property as his residence, the cost being £5,750. The value of the other capital assets of the trust is about £11,200.

In 1950 *Re Sechiari* (1) was decided. In that case, ROMER, J., decided that the British Transport stock distributed in pursuance of the resolution by Thomas Tilling & Co., Ltd., to which I have referred was, as between tenant for life and remaindermen under a settlement made by will, income and not capital, and was

- A *prima facie* payable to the tenant for life. The learned judge reserved by his order the question whether, in the circumstances of that case, the court had or would exercise in the execution of the trust any jurisdiction to apportion the dividend (that is to say, the British Transport stock) on equitable principles between income and capital. No steps, so far as I know, have hitherto been taken by the remaindermen to take advantage of that reservation, but it suggests
- B that there are or may be circumstances in which the court has power to make an apportionment which would do justice between tenant for life and remaindermen. The questions in this case are whether the jurisdiction exists, and if so whether it ought to be exercised in the circumstances I have recited. I may add that in *Re Sechiari* (1) the Thomas Tilling stock had been acquired a number of years before the distribution, and that no circumstances existed such as I have
- C rehearsed in the present case.

The argument of counsel for the tenant for life has the merit of simplicity. His client was, at the time when this sum of transport stock came into the hands of the trustees of the settlement, entitled to the income. The stock has been held to be income, and, therefore, it is payable to the tenant for life. On the face of it, that is the result of the transaction, and, not unnaturally, perhaps, the tenant

D for life, on seeing a report of the *Sechiari* case (1), sought to apply it to himself, but, as the transport stock had been sold in 1949 and the proceeds applied towards the purchase of a house, he is driven to claim an equitable charge on that house or the proceeds of its sale. The remaindermen, equally naturally, protest that this would work a monstrous injustice on them.

- E The first question is whether, in the circumstances of the present case, the tenant for life can make good his claim. Secondly, arises the question whether a court of equity, in executing a trust, has an overriding jurisdiction in pursuance of its duty of holding the balance fairly between capital and income to prevent a result which, on the face of it, seems to work an injustice to the remaindermen even if this involves treating income as capital. I should here mention that the
- F plaintiffs alleged that cl. 9 of the settlement empowered them to allocate this stock to capital and that they had exercised this power, but at the hearing they wholly failed to prove any proper exercise of this discretion, if it existed, and their counsel abandoned the point.

To decide the first question, I must add something to the facts above stated. Mr. Bidwell, the manager of the plaintiffs, was cross-examined before me, and he

- G deposed that his intention in the transaction was to acquire the transport stock on favourable terms as an investment. I interpret his statement to mean that the object of the transaction was to acquire the transport stock as an investment of capital, and that the acquisition of the Thomas Tilling stock was really a means to that end. The tenant for life was also cross-examined, and in substance he agreed with this view. He told me that he appreciated that the object of the purchase was to acquire the British Transport stock at a discount, and that he
- H agreed to the purchase as a capital investment. He further said that when the stock was sold, he consented to its sale on the footing that it was capital. To this I add that it must have been applied towards the purchase of the house in 1949 on that footing. In these circumstances, I ask myself what equity there can be in the tenant for life that he should be given a charge on this property. He consented to the whole transaction on the footing that it was a capital transaction, well knowing that the trustees would never have embarked on it if they had appreciated its possible results, and, in my judgment, the short answer is that

he has no claim to this charge or to be recouped the value of the transport stock, even though in other circumstances it may be (and I decide nothing about this) that he might properly claim it as income. This rests, not on an estoppel, because the elements of estoppel are not here present, but on the fact that the transaction was in substance the purchase with capital moneys of British Transport stock as a capital investment. That the trustees should have been willing to lend themselves to this kind of transaction seems to me a comment on their prudence, but I cannot think that the wisdom or otherwise of the step they took can result in a windfall for the tenant for life which neither they intended nor he expected. A

This would be enough to decide the question, but, as the broader consideration of the equitable jurisdiction of the court in administration proceedings has been argued at some length, I think I should express a view on it. Counsel for the remaindermen submitted that there is a power in the court in administration proceedings to declare that what *ex facie* is income is, in truth, capital, and *vice versa*. He admits that this power can be exercised only in exceptional circumstances. What those were, he did not venture to say, but he submitted that these circumstances (if any) are exceptional having regard to the facts I have last recited. He also submitted to me that, if this project had been known to the remaindermen before it was carried out and its result appreciated, they could have obtained an injunction to restrain the trustees from so unfair an exercise of their powers. I do not find this submission helpful for these reasons: First, the plaintiffs, if they had realised the result, would never have embarked on the transaction. Secondly, if they had done so with their eyes open, then I think it likely that they could have been restrained on the footing that they were committing a breach of trust and were not properly exercising their discretion as to investing the fund. Questions of breach of trust, however, cannot be raised in these proceedings, and I say no more about them. B C D

In support of his main submission counsel cited to me a series of cases beginning with *Countess (Dowager) Plymouth v. Lady (Dowager) Archer* (2). This was a decision of LORD THURLOW, L.C., and, as I read it, turned in fact on the true construction of the words "rents and profits" contained in a devise by will. In that case the person for whose benefit lands were to be purchased, and to whose use they were to be assured for his life without impeachment of waste so that he could cut timber for his own benefit, was restrained from cutting timber on certain land held on trust for sale although the rents and profits of that land were limited to the use of the same person who would be entitled to the lands to be bought. Rents and profits, according to LORD THURLOW, should not be held to include anything but annual profits and must exclude, therefore, the cutting of the timber because that would entitle the tenant for life to commit double waste. In my judgment, that case did not purport to vary in favour of capital something which *ex facie* was income, but merely construed the will. It is, however, fair to say that in subsequent cases it has been treated as deciding more than that. E F

Burges v. Lamb (3), a decision of LORD ELDON, L.C., merely decided that on the facts the tenant for life could not be restrained from cutting timber. It was complicated by the fact that the person claiming to be entitled to the timber was also one of the trustees. LORD ELDON did, however, refer to LORD THURLOW's case in making the following observations (16 Ves. 187): G

"The principle of such a bill is therefore driven to this: that, when the proportion, that such a tenant for life is to have, can be ascertained, all the excess beyond that ought to be removed from the estate; and laid out in that species of subject, that ought to be purchased, not hereafter, but now; as the increase hereafter will give the tenant for life the proper subject and value, when his estate comes into possession; not leaving him open to the variation of the price of timber and other accidents. In the present state of the record therefore this injunction is not to be maintained. Another object also deserves attention. The court, taking care, that the fund shall H

A be laid out, as LORD THURLOW says, according to a reasonable and sound execution of the trust, must not on the other hand place trustees in such difficulties, that they never can execute a trust of this sort without coming to a court of equity. Here are several tenants for life unimpeachable for waste; and it is very difficult to hit the *ratio*: but, if the timber bears a very considerable proportion to the value of the whole purchase, the tenant for life, especially as he is one of the trustees, cannot possibly be permitted to take it. The court may be driven to take this course; that trustees, laying out the fund in a timbered estate, without applying that reasonable and discreet attention, that in a fair view ought to be applied to the interests of all parties, should be considered in a court of equity as not buying any timber for their own benefit. That is a mode of cutting the knot, which perhaps in a new and difficult case might be adopted: but, without determining, what might be the decision upon such a case, my opinion is, that upon this bill the injunction cannot be maintained."

B I cannot derive much help from this.

C In *Lord Londesborough v. Somerville* (4) the plaintiff, being tenant for life of a very large sum in consols which were sold in exercise of a trust to invest in real estate, claimed part of the purchase price of the consols on the ground that they were sold at a time just before the dividend became due, and in such a way that he would be deprived of all income over a very considerable period. SIR JOHN ROMILLY, M.R., says (19 Beav. 298):

D "I think the tenant for life is entitled to something in respect of thees dividends. Cases have occurred frequently, showing the principle and view which equity takes of cases of this description. They rest upon the broad and general principle of doing justice between the tenant for life and the persons entitled to an estate in remainder, but which, as was observed by LORD ELDON in *Burges v. Lamb* (3) (16 Ves. 177), in some cases, involve matters of 'much importance and difficulty'."

E Later, the learned Master of the Rolls says (*ibid.*, 299):

F "The price of the stock, exclusive of the dividend, appears to me to be the capital, and the amount by which it was augmented by the dividend appears to me to be the income which belonged to the tenant for life, who is fairly entitled to receive it. If he does not receive it, the effect will be, that part of the purchase money for the *corpus* of an estate will be paid out of the income of the tenant for life, by which the remaindermen will gain an undue advantage."

G This was merely a case where the court departed from the general rule, which is only a rule of convenience, that there should be no apportionment between capital and income on sales of stock either cum dividend or ex dividend. It did not purport to treat capital as income or *vice versa*.

H To a similar effect is *Bulkeley v. Stephens* (5), decided by SIR JOHN STUART, V.-C., in 1864. The learned Vice-Chancellor made these observations (10 L.T. 229):

"... ordinarily, the court never makes an inquiry of this kind where there is a sale of three per cents. to invest in bank stock or any other security; the equity between the tenant for life and the remaindermen upon the sale of one kind of stock and the investment of the proceeds in another kind of stock, with a current dividend upon what is sold and upon what is bought, makes a sort of equation, and the court is never asked to enter upon the question. But what has that to do with the case where the sale is made under the authority of the court in the exercise of a discretion given by the will—that is to say, a discretion submitted to the court—where the sale of stock, during the currency of a dividend, is made for the purpose, not of

investing in another stock, but of laying it out in mortgage? The equities between the tenant for life and the remaindermen are very plain ”.

And then the learned Vice-Chancellor says that in the special circumstances of that case, the sale having been made by the order of the court, the court would see to it that neither party lost or gained by what was done.

The next case is also reported under the title *Bulkeley v. Stephens* (6). Here, again, the court departed from the general rule in a special case, and STIRLING, J., said ([1896] 2 Ch. 249):

“ Looking at all these circumstances, I am not prepared to introduce any novel practice applicable to the sale of shares in the ordinary course of the execution of a trust consequent on the death of a tenant for life. It has, however, been held that, even in such cases as were dealt with by KINDERSLEY, V.-C., effect may be given to the right claimed under special circumstances.”

Then the learned judge refers to *Lord Londesborough v. Somerville* (4) and *Bulkeley v. Stephens* (5). That case on its facts is the converse of the present one. The tenant for life only consented to the sale with a reservation of her claim to the dividend, and could not, therefore, be deprived of it. The tenant for life here made no such reservation.

In *Re Winterstoke's Will Trusts* (7) CLAUSON, J., with a view to preserving the rights between tenant for life and remaindermen, declared ([1937] 4 All E.R. 68) that the trustees ought not to treat the whole of the purchase price of shares as capital, but to apportion it in a certain way between capital and income. In the later case of *Re Firth* (8) that case was criticised by FARWELL, J., who said that only very special circumstances would justify the process applied by CLAUSON, J. The learned judge found no such circumstances in that case.

The court can, then, in special circumstances apportion between capital and income on sales or purchases of stock cum dividend or ex dividend, although it is not the practice to do so in the ordinary way because the various persons interested under settlements ought to take the rough with the smooth, and in order to ease the burden falling on trustees. The jurisdiction, however, exercised in special circumstances seems to be only the exercise of a right to make a more exact distinction of income from capital. As a matter of convenience, the practice is in the ordinary case that no apportionments are made, with the result that capital sometimes gets what, on a more exact scrutiny, would prove to be income and *vice versa*. Where this produces a glaring injustice, the court will cause a more exact calculation to be made, but it does not treat as income that which is capital, or as capital that which is income. In my judgment, therefore, the cases cited by counsel for the remaindermen do not justify the submission he sought to rest on them.

I understand that VAISEY, J., recently decided another case arising out of this Thomas Tilling transaction (*Re Kleinwort's Settlement Trusts* (9)) and held that the circumstances there before him did not warrant an apportionment. It was admitted before him that there was a jurisdiction to apportion in a proper case, but he expressed the view in a tentative way that its exercise was really confined to cases of breach of trust. This, I think, may well be the answer. It seems to me clear that the court would never allow the beneficial rights to be altered by a breach of trust, and if the circumstances were such that a purchase by trustees (of the Thomas Tilling shares, for instance, with a knowledge of the possible or probable results) would have been a breach, the court might well apportion the so-called dividend or allocate it to capital even though in fact the trustees did not realise what they were doing when they did it. In the present case, I have not to decide that question on the view I take of the facts. Regarding them as I do, I must hold that the tenant for life has no claim here to any part of the British Transport stock for two reasons: first, that he assented to its purchase as a capital investment, and secondly, that he assented to its sale and re-investment as capital in

real estate for his benefit. In these circumstances, I hold that the stock in this trust and the proceeds of its sale have assumed the guise of capital, and must be retained as such, and that no question of apportionment arises.

Order accordingly.

Solicitors: *Stibbard, Gibson & Co.* (for the plaintiff); *Janson, Cobb, Pearson & Co.* (for the first defendant); *Carpenters* (for the second defendant); *Guscotte, Fowler & Co.* (for the third defendant); *Bertram Sturt & Co.* (for the fourth and fifth defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

B *Re PRESTON (deceased). RABY AND ANOTHER v. PORT OF HULL SOCIETY'S SAILORS' ORPHANS HOMES AND OTHERS.*

[CHANCERY DIVISION (Vaisey, J.), June 22, 29, 1951.]

Costs—Charity—Gift to non-existent charity—Claims by various charities—Construction of will—Right to costs out of the estate.

By his will, a testator gave his residuary estate to his trustees on trust to sell the same and stand possessed of the proceeds, after payment of his debts, funeral and testamentary expenses, and legacies, on trust "to pay the same unto the widows and orphans fund of the Royal Merchant Navy." There being no institution bearing the name indicated, the trustees made inquiries and approached various charities which provided for seamen and their families. A number of charities so approached indicated a desire to claim the residuary estate and were joined as defendants in an originating summons issued by the trustees to determine the construction of the will. The court held that none of the claimants had a remote chance of establishing its claim and that the hopelessness of the claims should have been apparent after perusal of the evidence in support of the summons. On the question of costs,

HELD: the charities, though entitled to file evidence and argue in support of their claims, were not entitled to do so at the expense of the estate after it had become clear that their claims were hopeless, and, therefore, their costs (as between solicitor and client) would be paid out of the estate only down to and including perusal of the affidavit in support of the summons, and no order as to their costs thereafter would be made.

AS TO AWARDING OF COSTS GENERALLY, see HALSBURY, Hailsham Edn., Vol. 26, pp. 93-98, paras. 179-186; and FOR CASES, see DIGEST, Practice, pp. 848-860, Nos. 3941-4046.

Cases referred to:

- (1) *Re Alchin's Trusts*, (1872), L.R. 14 Eq. 230; 26 L.T. 824; 8 Digest 307, 874.
- (2) *Re Davis*, [1902] 1 Ch. 876; 71 L.J.Ch. 459; 86 L.T. 292; 8 Digest 310, 908.
- (3) *Re Buckton*, [1907] 2 Ch. 406; 76 L.J.Ch. 584; 97 L.T. 332; 43 Digest 820, 2648.
- (4) *Re Millington*, (1932), "The Times," January 14.
- (5) *Re Clara Jones*, (1949) (unreported).

ADJOURNED SUMMONS to determine whether on the true construction of the will of George Edwin Preston, deceased, his residuary estate was payable to any one or more (and if so which) of certain charitable institutions who claimed it, or to some other and what body or institution, or whether the gift should be regulated by a scheme, or lapsed. VAISEY, J., held that the matter should be referred to chambers for the settlement of a scheme. The case is reported on the question of costs,

I. G. H. Campbell for the plaintiffs, the executors of the will.

M. J. Albery for the first defendant, the Port of Hull Society's Sailors' Orphans Homes.

Newsom for the second defendant, the Royal Alfred Aged Merchant Seamen's Institution.

A. F. M. Berkeley for the third defendant, the Mercantile Marine Service Association.

Rawlence for the fourth defendant, the Shipwrecked Fishermen and Mariners' Royal Benevolent Society.

Plowman for other defendants, next of kin.

Denys B. Buckley for the Attorney-General.

Cur. adv. vult.

June 29. **VAISEY, J.**, read the following judgment. The testator, George Edward Preston, lived in Coventry and was a retired butcher. He appears to have been interested in the merchant navy. By his will, dated June 28, 1948, after appointing the plaintiffs to be executors and trustees thereof, he bequeathed a number of pecuniary and other legacies and gave the residue of his estate to his trustees on trust for sale and directed them to stand possessed thereof (after payment of his debts, funeral and testamentary expenses and legacies) on trust (I now quote the words of the will) "to pay the same unto the widows and orphans fund of the Royal Merchant Navy." He died on Jan. 17, 1949. His will was proved by the plaintiffs on Apr. 7, 1949. The value of the ultimate residue which he purported to dispose of by the words which I have quoted, is about £8,500.

The plaintiffs, having failed to find any institution or body of persons having the name of "the widows and orphans fund of the Royal Merchant Navy," set inquiries on foot to discover what other charities there were with names resembling the words in the will which I have mentioned, or carrying on activities of the nature indicated by those words. The result of those inquiries was to bring to the notice of the plaintiffs the following institutions, which it is convenient for me to designate by serial numbers as follows: (1) The Port of Hull Society's Sailors' Orphans Homes; (2) The Royal Alfred Aged Merchant Seamen's Institution; (3) Mercantile Marine Service Association; (4) The Shipwrecked Fishermen and Mariners' Royal Benevolent Society; (5) The Shetland Fishermen's Widows Relief Fund; and (6) Admiral of the Fleet Sir Frederick Richards Memorial Fund. Letters were sent by the plaintiffs to each of these institutions asking whether they wished to make a claim to the testator's residuary estate. As a result, claims were put forward by Nos. (1) to (5) inclusive. On behalf of No. (6) it was intimated that it did not wish to make a claim. Thereupon Nos. (1) to (5) or persons representing them respectively were joined as defendants to the present summons, which was issued on Oct. 10, 1949, in order to have it determined whether the gift to the widows and orphans fund of the Royal Merchant Navy operates as or is a gift to any of the said bodies or institutions Nos. (1) to (5), or to some other and if so what body or institution, or, alternatively, whether the gift should be regulated by a scheme, or in the further alternative, lapsed, and if necessary for an inquiry what institution or body of persons is referred to by the words of the will, and it asks that the costs may be provided for. The plaintiffs did not, as they might have done, though it was not incumbent on them to do so, warn the defendants Nos. (1) to (5) that if they wished to appear as parties to the application it must be at their own risk as to costs.

The Shetland Fishermen's Widows Relief Fund, No. (5), very prudently withdrew from the proceedings at an early stage, filed no evidence, and did not appear by counsel at the hearing, but each of Nos. (1) to (4) did file evidence to support its claim to be the institution indicated in the will, and argued its case by counsel, or attempted to do so, at the hearing. Not one of them, in my judgment, came anywhere near establishing a case. None of their names bears

A any similarity whatsoever to the words used in the will, and there is no ground for supposing that the testator had ever heard of any of them, or that any of them had ever heard of him. There is, I think, really nothing to choose between them: all are equally "out of the picture." I am satisfied on the evidence that there is, in fact, no institution or body of persons which can be said to be identifiable with the testator's descriptive words, and no inquiry on the point is necessary. Nor is this a case, such as *Re Alchin's Trusts* (1), in which I could hold that the testator must have intended to refer to one or other of the claiming institutions although I cannot say which. The matter seems to me to lie between the Attorney-General, who (relying on cases such as *Re Davis* (2)) submits that the words import a general charitable intent and asks for a scheme to give effect to that intent, and the testator's statutory next of kin who submit that the residuary estate is undisposed of. I reject the submission of the next of kin and accede to the Attorney-General's argument, and I will make an order accordingly.

B The only difficulty in the case is as to the costs of the application. Obviously the plaintiffs' costs taxed as between solicitor and client must be raised out of the estate in a due course of administration and the costs of the Attorney-General and the next of kin, between whom there was a serious point to be argued, must be similarly taxed and raised. What order ought I to make as regards the costs of the institutions Nos. (1) to (5)? Each of those Nos. (1) to (4)—I can disregard for the moment No. (5)—has argued that it is entitled to have the whole of its costs paid out of the estate, irrespective of the merits or absence of merits of its case, by the mere fact of having been joined as a defendant to the proceedings. I do not agree, particularly when I recall that it had already put forward its claim when the summons was issued, in contrast to No. (6) which deliberately refrained from doing so. Each of them, Nos. (1) to (5), in fact was joined at its own request, with a view, no doubt, to establishing, if it could, its identity with the institution designated by the words of the will. To No. (5) a discreet withdrawal appeared to be preferable to the advocacy of a hopeless cause. Now, of course, every case must depend to some extent on its own facts. For example, where a party has requested to be made a defendant to proceedings which but for that request would have been wholly unnecessary, he might be ordered to pay the whole of the costs himself: see *Re Buckton* (3) ([1907] 2 Ch. 415). Again, where such a request is wholly without justification he might well be made to pay the whole of his own costs and any other costs occasioned by his intervention. In the present instance, I think the test is this: "When ought the parties Nos. (1) to (5) to have discovered the utter hopelessness of their respective cases?", and I think that this should have been quite apparent to them at the very latest on perusal of the evidence filed in support of the summons. From that point onwards they were, in my judgment, bound to go on, if they wished to go on at all, at their own expense and risk. In other cases, the discovery might not have been complete until the parties had perused the whole of the evidence, but here I think the position was abundantly clear from the affidavit of the plaintiff, William Ernest Raby, filed Oct. 19, 1949. I do not for a moment dispute the right of each of the parties to file evidence and argue, however hopelessly, in support of its supposed claim; the only question is whether other parties should be asked to pay them for doing so. It may be regretted that the matter has not so far been adequately dealt with in any reported case, but in "The Times" newspaper of Jan. 14, 1932, the following paragraph appeared:

"FARWELL, J., on the hearing of an originating summons yesterday for the determination of the question whether any and what charitable society was entitled to a charitable bequest where no such charitable society as that named in the will actually existed, stated, on the suggestion of Mr. Stafford Crossman, who appeared for the Attorney-General, that in such a case a society who appeared in court to support a claim which was not

admitted must not expect as a right to be paid its costs out of the estate and might in certain events have to pay costs."

I am informed by counsel for the Attorney-General that the name of that case was *Re Millington* (4). He also informs me that in another case, *Re Clara Jones* (5), where there was a gift "to cancer research," DANCKWERTS, J., on Nov. 30, 1949, refused to make any order as to the costs of the first three defendants, namely, the British Empire Cancer Campaign, the Imperial Cancer Research Fund, and the Christie Hospital.

It was suggested that the defendants Nos. (1) to (4) were justified in coming forward at the hearing in order to establish their claim to participate under any scheme to give effect to a general charitable intent if such were held to be the true effect of the will. I do not assent to that. Any of those defendants could, when intimating (as did the Shetland Fishermen) the withdrawal of their claim to the whole fund, state that they would wish their claims to be considered in the event of a scheme being formulated. A similar request was made by another institution, not a party to these proceedings, *viz.*, the Royal Merchant Navy School. But a scheme would not necessarily have included any of those defendants. It might, for example, provide for the setting up of a new independent organisation and the idea that any and every claimant to an imaginary identity with a mis-described institution has a sort of secondary right to come in as a participant under a hypothetical scheme is not one to be encouraged, at any rate not by giving such a claimant any costs. The truth is that these defendants Nos. (1) to (4) have really not assisted me at all. They have merely put forward propositions of a most unsubstantial character in the hope of benefitting themselves. I do not complain of that, but I really do not see why their costs of doing so should be paid by anyone but themselves.

The order will provide for the taxation as between solicitor and client and payment out of the estate of the costs of the respective defendants Nos. (1) to (5) of entering appearances to the summons, and any other costs which they may have incurred down to and including the perusal by them respectively of Mr. Raby's affidavit, but as to their subsequent costs I make no order. Each of such defendant institutions must, therefore, bear its own costs of preparing and filing the evidence in support of its own claim and perusing the evidence of the other defendants, and also, of course, the costs of any attendances in chambers and of appearing at the hearing before me. I hope that attention will be paid to what I have said in this judgment. It involves no new principle, but one which is well supported by the two cases which I have mentioned, and also, I know, by other similar cases of which no record has been preserved. There is nothing in that principle which conflicts in any way with the decision in *Re Buckton* (3) or with any of the propositions laid down in that case.

Order accordingly.

Solicitors: *Hyde, Mahon & Pascall* (for the plaintiffs); *Robbins, Olivey & Lake* (for the first defendant); *Darley, Cumberland & Co.* (for the second defendant); *Whitfield, Byrne & Dean* (for the third defendant); *Lydall & Sons* (for the fourth defendant); *Langhams & Letts* (for next of kin); *Treasury Solicitor*.

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

Re PAYTON (deceased). PAYTON v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Lord Radcliffe, and Denning, L.J.), May 30, 31, June 1, July 2, 1951.]

Estate Duty—Passing—Property deemed to pass—Beneficial interest—Interest provided by deceased by arrangement with employer—Pension payable to deceased and on his death to his widow—Finance Act, 1894 (c. 30), s. 1, s. 2 (1) (d).

In 1933 a company entered into a contract or policy of assurance with an assurance society to provide, *inter alia*, pensions for employees after retirement from service. By virtue of the policy an employee became entitled to a pension on his "normal pension date," *i.e.*, on the anniversary of the date of commencement of his membership of the scheme which fell nearest to the date of his attainment of the age of sixty-five years. The amount of the pension was ascertained in accordance with a table annexed to the policy by reference to length of service with the company. The employee had an option to exchange this pension (which would be for five years certain and for so much longer as the employee lived) for a "last survivor pension" for a less annual sum calculated according to the respective ages of the employee and his named wife and payable to the employee for the remainder of his life, and, if his named wife survived him, to that wife for the rest of her life. Premiums were payable by the company to the society, being derived in part from the contributions of the employees. It was declared by the policy that the company should hold the policy and all benefits payable thereunder on trust for the persons to whom the benefits were expressed to be payable. Clause 4 provided that the society would pay to the person or persons specified in the schedule thereto, *i.e.*, the employee or his widow, on proof of existence and identity, the appropriate benefit or benefits as and when they fell due. An employee who had exercised his option to take a last survivor pension retired on Nov. 21, 1945 (after his normal pension date), and died on Feb. 17, 1946. The Inland Revenue Commissioners claimed duty on the actuarial value of the pension as at the date of the employee's death under the Finance Act, 1894, s. 1.

HELD: there had not come into existence under the policy a continuing item of property distinct from the respective beneficial interests therein of the employee and his widow, and, therefore, nothing passed on the death of the employee under s. 1, but the claim for duty arose under s. 2 (1) (d) of the Act of 1894.

Re Cassel ([1927] 2 Ch. 275) and *Re Duke of Norfolk's Will Trusts* ([1950] 1 All E.R. 664), distinguished.

Semble: if the society's covenant had been with the company to pay the latter during some period—*e.g.*, a fixed period or the life of the longest liver of a number of named persons—a certain annual sum, and if the company had then declared itself a trustee of the annual sum or of the benefit of the covenant for A and B successively, it may be that there would have been a passing under s. 1 as in *Re Duke of Norfolk's Will Trusts* ([1950] 1 All E.R. 664).

AS TO PROPERTY PASSING ON THE DEATH, see HALSBURY, Halsham Edn., Vol. 13, pp. 232-242, paras. 222-233; and FOR CASES, see DIGEST, Vol. 21, pp. 7-16, Nos. 21-80.

Cases referred to:

(1) *Cowley (Earl) v. Inland Revenue Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 21 Digest 7, 27.

- (2) *A.-G. v. Milne*, [1914] A.C. 765; 83 L.J.K.B. 1083; 111 L.T. 343; 21 Digest 46, 296.
- (3) *Re Norfolk's (Duke) Will Trusts*, [1950] 1 All E.R. 664; [1950] Ch. 467.
- (4) *Re Cassel*, [1927] 2 Ch. 275; 96 L.J.Ch. 483; 137 L.T. 785; Digest Supp.

APPEAL by the Crown from an order of WYNN-PARRY, J., dated Dec. 7, 1950.

The Crown claimed estate duty on two pensions payable, under certain policies of assurance effected by the deceased's employers, to the deceased for his life and after his death to his widow during her life, on the footing that the pensions were property passing on the deceased's death within the meaning of the Finance Act, 1894, s. 1. WYNN-PARRY, J., rejected the Crown's claim, and held that the claim arose under s. 2 (1) (d) of the Act of 1894 in respect of property in which the deceased "never had an interest" within the meaning of the proviso to s. 4 of that Act.

Pennycuik, K.C., and *J. H. Stamp* for the Crown.

Sir Andrew Clark, K.C., and *E. B. Stamp* for the plaintiff, the deceased's widow.

Cur. adv. vult.

July 2. **SIR RAYMOND EVERSHERD, M.R.**, read the following judgment of the court. In 1933 and 1942 the Austin Motor Co., Ltd. (whom we hereafter call "the company") entered into contracts with the Legal and General Assurance Society, Ltd. (whom we hereafter call "the society") for the purpose of providing benefits for certain of their employees. These contracts (which are described as "group policies", the earlier being numbered 1157 and the later 2367) are of a somewhat elaborate character, and the benefits to be provided included pensions after retirement from service with the company, life assurance, and total and permanent disablement insurance. In the present case we are concerned only with pensions.

It will be necessary for us to refer later to the terms of certain provisions in the policies or one of them, but we first state the general character and scheme of the contracts, so far as is relevant. The class of employees entitled to the benefits was defined as "eligible employees," and of these the term "original members" was applied to those eligible employees who became entitled to the benefits of the policies on their respective dates. The phrase "normal pension date" was defined as meaning, in the case of an original member under the first policy, the anniversary of the date of commencement of membership which fell nearest to attainment of the age of sixty-five, and, in the second policy, the anniversary of the date of commencement of membership which fell nearest to attainment of the age of seventy in the case of members who were aged more than 64½ years at the date of commencement of membership. The amount of the pension payable to any member was to be ascertained in accordance with tables annexed to the policies by reference to length of service with the company prior to normal pension date, and (subject to the option presently mentioned) began in the case of a member whose service terminated on normal pension date on that date and continued by monthly instalments for a period of five years certain and for so much longer thereafter as the member lived. The option to which we have referred enabled the member to exchange his own pension for what was described in both policies as a "last survivor pension" for a less annual sum calculated according to the respective ages of the member and his named wife, and payable for the remainder of the member's life only (*i.e.*, and not for five years certain in any event) and after his death, if his named wife survived him, to that wife during the rest of her life. For the purpose of providing these pensions, premiums were payable by the company to the society derived in part from the contributions of the members themselves and in part out of the company's own resources.

The late Mr. Ernest Leopold Payton (whom we will call "Mr. Payton") had for many years before his retirement and death been in the service of the

company, and he was, before he retired, chairman and joint managing director of the company. He was an original member within the meaning of both the policies. His normal pension date within the meaning of the first policy was Apr. 10, 1942, and his normal pension date within the meaning of the second policy was Apr. 13, 1947. Mr. Payton's service with the company was, with the consent of the company, prolonged until Nov. 21, 1945. He died on Feb. 17, 1946. It will be observed from the dates we have mentioned that Mr. Payton did not retire on his normal pension date under the first policy and did not survive to his normal pension date under the second policy, and, as a consequence, the terms of neither policy strictly applied so as to enable Mr. Payton to take advantage of the respective options under the policies for last survivor pensions. Special agreements were, however, made between the company, the society, and Mr. Payton (or on his behalf) so that (as has been conceded throughout these proceedings) Mr. Payton and the plaintiff (who is his widow) may be treated in all respects as enjoying respectively the benefits provided by the policies as though Mr. Payton had within the terms of the policies exercised his option in both cases for last survivor pensions in favour of himself and the plaintiff. Under the first policy the weekly contributions made by Mr. Payton amounted to fifteen shillings a week and the last survivor pension which he enjoyed from his retirement to his death and which Mrs. Payton now enjoys, amounts to £178 15s. per annum payable monthly. Under the second policy the weekly contributions made by Mr. Payton amounted to eighteen shillings, and the last survivor pension enjoyed by him and now enjoyed by Mrs. Payton is at the annual rate of £1,805 13s., also payable monthly.

In these circumstances the question has arisen of the amount of estate duty payable in respect of the two last survivor pensions as a consequence of Mr. Payton's death. The contention of the Inland Revenue Commissioners is that duty is payable under the Finance Act, 1894, s. 1, on "the principal value" of each pension, treating it as a single and continuing pension and as "property passing" within the meaning of the section on the death of Mr. Payton. For Mrs. Payton, on the other hand, it is contended that the case falls within s. 2 (1) (d) of the Act on the footing that the subject-matter to be taxed is Mrs. Payton's pension benefit as an "interest purchased or provided by the deceased . . . by arrangement with" the company "to the extent of the beneficial interest . . . arising by" virtue of her survivorship. Since the contest is between s. 1 and s. 2 of the Act, we may be forgiven for quoting once again the expression given by LORD MACNAGHTEN for his classic dichotomy in *Earl Cowley v. Inland Revenue Comrs.* (1) ([1899] A.C. 212):

" . . . if the case falls within s. 1 it cannot also come within s. 2. The two sections are mutually exclusive. Section 1 might properly, I think, be headed: 'With regard to property passing on death, be it enacted as follows.' Section 2 might with equal propriety be headed: 'And with regard to property not passing on death, be it enacted as follows'."

And LORD PARKER OF WADDINGTON observed in *A.-G. v. Milne* (2) ([1914] A.C. 779):

"The expression 'passing on the death' is . . . evidently used to denote some actual change in the title or possession of the property as a whole which takes place at the death."

It is, then, established that if s. 1 is to be applicable there must, in truth, be property passing. By the definition s. 22 (1) (f) of the Act of 1894, the expression "property" includes real property and personal property, and it is, indeed, to be given the widest signification. Still, there must be some property identifiable and persisting independently of the beneficial interests therein. If that test is satisfied, then it is that property which is taxed, and the duty is chargeable on its principal value and not on the value of the benefit enjoyed by the deceased

nor on the value of the benefit taken by, or arising in favour of, his successor. Further, by s. 4 of the Act, it is provided that all property passing on the death of the deceased is, for the purpose of the rate of duty, to be aggregated so as to form one estate. In the present case the actuarial value of the two "last survivor pensions" at the death of Mr. Payton was together, we were told, £17,500. The estate of Mr. Payton (apart from the pensions) amounted to over £1,000,000. The result, therefore, of the application of s. 1 would be a charge at the rate of fifty-two per cent. on the actuarial value of £17,500. If, on the other hand, there is, in truth, no such item of property which passes—if on a just analysis there was at Mr. Payton's death a cesser of his own pension and an arising of a pension of the same amount and equivalent characteristics in favour of the plaintiff, then the case falls within s. 2 (1) (d) of the Act and is excluded from aggregation under s. 4 by virtue of its proviso.

As we have already stated, the Crown contended before the learned judge and contended before this court that the conditions requisite for the application of s. 1 were satisfied because there came into existence under each of the two group policies "property", namely (putting it broadly for the moment), the single and continuing "last survivor pension," an entity distinct from the respective interests therein of Mr. Payton and the plaintiff. WYNN-PARRY, J., decided against this contention, and, in our opinion, decided rightly.

The contest being such as we have stated, it becomes necessary to examine more closely what precisely were the rights and obligations which emerged from the two policies. Counsel for the Crown reminded us that in a matter of this kind the answer depends on the result in law achieved by the particular transactions which are before the court. If the result in this case is that there has been created in each case a continuing item of property distinct from the particular interests of the two pensioners, it is no answer to the claim of the Crown that such result is for practical purposes the same as the creation, simply, of two separate, though in all material characteristics identical, pensions, the one payable to Mr. Payton and wholly ceasing on his death and the other arising for the first time on his death and payable to the plaintiff for the remainder of her life.

The question, then, turns on the legal result which flows from the language used in the policies properly construed according to the ordinary canons of construction. There is some divergence in the wording of the two policies, but it was not suggested before WYNN-PARRY, J., nor before us that for present purposes the divergence was material. It is, therefore, sufficient to refer only to the first policy, numbered 1157. After an immaterial recital, the contract (to which, as we have stated, the parties are the company and the society only) is expressed in five clauses to which are appended eleven general conditions and a schedule divided into five parts, part I relating to the pensions and parts IV and V consisting of various tables. Clause 1 of the contract contains the definitions to which we have already sufficiently alluded. Clause 2 so far as relevant provides:

"It is hereby agreed and declared that the grantees [the company] shall hold this policy and all benefits payable hereunder upon trust for the respective persons to whom the said benefits are expressed to be payable under and in accordance with the schedule hereto . . ."

Thus, *quoad* the pensions payable to Mr. Payton and the plaintiff, the company has declared itself a trustee for them respectively of the benefit of its contract with the society and of the benefits payable to Mr. Payton and the plaintiff pursuant thereto. But, so far, no contractual or proprietary rights have been created. These, whatever be their nature, arise under cl. 4—for we may pass over cl. 3. Clause 4 and those parts of the schedule material to the case which are incorporated by reference therein, is, therefore, the vital provision. Its terms are these:

"The society will pay . . . to the person or persons specified in the schedule hereto on proof of existence and identity the appropriate benefit or benefits as and when the same shall fall due in accordance with the terms and provisions of the schedule . . ."

Clause 5 provides that the receipt of any person or persons to whom any benefit is expressed to be payable should be a good and sufficient discharge to the society.

A Mr. Payton being treated as having validly exercised the option for a last survivor pension in favour of himself and the plaintiff, it is necessary to refer, in order to discover the incidents of last survivor pensions, to part I of the schedule where against the marginal note "last survivor pensions" it is stated:

B "At any time prior to normal pension date a male member may give written notice to the society requiring that any pension benefit becoming payable to such member at normal pension date shall after the member's death be paid to a (named) surviving wife . . .",

and there follow provisions which we need not recite as regards the amount of the pensions and other matters. The amount of the pensions is calculable by reference to table VII in part IV of the schedule which bears the heading:

C "Table showing reduced amount of pension payable from normal pension date until death of survivor of male member and his wife if the member elects to take a last survivor pension."

The passages in the schedule which we have quoted are, undoubtedly, so expressed that the "last survivor pension" is treated as one pension or annuity payable in the present case to Mr. Payton and the plaintiff successively and not as two pensions of the same amount, one payable to Mr. Payton for his life and one to the plaintiff (if she survives him) for her life, and counsel for the Crown has pointed out the arithmetical difference in result if the plaintiff died less than a month after her husband. For, in such event, if a monthly instalment of pension had fallen due just before Mr. Payton's death, nothing further would be payable in respect of the period of three weeks or so for which the plaintiff survived, whereas, if there were two separate pensions, the society would be liable for the plaintiff's pension benefit in respect of that period even though the plaintiff did not live to survive the first monthly pay day after her husband's death.

What is the legal effect of these provisions? They are clearly framed so as to get over the difficulties that arise under English law in enforcing a covenant with A by B to pay a sum of money to C on the ground that such a covenant gives, if unperformed, no right to A to recover other than purely nominal damages (since he suffers none) and no right of enforcement to C (as being *res inter alios*). By the joint effect of cl. 2 and cl. 4 in the event of default by the society in paying, say to Mr. Payton an instalment of his pension on its due date, Mr. Payton could sue the society joining the company as co-plaintiff with him or as co-defendant with the society. So much these clauses are plainly contrived to achieve. But in this respect their effect would be the same whether there were one pension or two. Counsel for the Crown, therefore, goes further and says that under this contract there has been created a single and identifiable (and intelligible) item of property, *viz.*, the benefit of the society's covenant with the company to pay what we may call the Payton last survivor pension throughout its term, which piece of property is enjoyed successively and is enforceable successively by Mr. Payton and Mrs. Payton. On this basis he contends that the case is *in pari materia* with *Re Duke of Norfolk's Will Trusts* (3).

We have been unable to accept the argument. If the society's covenant had been with the company to pay the latter during some period—*e.g.*, a fixed period or the life of the longest liver of a number of named persons—a certain annual sum, and if the company had then declared itself a trustee of the annual sum or of the benefit of the covenant for A and B successively, it may well be (though

we do not so decide) that the case would have been covered by the *Duke of Norfolk's* case (3). But the effect of his contract seems to us to be otherwise. Adhering (as enjoined by counsel for the Crown to do) to the actual terms of the bargain, there is here no covenant with the company to pay the company anything. There is a covenant with the company to pay "the pension," *i.e.*, the annual sum of £x by monthly instalments, to Mr. Payton during the period from his retirement to his death and then to pay the same pension, *i.e.*, the same annual sum by like instalments, to the plaintiff (if she survives Mr. Payton) during the rest of her life. Though the distinction be a fine one there does not seem to us to be in the latter case, in any real sense of the term, any single and continuing proprietary interest distinct from the beneficial interests, under the contract, of Mr. Payton and the plaintiff respectively, which proprietary interest can be said to "pass" on Mr. Payton's death. We think that some assistance may be derived from considering the effect of a release of the society by Mr. Payton during the latter's life. Such a release would appear wholly to discharge the society so that during the rest of Mr. Payton's life (or during any less period for which the release operated) there would be nothing left at all—no discernible proprietary right in the company or anyone else and certainly no acceleration of the "pension" rights of the plaintiff. A

In *Re Duke of Norfolk's Will Trusts* (3) the problem had arisen out of the will and codicils of a testator whereby he had (a) devised and appointed his freehold hereditaments to his trustees for a term of one thousand years and declared trusts of such term including a trust to pay out of the rents and profits any annuity bequeathed by him, and (b) given to his trustees an annuity of £2,000 to commence from the day of his death and to continue payable during the lives of his brother, the late Viscount Fitzalan, and his nephew, the then present viscount, and the life of the survivor of them and to be paid to the late viscount during his life and after his death to the then present viscount. The late viscount having died, the Crown claimed estate duty under either s. 1 or s. 2 (1) (b) of the Act in respect of the "slice" of the capital of the testator's estate which bore the same relation to the whole as did, at the date of the late viscount's death, the annual sum of £2,000 to the whole income of the estate. It was conceded throughout the case that on the true construction of the relevant provisions of the will and codicils, the interest in question was one continuing annuity (charged on the estates comprised in the one thousand years' term) for the longer of the lives of the two annuitants and could not be regarded as comprising two successive annuities, the first ceasing, and the second commencing, on the death of the late viscount: see *per* JENKINS, L.J. ([1950] 1 All E.R. 672). The Crown, nevertheless, contended that (contrary to the existing office practice) duty was exigible on the "slice" theory and that there was no logical or sensible distinction between such a case as that before the court and the case of two separate and successive annuities—in which case duty was admittedly charged on the "slice" theory on the death of the first annuitant. They further contended that the case was distinguishable from that of *Re Cassel* (4) decided by RUSSELL, J., in 1927, and, alternatively, that the decision in *Re Cassel* (4) should be overruled. D E F G

The subject-matter in *Re Cassel* (4) which gave rise to the claim for duty was a direction in the testator's will that, during a period of years ending in 1995, the testator's trustees should provide out of the rents and profits of the trust estate the annual sums required for payment of rent, rates, and certain other outgoings in respect of premises known as "Brook House" which was itself bequeathed in trust for the benefit of several persons in succession. RUSSELL, J. (contrary to his own inclination) held himself bound since *Cowley's* case (1) to hold that there passed on the death of the first person beneficially entitled to Brook House a specific item of property, *viz.*, the variable annuity already described, that is, the benefit of the variable annual sums to be raised and provided by the trustees. In the *Duke of Norfolk's* case (3) this court held that the case before them was H

covered by *Re Cassel* (4), which it thought (having regard to later affirmation and notwithstanding certain criticisms made of the judgment of RUSSELL, J.) binding at least on the Court of Appeal: see the judgment of SIR RAYMOND EVERSHERD, M.R. ([1950] 1 All E.R. 669); but it held also that the annuity bequeathed by the first and second codicil, being an item of property separate and distinct from the beneficial interests therein, "passed" on the death of the first annuitant within the meaning of s. 1 of the Act of 1894.

In our judgment, the present case is essentially different from the *Duke of Norfolk's* case (3) and also from *Re Cassel* (4). In each of those cases, the annuity arose out of specified trust property—the provisions of the will directed the trustees to raise the amount of the annuity yearly out of the income of the trust funds, for securing which in the *Duke of Norfolk's* case (3) a term of years was also created. The annuity so raised was given to the trustees to hold (in the *Duke of Norfolk's* case (3)), or was to be applied by the trustees (*Re Cassel* (4)) on trust for certain persons successively. In the present case the only rights and interests subsisting or capable of subsisting arise exclusively out of the terms of the contract of insurance. The only right of property which, according to the suggestion of the Crown, emerges from the respective policies is a chose in action. But a mere chose in action cannot, in our judgment, be considered or comprehended apart and separately from the right to enjoy, by the terms of the contract, the benefit contracted to be given. If there be any rights or interests of the company as distinct from the separate and individual rights of the pensioners they seem, accordingly, to us altogether too spectral to be fairly analogous to the interests of the trustees in the *Duke of Norfolk's* case (3) or the *Cassel* case (4), or to be fairly regarded as "passing" on the death of Mr. Payton within the meaning of the Finance Act, 1894, s. 1. For these reasons we think that the appeal fails and should be dismissed.

Order accordingly.

Solicitors: *Solicitor of Inland Revenue; Ward, Bowie & Co.*, agents for *Duggan, Elton & James*, Birmingham (for the widow).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

BOARD v. THOMAS HEDLEY & CO., LTD.

[COURT OF APPEAL (Denning, Birkett and Hodson, L.JJ.), June 26, 27, 1951.]

Discovery—Production of documents—Action for negligence against manufacturers—Dermatitis alleged to be due to product—Application for production of complaints after date of purchase of product—Form of order.

The plaintiff claimed damages for negligence from the defendants, alleging that they had manufactured and sold a dangerous cleaning product which she had used and in consequence had contracted dermatitis on both hands. On discovery the defendants disclosed all complaints and congratulatory letters received by them up to May 18, 1950, the date when the plaintiff bought the product. On an application by the plaintiff for a further and better affidavit disclosing "all complaints and other documents relating thereto" received by the defendants since May 18, 1950,

HELD: an important issue was whether the product was dangerous, and on that issue evidence that subsequent users had suffered from dermatitis would be admissible, and, therefore, documents relating to such later complaints might lead to a train of inquiry enabling the plaintiff to advance her case, and so were relevant and ought to be disclosed, but the order must be confined to "all complaints of personal injuries and other documents relating thereto."

AS TO WHEN FURTHER AFFIDAVIT FOR DISCOVERY OF DOCUMENTS MAY BE OBTAINED, see HALSBURY, Hailsham Edn., Vol. 10, pp. 369, 370, paras. 446-448; and FOR CASES, see DIGEST, Vol. 18, pp. 88-92, Nos. 400-433.

INTERLOCUTORY APPEAL by defendants against an order of DEVLIN, J., dated May 31, 1951, allowing an appeal of the plaintiff from Master BAKER.

Beyfus, K.C., and *Ormrod* for the defendants.

M. Waters for the plaintiff.

DENNING, L.J.: This case raises a question as to discovery. On the pleadings the plaintiff, Mrs. Board, alleges that she has suffered from dermatitis of both hands as a result of using the defendants' product, "Tide," for the purpose of washing clothes, and she claims damages from the defendants because, as she alleges, they were guilty of negligence in the manufacture and distribution of it. To make out her case she says that this preparation was dangerous and that the defendants ought to have known it. The defendants deny her allegations and say their product is safe for all normal users. They admit that the plaintiff suffered dermatitis as a result of using their product, but they say that it was due to her being unusually susceptible to that disease. Discovery has been ordered and the defendants have disclosed all complaints and congratulatory letters which were received by them up to May 18, 1950, when the plaintiff purchased the carton of "Tide" of which she complains, but they have not disclosed the complaints or congratulatory letters received by them after that date. The plaintiff thereupon applied for a further and better affidavit asking that the defendants should disclose "all complaints and other documents relating thereto" since May 18, 1950. The master refused the application, but on appeal DEVLIN, J., granted it. The defendants now appeal to this court.

If the sole issue had been the state of mind of the defendants when they issued the carton, that is, whether they knew or ought to have known at that time that their product was dangerous, it would be quite immaterial to inquire what complaints they received after May 18, 1950. But that is not the sole issue. Another, and a most important, issue, is whether the product was dangerous at all. The product would, I think, be dangerous if it might affect normal users adversely, or even if it might adversely affect other users who had a higher degree of sensitivity than the normal, so long as they were not altogether exceptional. On that issue it would be admissible for the defendants to call evidence that they had sold large quantities of the product without receiving any complaint, or, if they had received a few complaints, to explain those by saying that they were cases where the product had not been used properly or where the person concerned was unusually susceptible. It is common practice to call such evidence in cases like the present. Conversely, it must be admissible for the plaintiff to call witnesses at the trial, if she can find them, who are able to show that they were normal in their sensitivity, or, at any rate, not altogether exceptional, and yet they suffered from dermatitis through using the product, and those witnesses would not be confined to users before May 18, 1950, but would extend also to users at a subsequent time. The plaintiff would, if asked, have to give particulars of any person she relied on in this respect so that the defendants would be able to investigate the complaint, but the evidence would certainly be relevant and admissible.

Once it is held that evidence of dermatitis suffered by subsequent users would be admissible because it is relevant to the issue whether the product was dangerous, it follows that the documents relating to complaints of subsequent users ought to be disclosed, because they may fairly lead to a train of inquiry enabling the plaintiff to advance her case. Counsel for the defendants contended that discovery should not be allowed so as to enable the other party to "fish" for witnesses. I agree that is so in ordinary cases, but I regard this as an exceptional case which raises the issue whether or not the product is dangerous. The complaints are very relevant on that issue. The relevant information with regard to them is all in the hands of the defendants, and justice requires that the plaintiff should be put in possession of it also so that she can present her case on equal terms. If she is thereby enabled to find witnesses to support her case, all well

and good, for it is very right and proper that the important issue whether the product was dangerous should be fully investigated. Counsel for the defendants said it might lead to other complainants bringing legal proceedings which they might not otherwise have done. That may be so, but I do not think that that is a sufficient reason for refusing the discovery. The order at the moment is too widely expressed. It ought to be confined to "all complaints of personal injuries and other documents relating thereto." In my opinion, this appeal should be dismissed.

BIRKETT, L.J.: I agree.

HODSON, L.J.: I agree.

Appeal dismissed.

Solicitors: *Stanley Brent & Co.* (for the plaintiff); *Routh, Stacey, Hancock & Willis*, agents for *H. V. Mansfield*, Newcastle-on-Tyne (for the defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

TEALE v. BURT (otherwise TEALE) AND BURT.

[COURT OF APPEAL (Denning, Birkett and Hodson, L.J.J.), June 25, 26, 1951.]

Divorce—Collusion—Agreement for disposal of matrimonial property—Receipt by wife of reduced share in consideration of husband's foregoing right to claim damages—Claim for damages subsequently included in petition—Matrimonial Causes Act, 1950 (c. 25), s. 4 (2).

By their answers to a husband's petition for divorce on the ground of his wife's adultery with the co-respondent the wife and the co-respondent alleged that the petition was presented in collusion with the wife and the co-respondent. It was pleaded in support of that allegation that, on becoming aware of the wife's adultery, the husband began negotiations with her for the disposal of the matrimonial property, and, that, in consideration of the husband's foregoing any right to claim damages against the co-respondent, the wife consented to accept a sum which was less than her agreed share of the matrimonial property. It was further pleaded that that agreement was carried into effect and that a sum representing the wife's share, less the amount deducted in respect of the husband's foregoing his claim for damages, was paid by the husband to the wife before the institution of the proceedings, but when the petition was filed it contained a claim for damages against the co-respondent. On an application by the husband to strike out the averment of collusion and the facts supporting it,

HELD: it was possible that collusion might be inferred from the facts alleged, and, therefore, those facts and the averment of collusion must be put before the court which tried the petition to enable it to decide whether or not there was collusion, and so they could not be struck out.

Decision of WILLMER, J., reported sub nom. T. v. B. (formerly T.) and B. (ante p. 183), affirmed.

AS TO COLLUSION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 677, 678, paras. 1000-1003; and FOR CASES, see DIGEST, Vol. 27, pp. 332-336, Nos. 3123-3160.

APPEAL by the husband from a decision of WILLMER, J., dated May 28, 1951, and reported [1951] 2 All E.R. 183, dismissing the husband's appeal from an order of Mr. Registrar COMPTON-MILLER, made on April 27, 1951, whereby he refused to strike out paragraphs, together with the particulars thereunder, contained in the answers of the wife and the co-respondent to the husband's petition for divorce on the ground of adultery. The answers contained an introductory averment that the petition was presented in collusion with the wife and the co-respondent.

Merrylees for the husband.

Harvey, K.C., Friend and Andrew Edwards for the wife and the co-respondent.

DENNING, L.J.: This case raises a short pleading point. The parties were married in September, 1931. In November, 1949, the wife left her husband and went to live in adultery with the co-respondent, a fact which is admitted on the pleadings. On June 9, 1950, the wife, in return for the sum of £1,181 15s. 3d., assigned to her husband all her interest in the boarding-house which they had carried on, and on Sept. 14, 1950, the husband brought these proceedings for a divorce in which he claims against the co-respondent £2,000 damages. A

The question arises on the answers to his petition. Both the wife and the co-respondent have put in answers in identical terms in which they allege that the husband was "guilty of collusion". In support of this allegation, they set out certain alleged facts, namely, that the wife's interest in the boarding-house was worth £1,500, and that she accepted the lesser sum of £1,181 15s. 3d. in return for the husband's promise not to claim damages from the co-respondent. The introductory averment that the petitioner "was guilty of collusion" was an inartistic label, and **WILMER, J.**, gave leave to amend it so as to read that "the petition was presented in collusion with the respondent and the co-respondent in that the parties by agreement have provided for the conduct of the suit." The answers must be read as if that was the introductory averment. B C

There is, I think, a distinction to be drawn between the facts which are alleged and the averment of collusion with which they are introduced. So far as the facts are concerned, it is clear (and counsel for the husband so admits) that it will be the duty of the parties and of their professional advisers to bring those facts to the notice of the judge who tries the case so that he can determine whether there was collusion or not. That is always the duty in the case of arrangements made in contemplation of divorce proceedings. The parties, often quite reasonably, in anticipation of a divorce make arrangements in respect of such matters as the future of the house and furniture, the maintenance of the wife, the custody of the children, or even sometimes as to costs. Those arrangements are not collusive so long as they do not tend to pervert the course of justice. They often have to be made as a matter of necessity. They only amount to collusion if one party or the other uses them as a bribe—for instance, if a husband promises excessive maintenance as a bribe to persuade his wife to bring divorce proceedings, or if he promises to let the wife have the custody of the children as a bribe to induce her to abstain from defending herself. Parties can compromise a claim for damages in an enticement case, just as in the old days they could compromise an action for criminal conversation. So, also, they can compromise a claim for damages in divorce proceedings so long as the agreement does not tend to pervert the course of justice and it is brought to the notice of the court and sanctioned by the court. The reason why these matters have to be brought before the court is so that the judge can inquire whether there is collusion or not. Unless sanctioned by the court, they are invalid. I am, therefore, clear that the facts alleged in the answers of the wife and co-respondent are matters which must be put before the court to enable the court to reach a conclusion whether or not there was collusion. These alleged facts, therefore, cannot be struck out. D E F G

I turn now to the introductory averment. Counsel for the husband contends that, in any event, the averment of collusion ought to be struck out because the alleged facts do not warrant it. I do not agree. It seems to me that, if the court felt that the proper implication from the facts was that there was an agreement, express or implied, that the wife and the co-respondent would not set up a defence which was available to them, or would not make a counter-charge which was open to them, there would be collusion. At this stage the court cannot say that no such implication can be made. Counsel for the husband argues H

A that such an implication would have to be pleaded expressly, and that, as it is not expressly pleaded, the averment of collusion ought to be struck out. I do not think that is the proper way in which to approach the question. If facts are present from which collusion may conceivably be inferred, we ought not to strike out the introductory averment. It is possible that at the trial collusion will be negatived on the ground that there was no such implication, but we cannot strike out this averment unless it is plainly unarguable. In the present case we cannot say that. I would, therefore, dismiss the appeal.

B **BIRKETT, L.J.:** I agree. I appreciate the anxiety which arises when the word "collusion" rears its head in the conduct of proceedings for divorce, but I want to emphasise that the point we are now deciding is confined solely to pleading. We express no view whether or not collusion in the true sense exists here. The question is merely whether this paragraph alleging collusion be struck out at this stage. In my view, the pleading in its amended form should stand, and the trial judge will then deal with all the matters which have been raised in this court, including the question whether any implication should be drawn from the facts of this case.

C **HODSON, L.J.:** I agree.

Appeal dismissed.

Solicitors: *Lesser & Co.* (for the husband); *Kingsford, Dorman & Co.* (for the wife and the co-respondent).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

D

WHITE AND OTHERS v. KUZYCH.

[PRIVY COUNCIL (Viscount Simon, Lord Porter, Lord Morton of Henryton, Lord Reid and Lord Asquith of Bishopstone), April 18, 24, 25, 26, 30, May 1, 2, June 20, 1951.]

E *Trade Union—Domestic tribunal—Adjudication on member's conduct—Provision for appeal to executive of federation—Action begun by member without proceeding to appeal—Jurisdiction of court.*

F The respondent, a member of a Canadian trade union, was charged before the domestic tribunal set up under the bye-laws of the union with conduct unbecoming a member of the union and committing acts discreditable to it by campaigning against the union's policy of a "closed shop" and other offences named as "serious offences" in the bye-laws. He was found guilty, and at a general meeting a resolution was passed expelling him from the union. Article 26 of the bye-laws provided: "If a member has been found guilty . . . and feels that the decision is unfair, or the penalty too severe, he may, within sixty days file an appeal in writing with the executive of the Shipyard General Workers' Federation . . ." Article G 22 of the bye-laws provided that every member should be deemed to have entered into a contract with the union and at all times to abide by the following oath of obligation: "I promise that I will not become a party to any suit at law or in equity against this union or the federation, until H I have exhausted all remedies allowed to me by said constitution and bye-laws." After his expulsion the respondent brought an action in the British Columbia High Court for a declaration that he had not been validly expelled from the union, that he was still a member, and for consequential relief.

HELD: the conclusion reached at the general meeting to expel the respondent was a "decision" within the meaning of art. 26, even though it was tainted by bias or prejudice or arrived at in defiance of natural

justice; accordingly, the conclusion reached by the general meeting was subject to an appeal to the federation which the respondent was bound by his contract to pursue before he issued his writ; and, therefore, he was not entitled to the declaration which he sought.

AS TO POWERS OF COURT TO GIVE RELIEF AGAINST EXPULSION OF MEMBER OF TRADE UNION, see HALSBURY, Hailsham Edn., Vol. 32, p. 481, para. 770; and FOR CASES, see DIGEST, Vol. 43, pp. 98, 99, Nos. 1032-1041. A

Cases referred to:

(1) *Jackson v. Barry Ry. Co.*, [1893] 1 Ch. 238; 68 L.T. 472; 2 Digest 379, 424.

(2) *R. v. Local Government Board. Ex p. Arlidge*, [1914] 1 K.B. 160; 83 L.J.K.B. 86; 109 L.T. 651; 78 J.P. 25; *reversd.* H.L. *Local Government Board v. Arlidge*, [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 42 Digest 783, 2128. B

(3) *Maclean v. Workers' Union*, [1929] 1 Ch. 602; 98 L.J.Ch. 293; 141 L.T. 83; 43 Digest 101, 1046.

APPEAL by defendants against an order of the Court of Appeal of British Columbia, dated May 3, 1950, affirming a decision of WHITTAKER, J., on Sept. 22, 1949, that the respondent (plaintiff in the action) was entitled to a declaration that he had not been validly expelled from membership of the Boilermakers' and Iron Shipbuilders' Union of Canada, Local No. 1, but was still a member of good standing, and awarding him \$5,000 damages. C

J. W. de B. Farris, K.C. (with him *N. T. Nenetz*) (both of the Canadian Bar), of the appellants. D

A. W. Johnson (of the Canadian Bar) for the respondent.

June 20. The following judgment of the Board was delivered by **VISCOUNT SIMON**. This is an appeal by the defendants in the action from a judgment of the Court of Appeal for British Columbia dated May 3, 1950 (*O'HALLORAN, ROBERTSON, and SIDNEY SMITH, JJ.A., SLOAN, C.J., and BIRD, J.A., dissentiente*), which dismissed the appellants' appeal from a judgment of WHITTAKER, J., dated Sept. 22, 1949, in the respondent's favour. The litigation has involved the examination of a mass of evidence and the discussion of a number of difficult questions arising therefrom, but, as will appear in the sequel, the conclusion to be reached is arrived at by an overriding consideration which makes it unnecessary to pronounce on some of the other issues that have been raised. E

The respondent is a welder. He became a member of the Boilermakers' and Iron Shipbuilders' Union of Canada, Local No. 1 (hereinafter referred to as "the union"), in April, 1943. He has brought this action for a declaration that he has not been validly expelled from membership of the union, but is still a member of it in good standing, and for consequential relief. The judgment of WHITTAKER, J., which the Court of Appeal by a majority confirmed, so declared and awarded him \$5,000 as damages. The union had a contract with North Vancouver Ship Repairs, Ltd., at whose shipyard the respondent worked, one of the terms of which was that only members of the union would be employed. Such a contract constituted the shipyard a "closed shop." According to the witness Stewart, who had been a member of the union since 1942 and was an ex-president, the principle of the "closed shop" was the policy of the union since its inception. One of the objects and purposes of the union, as stated in its bye-laws dated Aug. 8, 1944, was "to consummate closed shop agreements in order to establish an equitable and lasting relationship with employers." The respondent was and is opposed to the principle of the closed shop and expressed himself, both before and at the trial of this action, as regarding it as "a very great evil," which he would tolerate "as long as it is necessary but not a moment longer." His criticisms went so far as to say that there was no F

trade union in Canada with whose principles he agreed, and he denounced the union, or at any rate the control over it exercised by its executive, as "spurious" and a "fake."

Such an attitude, whatever its justification, was not calculated to make him generally acceptable to the union and its officers, and in February, 1945, after much previous controversy and some abortive litigation, three charges were made against him in writing, by a member of the union, of offences committed in breach of art. 26 of the bye-laws of the union, as follows:

"(i) he assisted in holding an unauthorised public meeting to discuss internal business of the union; (ii) between October, 1942, and December, 1944, he was guilty of conduct unbecoming of a member of the union and committed acts discreditable to it in publicly opposing established policies of the union by campaigning against the closed shop principle; and (iii) he violated the oath of obligation of a member of the union in failing to repudiate certain radio broadcasts made in his behalf, which contained statements slanderous of one Stewart, a member and then president of the union."

Each of these offences was included in the list of "serious offences" under group B of the article.

Article 26 went on to provide that, on such a charge being laid and read out to a general business meeting of the union, it should be handed to the Press and Investigating Committee "to conduct the trial." The respondent was duly notified of the charges and of the date and place of hearing, as the bye-law required. He attended the proceedings, giving evidence and being cross-examined. He alleged that he wished other members, named McPheator and Mole, to attend as witnesses, but this was refused him by the committee. It turned out, however, that he wished for their presence only as observers and he did not intend to call them to testify.

The bye-law prescribes that the committee at the end of the hearing is to take a vote "to determine the guilt or innocence of the accused" and to prepare a concise report for the next regular general meeting of the union. This was done. The report was unanimous and found the respondent guilty on all three charges. Under the bye-law the steps then to be taken are as follows:

"(10) After the report is read out at a general membership meeting, the motion shall be put to accept or reject the committee's report and there shall be no debate or review of the case by the meeting; but the meeting shall first hear the views of the minority of the trial committee, if any, and shall permit one each, of the complainant's and accused's witnesses to plead for, or state their side, and shall permit statements to be made by the complainant and the defendant, or by their counsels, and by the union's counsel if one has been appointed; and all the said persons shall be given the right of the floor for an equal and predetermined period. (11) The meeting shall then vote on the motion by show-of-hands, standing or secret ballot, and if the charges are sustained by a majority of the members voting, the accused stands convicted and the meeting shall fix the penalty, also by majority vote; but concurrence of a two-thirds majority present and voting shall be required to expel a member. If the charges are not sustained, the defendant shall automatically be declared exonerated of the alleged offence."

Then follows a provision headed "Appeals":

"If a member has been found guilty by a general business meeting of any offence under group B of this article and feels that the decision is unfair, or the penalty too severe, he may, within sixty days file, an appeal in writing with the executive of the Shipyard General Workers' Federation; but no appeal shall be permitted from the imposition of a fine, or in cases

where a fine was part of some other penalty, unless such fine is first paid. If expulsion has been the penalty, an appeal shall stay the order, until decision by the appellate tribunal, but shall not restore the accused to regular membership and his status shall be that of a charged member, as specified in group B, s. (5) of this article."

Article 22 of the bye-laws provided in paras. (5) and (6) that a person who remained a member of the union after the bye-laws came into force (as was the case with the respondent) should be deemed to have entered into a contract with the union and with every other member therein whereby, in consideration of the benefits bestowed by such membership, such person undertook to accept, endorse, and at all times abide by the terms of the oath of obligation set forth in para. (7). The part of the oath of obligation which is immediately relevant in the present case runs as follows:

"I promise that I will not become a party to any suit at law or in equity against this union or the federation, until I have exhausted all remedies allowed to me by said constitution and bye-laws."

It is a crucial circumstance in the present litigation that it was instituted by the respondent without first appealing to the federation from the findings against him in the report and the resolution of expulsion subsequently adopted at the general business meeting.

The general business meeting (called in para. (10) of the bye-law the general membership meeting) before which the report came was held on Mar. 19, 1945, the chair being taken by the appellant Nuttall. Stewart put the case for the report, and the respondent, not without considerable interruption, opposed. Then, before the vote was taken, Nuttall spoke for a few minutes, strongly denouncing the respondent as a friend of the capitalist class—an intervention not in any way justified by the bye-law. On a show of hands a resolution expelling the respondent from the union was passed by 454 to twelve. A member named Jenkins was observed to be taking down the names of those who voted in the minority, and this is relied on by the respondent as confirming his allegation that the vote was influenced by intimidation. Moreover, the trial judge accepted the evidence of McPheator (i) that the appellant Clark, who afterwards acted on the committee which tried the respondent, told him that the respondent would be "crucified" by the committee—this, however, as the respondent's counsel admitted, was before Clark was elected to the committee—and (ii) that the appellant White warned McPheator to "lay off" talking to the respondent "or what they contemplated doing to him would also happen to me." WHITTAKER, J., also accepted the evidence of Mole that Clark had used threatening language to him if he continued to follow and back up the respondent. The evidence as to these threats seems to indicate that White and Clark were speaking in reference to an impending election of union officers (when the respondent stood unsuccessfully for the presidency) which took place in December, 1944.

Whatever the correct details may be, their Lordships are bound to conclude that there was, before and after the trial, strong and widespread resentment felt against the respondent by many in the union and that Clark, among others, formed and expressed adverse views about him. If the so-called "trial" and the general meeting which followed had to be conducted by persons previously free from all bias and prejudice, this condition was certainly not fulfilled. It would, indeed, be an error to demand from those who took part the strict impartiality of mind with which a judge should approach and decide an issue between two litigants—that "icy impartiality of a Rhadamanthus" which BOWEN, L.J., in *Jackson v. Barry Ry. Co.* (1) ([1893] 1 Ch. 248) thought could not be expected of the engineer-arbitrator—or to regard as disqualified from acting any member who had held and expressed the view that the "closed shop" principle was essential to the policy and purpose of the union. What those who considered the charges against the respondent and decided whether he was guilty ought to

bring to their task was a will to reach an honest conclusion after hearing what was urged on either side and a resolve not to make up their minds beforehand on his personal guilt, however firmly they held their conviction as to union policy and however strongly they had shared in previous adverse criticism of the respondent's conduct.

A The question of the extent to which those who took part in the so-called trial, and in the general meeting which considered the report, were actuated or influenced, not only by pre-conceived views, but by a resolve to condemn the respondent, is a question of fact to be deduced or inferred from the evidence. WHITTAKER, J., concluded that

“it cannot by any stretch of the imagination be said that the trial within the union was one that was free from prejudice and bias.”

B And after referring to the evidence of McPheator and Mole and to an article written by the secretary of the union in its official organ on Feb. 2, 1945, which strongly denounced the respondent's previous conduct and said that if he

“intends to take us to court again, he will be placing the entire trade union movement on trial as to whether a trade union has the right to discipline its members for violation of union policies and individual member's obligations,”

C the learned judge added:

“It is almost inconceivable that so determined an effort should have been made to influence the members against the plaintiff while the charges were pending and before the plaintiff had been tried . . . In the light of the facts detailed above, I am of the opinion that the purported expulsion of the plaintiff was contrary to natural justice.”

D In the Court of Appeal, O'HALLORAN, J.A., went even further, holding that the leaders of the union had no justification for the conclusion that the respondent was an enemy of organised labour and that the trial committee “was inexorably biased against the respondent.” He went on:

E “In such circumstances it was obviously impossible for the respondent to receive a fair trial on the merits. Once it was proven he was against the closed shop policy and in favour of the open shop policy (as he readily conceded he was), it was obvious the verdict would be for his expulsion from the union. There could be in that trial committee as constituted no opportunity for judicial consideration of the question on its merits. The verdict for expulsion was inevitably prejudiced and virtually decided before the trial was held. In essence, there was no trial at all. The trial committee was simply carrying out the declared policy of the union as announced by its leaders at the time.”

F O'HALLORAN, J.A., after dwelling on the gravity of a sentence of expulsion, in view of its effect in limiting or destroying the respondent's prospects of obtaining work elsewhere, went on to lay it down:

G “A man has a right to work at his trade. If membership in a union is a condition attached to working at his trade, then he has an indefeasible right to belong to that union. It must be so, or else the union can have no right to agitate for a closed shop . . . Moreover, the civil liberties of the subject cannot be decided by a trial committee set up by a labour union. That is the prerogative of the constituted courts of the country. In my judgment, the question the union trial committee sought to deal with in the circumstances here was beyond the competence of any union to decide.”

H Their Lordships, while fully alive to the considerations which weighed with this learned judge, must not be understood to agree with these last observations, which form no part of the argument used by the other judges who considered

the case, and which are not necessary to support the view which has hitherto prevailed in this litigation. Moreover, it is right to observe that the defence that the union was an illegal association, having objects which are in restraint of trade, was pleaded in the amended statement of defence, but at the trial WHITTAKER, J., held that the defence of illegality was not sufficiently raised and, in any case, was not established. This finding was not challenged on appeal and is not really in issue before their Lordships.

ROBERTSON, J.A., agreed with the trial judge that the purported expulsion was contrary to natural justice and further held that the committee was not competent to hear the charges and that Clark, a member of the committee, was so biased against the respondent as to render him unfit to act. SIDNEY SMITH, J.A., thought that the phrase "natural justice" had little meaning and that it might be misleading. He quoted the words of HAMILTON, L.J., in the Court of Appeal in *R. v. Local Government Board. Ex p. Arlidge* (2) ([1914] 1 K.B. 199), that the phrase was an "expression . . . sadly lacking in precision." While accepting and applying the view of MAUGHAM, J., in *Maclean v. Workers' Union* (3), that the conduct of a person charged might well be such that every other member of the union might have a strong animus against him, and agreeing that the court should not interfere merely because the committee and the general executive detested him, the learned judge went on to say:

"But the plaintiff's actions by no means justified the conduct that some of the committee and some of the main executive had been guilty of. No resentment, however just, can excuse it."

And, after reviewing the evidence, he concluded that the expulsion was invalid and bad in law. The two judges who were in the minority in the Court of Appeal, SLOAN, C.J., and BIRD, J.A., do not express any dissent from the adverse view on the merits taken by their colleagues, and their Lordships will deal with the matter on the basis that severe condemnation of the methods followed in the proceedings under review is fully justified. If these were the only relevant considerations, some difficult questions would arise. For example: Is the conclusion of a judicial tribunal acting within its jurisdiction, which is arrived at in a way which amounts to a denial of natural justice, appealable, or, on the contrary, is it simply void and thus not subject to appeal at all? And the further question would then have to be considered, *viz.*, how far the law on the subject of bias or prejudice or failure to apply natural justice extends to such a tribunal as the trial committee and the general meeting which is considering the committee's report.

The answers to these questions would not, however, be decisive of the present case, if the view taken by the two judges who were in the minority of the Court of Appeal prevails. The respondent, after his condemnation by the general meeting, did not appeal to the Shipyard General Workers' Federation before invoking the court's jurisdiction, although he was contractually bound not to institute any action against the union until he had exhausted all the remedies allowed by the union's constitution and bye-laws. The Chief Justice and BIRD, J.A., took the view that on this ground the respondent's claim must fail. This issue has been elaborately and excellently argued before their Lordships by counsel on either side and it remains to examine the contention. The respondent sets up two answers to it. (i) He contends that the trial committee was not properly constituted. If this is proved to be so, any proceedings for hearing and deciding on the charges were a nullity; the general meeting had no valid report before them; the sentence of expulsion would be without authority under the bye-laws; and there would be no basis for an appeal to the federation. (ii) Even if the committee was properly constituted, he contends that the conclusion reached at the general meeting should not be regarded as a "decision" on the ground that it was arrived at by methods which make it contrary to natural justice and that it is the result of bias and even intimidation.

The respondent relied on expressions in some English cases which would suggest that a conclusion reached by certain tribunals in such circumstances may depart so far from a judicial pronouncement as not to amount to a "decision" at all. However this may be, a crucial question under this second head is whether the conclusion reached by the general committee was a "decision" within the meaning of that word in the provision headed "Appeals" above quoted.

- A On both of these points there is a difference of opinion among the British Columbian judges. As to (i) WHITTAKER, J., held that the committee was not properly constituted, inasmuch as when one of the six declared to have been elected to it was found not to be qualified, the vacancy was not filled by the election of one new member, but the five who had been duly elected resigned and were re-nominated together with a substituted candidate, while the rest of the candidates originally nominated but not elected were treated as no longer standing. Thus, the six who acted as the committee had an unopposed return. In the Court of Appeal, O'HALLORAN, J.A., did not pronounce on the point, ROBERTSON, J.A., assumed that the second election produced a validly constituted committee, SIDNEY SMITH, J.A., was by no means satisfied that there was anything irregular in the method chosen for filling the vacancy, while BIRD, J.A., with whom SLOAN, C.J., agreed, considered that the method adopted was

"... a *bona fide* attempt to resolve the difficulty consequent upon the discovery of the disqualification of one member"

- D and that the solution as a whole "constituted a reasonable and practical compliance with the spirit of the bye-laws." The secretary to the committee was chosen by its members out of their own body, whereas bye-law 18 directed that he should be "the most successful candidate," but this adaptation was necessitated by the fact that all the members were elected without a ballot. Their Lordships, after receiving argument on issue (i) from both sides, intimated at the hearing that in their view the trial committee must be regarded as validly constituted.

- E As to (ii) the whole difficulty is to put the proper construction on the word "decision" when the bye-law gives a right of appeal from the general meeting to the federation if a member found guilty or penalised by the former "feels that the decision is unfair or the penalty too severe." The view of SLOAN, C.J., and BIRD, J.A., is that the conclusion reached by the general meeting was a
- F "decision" within the meaning of that expression in the bye-laws even though it was tainted by bias or prejudice or arrived at in defiance of natural justice, and even though the voting of some members may have been affected by intimidation. According to this view, these circumstances, or the allegation of them, would be matter for the consideration of the appellate tribunal, and would not justify the contention that no appeal was possible because there was
- G no "decision" to appeal against. After anxious reflection, their Lordships have reached the conclusion that this is the correct view. The meaning of "decision" in bye-law 26 must be arrived at by examining the bye-laws as a whole. The scheme of them manifestly is that members of the union design to settle disputes between a member and the union in the domestic forum to the exclusion of the law courts, at any rate until the remedies provided
- H by the constitution and bye-laws, including the opportunity for appeal to the federation, are fully exhausted. If the question had been asked of the respondent or of any of his fellow-members: "What was the decision of the general committee?" it cannot be doubted that the answer would have been, not that no decision had been given, but that the decision was to condemn and expel the respondent. And this would be so, not only because it is the natural reply for members of the union to give in the circumstances, but because it would be the right answer. "Decision" in the bye-law means "conclusion." The

refinement which lawyers may appreciate between a tribunal's "decision" and a conclusion pronounced by a tribunal which, though within the tribunal's jurisdiction, may be treated, because of the improper way in which it was reached, as no decision at all, and, therefore, incapable of being subject to appeal, cannot be attributed to the draftsman of these bye-laws or to the trade unionists who adopted them as their domestic code.

Their Lordships are, therefore, constrained to hold that the conclusion reached by the general committee was subject to appeal. And they must respectfully repudiate both the correctness and the relevance of the view that it would have been useless for the respondent to appeal because the federation would be sure to decide against him. They see no reason why the federation, if called on to deal with the appeal, should be assumed to be incapable of giving its honest attention to a complaint of unfairness or of undue severity and of endeavouring to arrive at the right final decision. At any rate, this is the appeal which the respondent was bound by his contract to pursue before he could issue his writ. He has not done so, and on this ground their Lordships will advise His Majesty that the appeal must be allowed. The respondent must bear the costs of the appeal to this Board and of the appeal to the Court of Appeal in British Columbia, but each party should bear its own costs of the trial where the point on which the appellants now succeed was not originally raised.

Appeal allowed.

Solicitors: *Gard, Lyell & Co.* (for the appellants); *White & Leonard* (for the respondent).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

ALEXANDER v. RAILWAY EXECUTIVE.

[KING'S BENCH DIVISION (Devlin, J.), May 24, 25, 28, 29, 1951.]

Bailment—Luggage—Railway cloak-room—Conditions excluding liability—Delivery to third party without production of tickets—Fundamental breach of contract—Right of Railway Executive to rely on conditions—"Misdelivery."

On Aug. 22, 1948, the plaintiff deposited a large amount of baggage at a railway station, where, with the assistance of C., he re-packed it. He was issued with tickets relating to the deposit, and he paid the due charges therefor. The deposit was made subject, *inter alia*, to the following conditions which were sufficiently brought to the plaintiff's notice: "2. (a) The [railway] company shall not be liable for loss, misdelivery or detention of, or damage to—Any articles or property, which separately or in aggregate exceed the value of £5, unless at the time of deposit the true value and nature thereof shall have been declared by the depositor, and 1d. per £ sterling of the declared value paid for each day, or part of a day, in addition to the ordinary cloak-room charges . . . 3. The company shall be entitled to withhold the articles or property deposited except on production of the ticket issued in respect thereof. The company may deliver such articles or property to—(a) any person producing the ticket, or (b) any person, who fails to produce the ticket, upon such evidence of the loss of the ticket, and of ownership or authority to receive the articles or property, as the company's servants may consider satisfactory, in which case the company's form of indemnity must be signed by the person to whom the articles or property are delivered. The delivery of the articles or property shall acquit the company from all further claims in respect thereof. 4. Depositors are not permitted access to any articles deposited." The plaintiff did not make the additional payment referred to in condition No. 2 (a) although the value of the baggage exceeded £5. On Sept. 2, 1948, C. was permitted by

the parcels clerk in breach of regulations to remove certain articles from one of the deposited trunks. On Sept. 25, 1948, C. persuaded the parcels clerk to permit him to remove further articles on payment by him of certain accrued charges and his signing a form of indemnity. C. then re-deposited the remaining baggage and received tickets for it. On Oct. 19, 1948, C. wrote to the parcels clerk enclosing the new tickets and asking that the baggage be sent to him. The baggage was sent, and C. paid the charges. C. then disposed of the baggage, which was the property of the plaintiff, who claimed damages from the Railway Executive in respect of the loss suffered by him.

HELD: (i) the Railway Executive were guilty of a breach of an implied term fundamental to their contract of bailment with the plaintiff in permitting C. on Sept. 2, 1948, to remove articles from the plaintiff's baggage, with the result that the contract was terminated and the Executive could not thereafter rely on the terms and conditions of the contract excluding their liability in relation to the rest of the baggage.

Dictum of COHEN, L.J., in *North Central Wagon & Finance Co., Ltd. v. Graham* ([1950] 1 All E.R. 784), applied.

(ii) apart from any question of bailment, there had been such a breach of a fundamental term of the contract as to give the plaintiff the right to rescind it, and, therefore, the Railway Executive were disentitled from relying on the special conditions of the contract.

(iii) even if the Railway Executive were not precluded from relying on the conditions, condition No. 3 was inapplicable because there was no such evidence before the parcels clerk that the tickets had been lost or that C. had authority to receive the baggage as could reasonably be regarded by him as satisfactory; and there had been no misdelivery of the baggage because the term "misdelivery" in condition No. 2 (a) meant a wrong delivery involving some form of mistake or inadvertence, and, therefore, condition No. 2 (a) would not protect the Railway Executive.

AS TO RECEIPT OF LUGGAGE IN RAILWAY CLOAK-ROOMS, see HALSBURY, Hailsham Edn., Vol. 1, p. 756, para. 1240; and FOR CASES, see DIGEST, Vol. 3, pp. 83-85, Nos. 189-198.

Cases referred to:

(1) *Lilley v. Doubleday*, (1881), 7 Q.B.D. 510; 51 L.J.Q.B. 310; 44 L.T. 814; 46 J.P. 708; 3 Digest 77, 163.

(2) *Hain S.S. Co., Ltd. v. Tate & Lyle, Ltd.*, [1936] 2 All E.R. 597; 155 L.T. 177; Digest Supp.

(3) *North Central Wagon & Finance Co., Ltd. v. Graham*, [1950] 1 All E.R. 780; [1950] 2 K.B. 7.

(4) *Fenn v. Bittleston*, (1851), 7 Exch. 152; 21 L.J.Ex. 41; 18 L.T.O.S. 197; 155 E.R. 895; 3 Digest 106, 317.

(5) *Bontex Knitting Works, Ltd. v. St. John's Garage*, [1943] 2 All E.R. 690; *affd.* C.A. [1944] 1 All E.R. 381 n; 2nd Digest Supp.

ACTION for damages for breach of a contract of bailment.

On Aug. 22, 1948, the plaintiff in company with one, Colmar, and others, took a number of trunks and other baggage belonging to the plaintiff to Launceston railway station. Having, with Colmar's help, re-packed some of the trunks, the plaintiff, who had been engaged locally in a theatrical performance with Colmar, deposited the baggage at the station, and, in return for the due payment of the booking charges, he received cloak-room tickets in respect of it. Most of the trunks and cases were locked or roped. On Sept. 2, 1948, when the parcels clerk, one Wakeford, came on duty, he found Colmar inside the parcels office with one of the trunks opened. Wakeford (who had not originally accepted the deposit) was informed by another member of the station staff that Colmar was one of those who had packed the baggage, and Colmar persuaded Wakeford

to let him remove various articles on his signing a list of them. On Sept. 25, 1948, after Colmar had alleged that the plaintiff had sent the tickets to him, Colmar, or to the station, but that they must have been lost in the post, Wakefield again permitted Colmar to remove various articles. Colmar paid the excess charges in respect of the baggage, and signed a form of indemnity. He then re-deposited the baggage and received new tickets in respect of it. On Oct. 19, 1948, Colmar wrote from Liverpool enclosing the tickets and asking that the baggage be sent to Rochdale railway station where he would collect it and pay the charges. The baggage was sent as asked, and Colmar disposed of a large proportion of it. He was later prosecuted and pleaded Guilty to a charge of larceny.

Laski, K.C., and *Lloyd-Davies* for the plaintiff.

Berryman, K.C., and *W. G. Wingate* for the defendants.

DEVLIN, J., stated the facts and continued: The question which I now have to determine is whether there is any liability in the defendants. *Prima facie*, they are bailees of the goods, and, *prima facie*, the liability of a bailee is to restore the goods to the bailor in the same condition as they were deposited, and that the defendants have failed to do. They base their defence on two conditions which they said formed part of the contract of bailment and excuse them from liability. These conditions were contained in very small print on the cloak-room tickets and were also contained on a large notice which was exhibited in the waiting room and in the parcels office.

The defendants rely, first, on condition No. 2 (a), which provides:

"The company shall not be liable for loss, misdelivery or detention of, or damage to—Any articles or property, which separately or in aggregate exceed the value of £5, unless at the time of deposit the true value and nature thereof shall have been declared by the depositor, and *1d.* per £ sterling of the declared value paid for each day, or part of a day, in addition to the ordinary cloak-room charges . . ."

It is not disputed that these articles exceeded the value of £5. I find that their true value was never declared and the *1d.* per £ sterling was not paid. Accordingly, the defendants say that they are not liable for loss, misdelivery or detention, and claim that what happened was a loss or misdelivery. Secondly, the defendants rely on condition No. 3, which provides:

"The company shall be entitled to withhold the articles or property deposited except on production of the ticket issued in respect thereof. The company may deliver such articles or property to—(a) any person producing the ticket, or (b) any person, who fails to produce the ticket, upon such evidence of the loss of the ticket, and of ownership or authority to receive the articles or property, as the company's servants may consider satisfactory, in which case the company's form of indemnity must be signed by the person to whom the articles or property are delivered. The delivery of the articles or property shall acquit the company from all further claims in respect thereof."

Under this clause the defendants contend that they delivered the articles to Colmar, as a person who failed to produce the ticket, on evidence of the loss of the ticket and of ownership and authority which was satisfactory to Mr. Wakeford who was concerned with the matter, and, accordingly, the delivery to Colmar acquits the defendants from all further claims in respect thereof.

[His LORDSHIP rejected arguments by the plaintiff that there was a special contract made between himself and the defendants excluding the conditions on which the defendants relied, and that the conditions were not reasonably brought to his notice, and continued:] The next argument which the plaintiff puts forward is that there was a breach of the terms of the bailment on Sept. 2, 1948, which disentitled the defendants from relying thereafter on the exceptions

in the contract, and, indeed, put an end to the contract of bailment. In the statement of claim it is alleged that the defendants in breach of the agreement

A "on or about Sept. 1, 1948, allowed one William George Colmar without the knowledge or authority of the plaintiff and without any possible right in the said Colmar so to do to enter the said parcels office, break open the said packages, extract articles therefrom, and finally remove from the said parcels office and take into his possession the said articles and one of the said packages."

That has been made out by the evidence in relation to five of the articles that were taken away on Sept. 2. In answer to the plea of the conditions, it is pleaded:

B "The plaintiff will contend that the defendants can rely upon the said conditions provided that and so long as the defendants themselves are not in breach of the said conditions . . . The defendants are in breach of the said conditions in that they wrongfully and in breach of condition No. 4 allowed the said Colmar to have access in the manner set forth in . . . the statement of claim and the particulars furnished thereunder

C to the said six packages."

Condition No. 4 provides: "Depositors are not permitted access to any article deposited." The breach of that condition is a breach of the contract, so the plaintiff alleges, and it is a fundamental breach which goes to the root of the matter and determines the bailment. This sort of point has been considered in a number of cases which, themselves on rather different lines, are comprehended within the same principle. The well-known case of *Lilley v. Double-day* (1) deals with bailments and with exceptions applying or not applying when the articles are moved to an unauthorised place. Cases such as *Hain S.S. Co., Ltd. v. Tate & Lyle, Ltd.* (2) deal with fundamental breaches of a contract of affreightment when there has been a deviation from the contract voyage and the effect thereof on the exceptions contained in the contract of affreightment.

E Counsel for the plaintiff relied on the recent case of *North Central Wagon & Finance Co., Ltd. v. Graham* (3). Counsel referred to the following passage in the judgment of COHEN, L.J. ([1950] 1 All E.R. 784):

"I must further point out that [the hirer], in instructing the defendant to sell, and in selling, the car, committed a breach of the contract which goes to the root of it. In those circumstances, a passage in HALSBURY, Hailsham ed., vol. 1, p. 736, para. 1211, seems in point. It says: 'The act of the bailee in doing something inconsistent with the terms of the contract terminates the bailment, causing the possessory title to revert to the bailor, and entitling him to maintain an action of trover.' That view is stated in somewhat similar language in POLLOCK AND WRIGHT ON POSSESSION IN THE COMMON LAW, p. 132, where it is said: 'Any act or disposition which is wholly repugnant to or as it were an absolute disclaimer of the holding as bailee re-vests the bailor's right to possession, and therefore also his immediate right to maintain trover or detinue even where the bailment is for a term or is otherwise not revocable at will, and so *a fortiori* in a bailment determinable at will.' The authority cited for both those passages is *Fenn v. Bittleston* (4), the relevant passage occurring in the judgment of PARKE, B. (7 Exch. 159)."

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The learned lord justice goes on to say that those passages are a correct statement of the law. Substantially the same thing was stated by ASQUITH, L.J., earlier where he said (*ibid.*, 782), in effect, that as a general principle of law it was right to say that a bailee who comports himself in a manner utterly repugnant to the terms of the bailment terminates the bailment and thereupon the right to possession re-vests in the bailor.

These principles are clearly laid down. The difficulty always is to see how they apply to the facts of the case. I must first ask myself whether there was a breach of contract on Sept. 2, 1948; secondly, whether it was a breach of a fundamental term; and, thirdly, what are its consequences in law. That there has been a breach of contract is, I think, hardly denied. There is obviously a duty on a bailee to take care of the goods, and that means to keep them safe from interference by third parties. Accordingly, quite apart from the delivery of the five articles, when the defendants' servants allowed Colmar to enter the parcels room and to open at least one of the trunks and have access to the articles there, they were breaking what was an essential term of the bailment and one that was plainly implied in the contract between these parties. Whether when the five articles were taken away there was a misdelivery which could come within one of the exceptions, I do not think I need for this purpose determine because I think that before the five articles were taken away, when access was allowed, there was a breach of the contract which the defendants are unable to justify, and which they do not, I think, seek to justify, by reference to any one of the conditions and terms in the contract which protected them. A B

Was that, then, a fundamental breach of contract? I think, on consideration, that it was. There can be no doubt that the duty to take care is an essential part of the duty of a bailee, and the importance that should be attached to the exclusion of unauthorised persons from access to articles which are in a cloak-room can hardly be over-emphasised. The view that the defendants themselves take is shown by the fact that they specifically provide in their contract that not even the depositor himself is to be entitled to have access to the articles, and still more must it, therefore, be that no third person should be entitled to have access thereto. Furthermore, to permit the breaking open of locked articles appears to me to come within the character of a fundamental breach. The evidence is not entirely clear on that point, but I think, on the whole, that I ought to draw the inference that on Sept. 2 the probability is that one of the locked articles was broken into. In *Bontex Knitting Works, Ltd. v. St. John's Garage* (5) it was held that the leaving of a delivery van unintended by the driver was a fundamental breach of contract which disentitled the bailees of the goods in the van from relying on the exceptions in the contract. If that be so, then it is certainly a much greater breach of contract to allow access by unauthorised persons to articles which are deposited in a cloak-room. On that view, therefore, counsel for the plaintiff contends that, in accordance with the passage which I have cited from *North Central Wagon & Finance Co., Ltd. v. Graham* (3), the bailment was brought to an end. The result of that would be, of course, that the defendants could not thereafter rely in relation to the other incidents when they parted with the main bulk of the goods, apart from the articles already removed, on the terms and conditions of the contract which were inserted for their protection. C D E F

The matter may, perhaps, be put in another way, quite apart from the law of bailment. The ordinary law of contract, as it is discussed in *Hain S.S. Co., Ltd. v. Tate & Lyle, Ltd.* (2) in the House of Lords, involves that where there has been a breach of a fundamental term of the contract which gives the other party the right to rescind the contract, then, unless and until with full knowledge of all the facts the other party elects to affirm and not to rescind, the special terms of the contract go and cannot be relied on by the defaulting party. There is no question that the plaintiff ever knew of the circumstances in this case which entitled him to rescind or that he ever elected to affirm the contract. G H

I think, therefore, that this point succeeds and provides a good answer to the defendants' reliance on the conditions and that this defence fails. I think, however, that I ought also to examine the conditions which have been relied on, partly because I desire to sustain the conclusion which I have already

expressed by the further conclusion that, even if the conditions were applicable, they would not, in the circumstances of this case, assist the defendants, and partly because those further conditions involve findings of fact which it is necessary that I should make in case the view which I have expressed is wrong in law.

- I will take, first of all, condition No. 3, because it is the one which is obviously
A designed to deal with this sort of situation. Counsel for the defendants concedes that, although it is not expressly so stated in the condition, there must be reasonable grounds for the satisfaction of the defendants. The condition reads "such evidence . . . as the company's servants may consider satisfactory." Counsel concedes that that must mean "may reasonably consider satisfactory" and that there must be reasonable grounds for the decision of Mr. Wakeford,
B who was the official responsible in this case. It has been contended on the part of the plaintiff that there were no such reasonable grounds. [HIS LORDSHIP considered the evidence and continued:] I have come to the conclusion that there were no reasonable grounds and no evidence which should have satisfied Mr. Wakeford, first, that the tickets had been lost, and, secondly, that Colmar had authority to receive the goods.
- C Counsel for the defendants, however, says that, apart from the question of the applicability of condition No. 3, there was a loss or misdelivery under condition No. 2. I do not think it is contended that there was any loss except in the sense that there was a misdelivery. Therefore, the question which arises is whether in the circumstances of this case a delivery to Colmar can rightly be regarded as a misdelivery within the meaning of that word as it is used in
D condition No. 2. No doubt, if "misdelivery" means any delivery to the wrong person, even a deliberate delivery to the wrong person, then the case is covered, and it may well be true to say that in many cases that is the right meaning of the word "misdelivery." It appears to be the dictionary meaning. There is no authority that directly bears on the point. Counsel has cited several cases to me, but I do not think it is necessary that I should review them, because
E they do not really deal with the sort of point which I have to consider. The alternative argument is that "misdelivery" in its natural and ordinary meaning conveys to the ordinary man that there has been some mistake or inadvertence. If, for example, there are two conflicting claims between A and B and the bailee who holds the goods weighs them carefully up and decides, on the whole, that he ought to deliver to A, and decides wrongly, I doubt that in the ordinary
F sense of the word he would be said to have misdelivered to A, although he has wrongly delivered. When, for example, Mr. Wakeford in this case allowed Colmar to abstract the five articles on Sept. 2, he, Wakeford, knowing quite well that it was in breach of the regulations, but being moved to do so by the rather pitiful tale which Colmar told him, was he misdelivering them to A? If, taking a third example, he had taken all the articles out of all the trunks and distributed
G them to anybody who came to ask for them, could it be said, in the ordinary use of language, that he was misdelivering? I am disposed to think that while in certain contexts the word "misdelivery" may bear the wider meaning, in its more natural and popular meaning it is restricted to a wrong delivery involving some form of mistake or inadvertence, and that it is intended to cover the sort of situation where a package is delivered to the wrong person or address
H by error or inadvertence, or where the wrong article is handed out over a counter or in a cloak-room. No principle is more firmly settled than that when one is construing exceptions to the general liability of a carrier or a bailee, those exceptions are to be construed strictly, and, if a word is capable of bearing two meanings, it is the narrower meaning which ought to be given to it. I think that where "misdelivery" is used in an exception designed to protect a bailee, it does not cover more, and would not be regarded by the ordinary man who read such conditions as covering more, than what I might call accidental misdelivery

by mistake or error; and that, if a bailee in such circumstances wants to protect himself against every sort of wrongful delivery, however deliberately made, he must use clear and express terms to that end. Accordingly, I should hold that that condition, if it applied, would not protect the defendants in this case. For these reasons, the plaintiff's claim succeeds on liability, and there must be an inquiry into the amount of the damage which he has sustained.

Judgment for the plaintiff.

Solicitors: *Alan, Edmunds & Co.* (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

NANCE v. BRITISH COLUMBIA ELECTRIC RAILWAY CO., LTD. B

[PRIVY COUNCIL (Viscount Simon, Lord Porter, Lord Morton of Henryton, Lord Reid and Lord Asquith of Bishopstone), April 17-20, 23, June 20, 1951.]

Negligence—Contributory negligence—Running down action—Duty of plaintiff towards traffic.

When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full. This, however, is not to say that in all cases the plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully. Indeed, it would appear that in cases relating to running-down accidents such a duty exists. The proposition can be put even more broadly. Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle.

Davies v. Swan Motor Co. (Swansea), Ltd. ([1949] 1 All E.R. 620), applied, but observation of DENNING, L.J. (*ibid.*, p. 631), criticised.

AS TO CONTRIBUTORY NEGLIGENCE AS A DEFENCE TO A CLAIM FOR INJURIES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 679, 680, paras. 963, 964, and 1951 Supplement; and FOR CASES, see DIGEST, Vol. 36, pp. 109-117, Nos. 726-781, and Digest Supps.

Case referred to:

(1) *Davies v. Swan Motor Co. (Swansea), Ltd.*, [1949] 1 All E.R. 620; [1949] 2 K.B. 291; 2nd Digest Supp.

APPEAL by the plaintiff and CROSS-APPEAL by the defendants from a decision of the Court of Appeal of British Columbia (SLOAN, C.J., O'HALLORAN and SIDNEY SMITH, JJ.A.), dated Feb. 23, 1950, allowing in part an appeal from an order of WHITTAKER, J., dated June 24, 1949, on the trial of an action before a special jury.

On Jan. 18, 1949, between 11 p.m. and midnight, the appellant and her husband were crossing a road when a street-car driven by a motorman employed by the respondent company, which had stopped some seventy-five feet away to pick up passengers, re-started without warning and knocked down and killed the appellant's husband. At the time the road surface was slippery from ice and

the appellant and her husband could only cross the road slowly. The area was well lighted. The appellant claimed that her husband's death was due to the negligence of the motorman for which the respondent company was responsible, and the jury so found, awarding the plaintiff \$35,000 damages. In their defence the respondent company pleaded contributory negligence by the appellant's husband, but the jury found that there had been no such negligence. On appeal by the company, the Court of Appeal reduced the damages to \$12,000.

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David A. Sturdy (of the Canadian Bar) for the appellant.

J. W. de B. Farris, K.C., and *A. B. Robertson, K.C.* (both of the Canadian Bar), for the respondents.

June 20. **VISCOUNT SIMON**, in delivering the judgment of the Board, stated the facts and continued: Their Lordships consider that there would be no ground for reversing the jury's finding on the question of contributory negligence or for ordering a new trial unless the summing-up misled the jury. As to this, the passage in the learned judge's charge which is complained of was as follows:

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"Before you can find that Nance was guilty of contributory negligence, you must find that he owed a duty to the defendant, and that he committed a breach of that duty, and was, therefore, negligent. The onus of proving contributory negligence is on the defendant, and that must be proved by a preponderance of evidence which you are prepared to accept."

The three judges of the Court of Appeal were unanimously of the view that the judgment below could not stand, but for widely different reasons. **SLOAN**, C.J., held that the passage just quoted from the summing-up was a misleading and inaccurate exposition of the obligations of the deceased. In his view, the deceased owed no "duty" to the respondent company, but was subject to an imperative obligation to exercise reasonable care for his own safety. As the jury was not so instructed, the Chief Justice held that there was misdirection which had occasioned a miscarriage of justice, and that the verdict of the jury and the judgment entered thereon must be set aside. The learned Chief Justice then substituted the judgment which he considered ought to have been given, *viz.*, that the deceased was at fault in not keeping a proper look-out for the approaching street-car. He said:

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"Had he taken the precaution of a momentary glance, he would not have walked into a position of imminent peril."

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On this, their Lordships would respectfully observe that, in their opinion, there was no evidence that the deceased did not look, and that, if he looked, it may be that he saw that the street-car was stationary. A person crossing the road in such circumstances cannot reasonably be expected to "keep his eye" continuously on a street-car, for he has to look after his own steps on the slippery surface, and the Chief Justice only postulates a "momentary glance." As for damages, the Chief Justice's view was that the damages awarded by the jury were excessive and \$20,000 would fairly represent the pecuniary loss suffered by Mrs. Nance and those she represents. He fixed the degree of fault of the motorman at sixty per cent. and that of the deceased at forty per cent., with the result that judgment should be entered for \$12,000. **O'HALLORAN, J.A.**, on the contrary, took the view that "the jury would have failed to act judicially if they had not reached the decision that the motorman was solely responsible for the collision." The learned judge met the criticism directed to **WHITTAKER, J.**'s summing-up by examining the pleadings, which he considered set up the breach of duty owed by the deceased to the respondent company as the only contributory negligence alleged and did not include an allegation of his carelessness apart from duty. In his view **WHITTAKER, J.**'s charge was entirely correct. He added

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"the argument that in crossing the street the deceased owed no duty to

the street-car to be careful is one which I have struggled unsuccessfully to appreciate."

In the result, O'HALLORAN, J.A., while holding the respondent company solely to blame, was of opinion that the \$35,000 awarded as damages appeared to be "purely arbitrary and without foundation in the evidence" and was in favour of directing a new trial to decide the proper *quantum*. SIDNEY SMITH, J.A., also took the view that there was no contributory negligence by the deceased. A He said:

"the assumption that the deceased did not see the car at all is against the evidence . . . but he was then so far advanced in the intersection that he was entitled to assume the car would give way to him."

This learned judge was not prepared to accept the view that a pedestrian crossing a street owes to approaching traffic the duty to be careful, for he said: B

"a pedestrian carries no menace and, since a pedestrian is practically incapable of causing damage to a vehicle by a collision, only damage to him need be considered."

Their Lordships, as will appear hereafter, must not be understood to agree with this proposition. The learned judge consequently held that there was clear misdirection, but at the same time he held that the respondent company had disabled itself from taking the point since at the end of the summing-up WHITTAKER, J., had inquired of counsel whether there was any objection to his charge and counsel then appearing for the defendants had replied that it was "entirely fair." Their Lordships find themselves relieved from pronouncing on this view of the matter, which was apparently not shared by the other two judges of the Court of Appeal. SIDNEY SMITH, J.A., however, considered that the award of damages was excessive and thought that a figure of more than \$12,000 could not be justified. With this conflict of judicial opinion before them their Lordships must now deal with the objection to the summing-up and consider whether the conclusion reached by the jury was affected by any mistake in it. C

The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendants to the plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full. This view of the matter has recently been expounded, after full analysis of the legal concepts involved and careful examination of the authorities, by the English Court of Appeal in *Davies v. Swan Motor Co. (Swansea), Ltd.* (1) to which the Chief Justice referred. This, however, is not to say that in all cases the plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully. Indeed, it would appear to their Lordships that in cases relating to running-down accidents like the present such a duty exists. The proposition can be put even more broadly. Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle. If it were not so, the individual on foot could never be sued by the owner of the vehicle for damage caused by his want of care in crossing the road, for he would owe to the plaintiff no duty to take care. Yet such instances may easily occur, e.g., if the individual's rashness causes D E F G H

the vehicle to pull up so suddenly as to damage its mechanism, or as to result in following traffic running into it from behind, or, indeed, in physical damage to the vehicle itself by contact with the individual. When a man steps from the kerb into the roadway, he owes a duty to traffic which is approaching him with risk of collision to exercise due care, and if a sentence of the judgment of DENNING, L.J., in the *Davies* case (1), where he says ([1949] 1 All E.R. 631):

A

“When a man steps into the road he owes a duty to himself to take care for his own safety, but he does not owe to a motorist who is going at an excessive speed any duty to avoid being run down.”

is to be interpreted in a contrary sense, their Lordships cannot agree with it.

B

Their Lordships do not feel able to accept the view of O'HALLORAN, J.A., that the pleadings in this case debar the respondent company from objecting that the passage complained of in the charge of WHITTAKER, J., is wrong in law. The plea that the deceased was guilty of contributory negligence is wide enough to cover the contention that he was careless of his own safety, even though he did not owe a duty to the respondent company to be careful. It is, perhaps, unfortunate that the phrase “contributory negligence” uses the word “negligence” in a sense somewhat different from that which the latter word would bear when negligence is the cause of action. It may be pointed out that in the Law Reform (Contributory Negligence) Act, 1945, of the United Kingdom Parliament the contrast between the two meanings is recognised, for that Act, which provides for a sharing of responsibility for damage where a person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons,

D

defines “fault” by s. 4 as

“... negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.”

The Contributory Negligence Act, 1936, of British Columbia, which was passed before the United Kingdom Act, does not contain a definition of “fault,” but there is no doubt that in British Columbia the conception of contributory negligence, which is part of the common law, is the same as in this country. Such a plea should be treated as setting up want of care by the plaintiff for his own safety, whether in the circumstances of the accident the plaintiff owed a duty to the defendant or not.

F

With the above considerations in mind, both as to the facts and as to the law, their Lordships have carefully considered whether the impugned passage in the summing-up of the trial judge should be regarded as vitiating the conclusion of the jury. To decide this question, it is necessary to have regard to the summing-up as a whole. The misdirection occurs early in the judge's charge and it is followed by a full and careful survey of the evidence to which no objection can be taken

G

and which placed the essential issues before the jury very clearly. Moreover, the question put at the end of the summing-up to the jury on contributory negligence is correctly framed and contains no suggestion that the defence would be incomplete unless “duty” is proved to the jury's satisfaction. Their Lordships have come to the conclusion, after weighing these various elements, that the error complained of did not mislead the jury and the verdict that the respondent company was solely to blame should stand.

H

[HIS LORDSHIP dealt with the facts relating to the *quantum* of damages and concluded:] Their Lordships are satisfied that a jury could not reasonably have computed the total recoverable damages at a figure exceeding \$22,500. This figure, in their view, falls short of the \$35,000 award by a margin wide enough to justify the British Columbia Court of Appeal in rejecting the jury's figure. In that case a new trial on damages could be ordered, but the parties through their counsel have expressed their preference for the determination of the

figure for damages on the advice of this Board. Their Lordships, accordingly, will humbly advise His Majesty that the appeal should be allowed, and the sum of \$12,000 awarded as damages by the Court of Appeal should be increased to \$22,500. The cross-appeal should be dismissed.

Appeal allowed. Cross-appeal dismissed.

Solicitors: *Gard, Lyell & Co.* (for the appellant); *Linklaters & Paines* (for the respondents).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

STEYNING AND LITTLEHAMPTON BUILDING SOCIETY v. WILSON.

[CHANCERY DIVISION (Danckwerts, J.), July 6, 1951.]

Agriculture—Agricultural holding—Mortgage—Attornment clause—Notice to quit—Validity—Agricultural Holdings Act, 1948 (c. 63), s. 2 (1), s. 23 (1).

Mortgage—Attornment clause—Creation of relationship of landlord and tenant—Notice to quit—Validity—Application of Agricultural Holdings Act, 1948, s. 2 (1), s. 23 (1).

A mortgage, dated June 8, 1948, of property comprising market gardens and nursery grounds provided: "The [mortgagor] hereby attorns tenant to the [mortgagee] of the property at the yearly rent of 6d. if demanded provided that the [mortgagee] may at any time after the last Thursday in July next by giving to the [mortgagor] . . . at least three days' notice in writing of the intention of the [mortgagee] so to do determine the tenancy hereby created and enter upon the property but so that the said tenancy shall not render the [mortgagee] liable to account to any person as mortgagee in possession." On Oct. 26, 1950, the mortgagee gave written notice to the mortgagor determining the tenancy created by the attornment clause on Oct. 31, 1950, but the mortgagor contended that, the property being agricultural land, the notice was ineffective by reason of the Agricultural Holdings Act, 1948, s. 2 (1) and s. 23 (1).

HELD: the attornment clause did not have the effect of creating an agricultural tenancy for the purpose of the Agricultural Holdings Act, 1948, which applied only to true transactions between landlord and tenant in respect of agricultural holdings (*viz.*, tenancies created for the purpose of farming the land), and not to an artificial tenancy created by an attornment clause in a mortgage deed, and, therefore, the notice to quit was not ineffective by reason of s. 2 (1) and s. 23 (1) of the Act.

Portman Building Society v. Young ([1951] 1 All E.R. 191), considered.

AS TO RELATIONSHIP EFFECTED BY ATTORNMENT CLAUSE, see HALSBURY, *Hailsham Edn.*, Vol. 23, p. 325, para. 489; and FOR CASES, see DIGEST, Vol. 35, pp. 327-330, Nos. 712-737.

FOR THE AGRICULTURAL HOLDINGS ACT, 1948, see HALSBURY'S STATUTES, Second Edn., Vol. 28, p. 25.

Cases referred to:

(1) *Portman Building Society v. Young*, [1950] 2 All E.R. 443; *revsd.* C.A. [1951] 1 All E.R. 191.

(2) *Ex p. Isherwood. Re Knight*, (1882), 22 Ch.D. 384; 52 L.J.Ch. 370; 48 L.T. 398; 35 Digest 328, 719.

ADJOURNED SUMMONS.

The plaintiffs, Steyning and Littlehampton Building Society, as mortgagees issued an originating summons under R.S.C., Ord. 55, r. 5A, claiming possession of the mortgaged property from the defendant, the mortgagor. The mortgage contained an attornment clause whereby the tenancy created by the clause

could be determined by the society by three days' notice to the mortgagor. This notice had been given, but the mortgagor contended that, as the property was agricultural land, the notice was ineffective by reason of the Agricultural Holdings Act, 1948, s. 23 (1). The master made an order for possession subject to the decision of the judge on the point of law raised by the mortgagor's contention.

A *Dunbar* for the building society.
J. L. Arnold for the mortgagor.

B **DANCKWERTS, J.:** By an originating summons in the usual form, a mortgagee seeks to enforce his mortgage against the mortgagor by an order for delivery up of possession of the mortgaged property. The case illustrates again the undesirability of retaining in mortgages an attornment clause which is entirely obsolete, and, at the present time, serves no useful purpose. The mortgagor obtained an advance of £4,500 from the mortgagee, the Steyning and Littlehampton Building Society, and secured it by a mortgage, in the form commonly used by building societies, dated June 8, 1948. The deed contains the usual clauses for payment of the principal sum and interest by instalments and a charge by the mortgagor by way of legal mortgage of the property therein mentioned. The property in the present case consists of market gardens and nursery grounds, and is, therefore, of an agricultural nature. In cl. 3 (2) there is a provision requiring the mortgagor to repair the property. Clause 5 enables the society, if it expends money in repairs, to add the amount thereby expended to the security with interest. Clause 8 is in these terms:

D "The borrower hereby attorns tenant to the society of the property at the yearly rent of 6d. if demanded provided that the society may at any time after the last Thursday in July next by giving to the borrower or leaving upon the property at least three days' notice in writing of the intention of the society so to do determine the tenancy hereby created and enter upon the property but so that the said tenancy shall not render the society liable to account to any person as mortgagee in possession."

E The society has obtained from the master an order for possession in exercise of the learned master's discretion, subject only to the point of law in respect of which the case has been adjourned to me. The point of law is this. Counsel for the mortgagor contends that the attempt which was made by the society, by a letter dated Oct. 26, 1950, to determine the tenancy, created by cl. 8 of the mortgage, on Oct. 31, 1950, was ineffective by reason of the Agricultural Holdings Act, 1948, s. 23 (1), and, therefore, the tenancy still continues. Section 23 (1) provides:

G "A notice to quit an agricultural holding or part of an agricultural holding shall (notwithstanding any provision to the contrary in the contract of tenancy of the holding) be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy . . ."

H That sub-section, at first sight, does not seem to apply to a tenancy at will, but counsel for the mortgagor contends that it does so apply by reason of s. 2 (1) of the Act, which provides:

"Subject to the provisions of this section, where under an agreement made on or after Mar. 1, 1948, any land is let to a person for use as agricultural land for an interest less than a tenancy from year to year, or a person is granted a licence to occupy land for use as agricultural land, and the circumstances are such that if his interest were a tenancy from year to year he would in respect of that land be the tenant of an agricultural holding, then, unless the letting or grant was approved by the Minister

before the agreement was entered into, the agreement shall take effect, with the necessary modifications, as if it were an agreement for the letting of the land for a tenancy from year to year . . ."

Counsel for the mortgagor submits that a tenancy at will is less than a tenancy from year to year, and so, by virtue of s. 2 (1), assuming that the provisions of the Act otherwise apply, the tenancy shall take effect, with the necessary modifications, as if it were an agreement for the letting of the land for a tenancy from year to year, and, therefore, s. 23 (1) applies and restricts the giving of notice to quit.

Section 1 (1) of the Act contains the meaning of "agricultural holding." Section 1 provides:

"(1) In this Act the expression 'agricultural holding' means the aggregate of the agricultural land comprised in a contract of tenancy, not being a contract under which the said land is let to the tenant during his continuance in any office, appointment or employment held under the landlord. (2) For the purposes of this and the next following section, the expression 'agricultural land' means land used for agriculture which is so used for the purposes of a trade or business and includes any other land which, by virtue of a designation of the Minister of Agriculture and Fisheries (hereafter in this Act referred to as 'the Minister') under s. 109 (1) of the Agriculture Act, 1947, is agricultural land within the meaning of that Act."

By s. 94 (1), which is the definition section of the Act:

"'agricultural holding' has the meaning assigned to it by s. 1 of this Act . . . 'agriculture' includes horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds . . ."

Section 94 (1) contains a definition of "contract of tenancy" which I do not think I need read. "Landlord" is defined as meaning "any person for the time being entitled to receive the rents and profits of any land," and "tenant" as meaning "the holder of land under a contract of tenancy" and as including the executors and other persons deriving title from a tenant.

A somewhat similar point was considered by me in *Portman Building Society v. Young* (1), where I held that, in the case of an attornment clause in another building society mortgage, the relationship of landlord and tenant was created so that the rights of the landlord to obtain possession, even though the tenancy had been determined, were subject to the provisions of the Rent Restrictions Acts. The attornment clause in that case was different in certain respects from the present clause, and was in these terms:

"The mortgagor hereby attorns tenant to the society of such parts of the property as may at any time be in the occupation of the mortgagor at the monthly rent of £9 16s. to be paid on the days hereinbefore appointed for payment of monthly instalments and such rent is to be applied in or towards satisfaction of such instalments. Provided always that the society may at any time without giving previous notice in that behalf determine the tenancy created by such attornment."

In that case no notice had been given and it was the issue of the summons by the building society which determined the tenancy before the date when the matter came before me. On an appeal by the building society, the Court of Appeal took the view that the protection of the Rent Restrictions Acts, which I thought applied notwithstanding the argument that they had no application to mortgage transactions, did not apply because the relationship created

by the attornment had come to an end. SIR RAYMOND EVERSLED, M.R., said ([1951] 1 All E.R. 194):

“Once the contractual situation created by the attornment clause is gone, it is impossible with any sense of the meaning of words to refer to [the] relationship [of the parties] as that of landlord and tenant.”

A On that ground the Court of Appeal decided that there was no relationship of landlord and tenant and that the Rent Restrictions Acts had no application. I feel somewhat puzzled by the decision because one cannot help noticing that in many cases in which the Rent Restrictions Acts are applied the contractual relationship of landlord and tenant has gone, either by the expiration of the term of the tenancy, or by the giving of notice to quit, or for some other reason, and the tenant is protected by the provisions of those Acts, which create what is sometimes called a statutory tenancy. It is clear that the decision of the Court of Appeal in *Portman Building Society v. Young* (1) was based entirely on the view that, when the matter came before the court, there was no relationship of landlord and tenant between the parties. The present case is not one in which protection would be given by the relevant Act to a person who ceased to be a tenant, but it is argued by counsel for the mortgagor that the provisions of the Agricultural Holdings Act, 1948, impose certain restrictions on the giving of notices to determine tenancies so that, if those restrictions are not complied with, the notice to quit and the attempt to determine the tenancy is ineffective.

D The argument for the society in the present case is similar to the other argument which was put up by the building society in *Portman Building Society v. Young* (1), viz., that the situation between mortgagor and mortgagee was not such as was contemplated by the legislation which was alleged to restrict the mortgagee's right to possession. That argument is noticed by SIR RAYMOND EVERSLED, M.R., ([1951] 1 All E.R. 192) in *Portman Building Society v. Young* (1), but the court expressed no opinion on it, and, therefore, E I am left to consider, without any real assistance from that decision, whether the argument is an effective one in the present case. In the *Portman Building Society* case (1) SIR RAYMOND EVERSLED, M.R., after referring to the argument that the Rent Acts applied, said (*ibid.*, 192):

F “I confess that at first sight it seemed a strange case for the invocation of the Acts. It did not look as though it was the sort of case Parliament desired to protect in this way. Still, the mortgagees, for their own purposes, and to give themselves certain procedural advantages, had thought fit to insert this attornment clause, and it might be said that they must take the rough with the smooth and must prove what was necessary to bring their case within the class in which an order for possession under the Acts can be made, though, being mortgagees, they would almost inevitably have to sue in the High Court where they would be deprived of costs. The question whether or not an attornment clause in general does create what G SIR GEORGE JESSEL, M.R., called a real tenancy between a real landlord and a real tenant is one which might be perceptible of a good deal of argument. In the days when *Ex p. Isherwood. Re Knight* (2) came before this court, a mortgage commonly took the form of a conveyance of the fee simple so that at law the mortgagee was the owner of the property and the mortgagor his tenant at will. The position in equity was superimposed, and, in fact, controlled the relationship, but, as I have said, in those days the mortgagee became the owner at law, and, that being so, it was, perhaps, somewhat easier to say that in reality a position of H landlord and tenant was created by putting the attornment clause in the mortgage deed. Under modern conveyancing practice, the mortgagee does not become the legal owner. He becomes a chargee. He may become

a lessee under a term of years, but he does not become the owner. The mortgagor remains at law, as well as in equity, the owner subject to the charge and otherwise to the provisions of the mortgage deed. I do not think it necessary to pursue that aspect of the case further, nor do I think it necessary (and, indeed, on this we have heard no argument) to decide whether, having regard to the terms of the attornment clause and the uncertainty which, it is said, surrounds the description of the parcels, it would be right to say that no tenancy in the true sense of the term ever came into existence."

The reference to uncertainty in that case was a reference to the fact that the attornment there was of such part of the mortgaged property as might at any time be in the occupation of the mortgagor. In the present case there is no doubt that the attornment refers to the whole of the property and, consequently, the question of uncertainty does not arise.

There remains the argument of counsel for the society in the case now before me that, however ingeniously counsel for the mortgagor may have applied the provisions of the Agricultural Holdings Act, 1948, to the situation created by the attornment clause, the matter is not really a true contract of tenancy, but is only a lending and borrowing transaction, and, therefore, not within the intention of the Agricultural Holdings Act, 1948, or the Agriculture Act, 1947, which contains elaborate provisions for securing good management on the part of the landowners and good husbandry by the tenants of agricultural land. It seems to me that *Ex p. Isherwood. Re Knight* (2) does not assist the argument of counsel for the society, but does, in a sense, assist that of counsel for the mortgagor, because, although SIR GEORGE JESSEL, M.R., said a good deal about there being, not a real tenancy, but the relationship of mortgagor and mortgagee in that case, what he said was for the purpose of the exercise by the court of a discretion under the Bankruptcy Act, 1869, and the Bankruptcy Rules, 1871, in regard to the terms to be imposed on the trustee in bankruptcy in disclaiming a leasehold interest of a bankrupt, and SIR GEORGE JESSEL, M.R., was not, as it seems, saying that, by reason of it not being a true landlord and tenant case, the disclaimer provisions in the statutory provisions relating to bankruptcy had no application. Therefore, to that extent, it may be said that *Ex p. Isherwood. Re Knight* (2) supports the argument which counsel for the mortgagor seeks to apply in the present case. On the other hand, it seems to me that, if an attornment clause of this kind is to invoke the provisions of the Agricultural Holdings Act, 1948, and the Agriculture Act, 1947, and if those provisions are also to be applied to the artificial term of years created either expressly in the mortgage or by implication under s. 85 of the Law of Property Act, 1925, extremely odd results will occur, and the situation requiring the application of elaborate provisions in the Act of 1948 and the Act of 1947 will be an extraordinarily unreal one. It seems to me that those Acts cannot have been intended to apply to anything other than true transactions between landlord and tenant in respect of agricultural holdings. The tenancy agreements subject to the Acts are the tenancies created for the purpose of farming the land, and not the artificial tenancies created either under s. 85 (2) of the Act of 1925 or by an attornment clause in a mortgage deed for the purpose of providing a security to a mortgagee.

In the present case, I am supported in that conclusion by the form of the attornment clause. I took a different view in *Portman Building Society v. Young* (1), but in that case there was a rent in the attornment clause of a real money value, and for that reason I considered that the case came within the provisions of the Rent Restrictions Acts. In the present case, the tenancy, such as it is, created by the attornment clause in cl. 8 of the mortgage, is at a yearly rent of 6d., if demanded. It seems to me that it would be disregarding the true nature of the transaction and applying in a highly artificial manner

the provisions of a statute passed for a very different purpose, if I were to hold that that attornment clause had the effect of creating an agricultural tenancy for the purpose of the Agricultural Holdings Act, 1948, which could only be terminated on notice in accordance with the very restrictive provisions contained in that statute for the benefit of the farming community. Accordingly, I hold that the Agricultural Holdings Act, 1948, does not apply here.

Declaration accordingly.

Solicitors: *Lewis, Holman & Lawrence*, agents for *Raper & Co.*, Chichester (for the building society); *Montagu's and Cox & Cardale* (for the mortgagor).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

NOVELLO AND CO., LTD. v. HINRICHSEN EDITION, LTD. AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Birkett, L.JJ.), June 21, 27, 28, 29, 1951.]

Copyright—Emergency legislation—Power of comptroller to grant to non-enemy subject licence to exercise copyright owned by enemy—Right of owner, after shedding enemy character, to exercise copyright subject to rights of statutory licensee—Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939 (c. 107), s. 2 (1).

On Feb. 19, 1940, the plaintiffs obtained from the Comptroller-General of Patents, Designs and Trade Marks, under the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, s. 2 (1), a non-exclusive licence in respect of the copyright of a musical work published by the firm of C. F. Peters, the owner of the firm and of the copyright being, at that time, H.H., an enemy subject within the meaning of the Act, who died in Belgium in 1942, the executor named in his will having pre-deceased him. On June 1, 1948, the plaintiffs obtained a similar licence in respect of another musical work published by C. F. Peters. On Mar. 2, 1949, M.H., who was at all material times a British subject by naturalisation, obtained letters of administration with the will annexed of the estate of his father, H.H. In an action by the plaintiffs against H. Edition, Ltd. and M.H., alleging infringement of copyright in respect of these works, the defendants contended, *inter alia*, that, as H. Edition, Ltd., had done the acts complained of as the licensee of M.H., in whom the copyright in the works was now vested, there was no infringement of the plaintiffs' licences by either of the defendants.

HELD: on the true construction of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, owners of copyrights to which the Act referred were still free to exercise their rights, subject to the restrictions imposed by the Trading with the Enemy Act, 1939, unless and until a licence affecting them was granted by the comptroller; under s. 2 (4) of the Copyright Act a licence, when granted, ousted any exercise of the owner's right which would be inconsistent with the terms of the licence, and, to the same extent, it overrode any licence previously granted by the owner, and, therefore, when a licence was granted under the Act its terms had to be looked at to see how far the owner's rights were restricted; as the statutory licences granted to the plaintiffs under s. 2 (1) were non-exclusives there was nothing to prevent M.H., the present owner of the copyright, (and a non-enemy subject), from exercising the copyrights or granting non-exclusive licences in respect of them, and, therefore, there was no infringement by either of the defendants of the licences granted to the plaintiffs.

Per SIR RAYMOND EVERSLED, M.R.: As, in the circumstances, the question whether the comptroller had jurisdiction to make the order of June 1, 1948, would not affect the result of the appeal, the court would

not express a concluded opinion on the point, but, having regard to the view expressed by MORTON, J., in *Re I. G. Farbenindustrie Akt.'s Agreement* ([1940] 4 All E.R. 490, and 58 R.P.C. 54), it was not certain that the view expressed by WYNN-PARRY, J., on this matter was well founded. The point should, therefore, be left open for the judge of first instance, when a similar question came before the courts, to take his own independent view and not to feel himself bound either by the view of WYNN-PARRY, J., or that of MORTON, J.

Decision of WYNN-PARRY, J. ([1951] 1 All E.R. 779), affirmed.

FOR THE PATENTS, DESIGNS, COPYRIGHT AND TRADE MARKS (EMERGENCY) ACT, 1939, s. 2, see HALSBURY'S STATUTES, Vol. 32, p. 1171.

Cases referred to:

(1) *Willcock v. Muckle*, *ante*, p. 367.

(2) *Re I. G. Farbenindustrie Akt.'s Agreement*, [1940] 4 All E.R. 486; [1941] Ch. 147; 110 L.J.Ch. 167; 165 L.T. 290; 58 R.P.C. 31; 2nd Digest Supp.

APPEAL by the plaintiffs from an order of WYNN-PARRY, J., dated Feb. 21, 1951, and reported [1951] 1 All E.R. 779, dismissing an action for alleged infringement of copyright.

The plaintiffs, who were music publishers, claimed *inter alia* an injunction to restrain the defendants, Hinrichsen Edition, Ltd., and Max Hinrichsen, from producing, or reproducing, or selling, or offering for sale by way of trade, or distributing for the purposes of trade, certain musical works in respect of which the plaintiffs held licences dated Feb. 19, 1940, and June 1, 1948, granted to them by the Comptroller-General of Patents, Designs and Trade Marks, under the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, s. 2. The defendants admitted the acts which were alleged to constitute infringement, but denied infringement, contending that the copyright in the works in the United Kingdom was vested in the second defendant as administrator of the will annexed of his father, Henri Hinrichsen, who was the former owner of the copyrights, and who had died in Belgium in 1942, and that the defendant company had done the acts complained of as the licensee of the second defendant, who was at all material times a British subject by naturalisation.

WYNN-PARRY, J., held *inter alia* (a) that the claim of Max Hinrichsen to have succeeded to the copyrights formerly owned by his father was well founded; (b) that the comptroller had no jurisdiction to grant the licence of June 1, 1948; and (c) that there was nothing in the language of the Act of 1939 to prevent the owner of a copyright who had shed his character of an enemy from exercising his copyright subject to any licences granted by the comptroller, and, therefore, as the licences granted to the plaintiffs were non-exclusive, Max Hinrichsen, as the present owner of the copyright of the works in question was entitled to permit the exercise of that copyright by the defendant company, provided that the plaintiffs' statutory licences were not prejudiced so long as they continued to exist. The plaintiffs appealed from the decision of the learned judge on the last two points.

Sir Andrew Clark, K.C., and *Aldous* for the plaintiffs.

S. Pascoe Hayward, K.C., and *F. E. Skone James* for the defendants.

SIR RAYMOND EVERSHED, M.R.: This is an appeal from a decision of WYNN-PARRY, J., in an action brought by the plaintiffs for infringement of certain copyrights. The nature of the claim is set out with commendable brevity in the statement of claim and is founded on two orders made by the Comptroller-General of Patents, Designs and Trade Marks pursuant to powers which, it is said, were duly vested in him under the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939. The first of the two orders was dated Feb. 19, 1940, and related to a piece of music known as "Rustle of Spring" by Sinding, and the second order was made on June 1, 1948, relating

to a sonatina by Clementi. It was alleged in the statement of claim that the first defendants, Hinrichsen Edition, Ltd., had infringed the plaintiffs' rights by selling or offering for sale these musical works, and the second defendant, Max Hinrichsen, was joined as being a person who, it was said, had participated in the wrong and had purported to grant to the first defendants a licence, claiming himself to be the owner of the copyrights. The relief prayed was an injunction to restrain the defendants from infringing the copyrights in these musical works and an inquiry as to damages and delivery up of the infringing material. The amended defence is a long document to which I need only briefly allude, but the substance of it was to allege that Max Hinrichsen, the second defendant, was the owner of the copyright in these two works at all material dates (a phrase which I shall have presently to define) and that, the first defendants being his licensees, there was no infringement by either of the defendants.

The short facts which gave rise to the litigation as so pleaded are these. Until 1938 or 1939, an old-established business of high repute, known as C. F. Peters of Leipzig, had been the owners of the copyright in those two works and a great many other musical works. That firm was a partnership, or what is the equivalent to a partnership, and the partners at the date of which I am speaking consisted of one Henri Hinrichsen, the father of the second defendant, and another of his sons. The Hinrichsen family were Jews and they came, therefore, under the disapproving eye of the then rulers of Germany, who proceeded, in pursuance of the anti-Jewish legislation in which they indulged with apparent pleasure to themselves and great injustice to the Jewish community, to cause the business and assets of the firm to be transferred, nominally by the Hinrichsens, to two persons called Dr. Hermann and Dr. Petschull. The two Hinrichsens departed from Leipzig. The son died first, in 1940, and in 1942 the father, Henri, died in Belgium, which was then in the occupation of the Nazi armies. The way in which Max Hinrichsen, the second defendant, claims to have succeeded to the copyrights of the old firm of Peters is that in March, 1949, he took out letters of administration with will annexed of the estate of his father, Henri. That grant, dating back, according to the principles of our law, meant that, ever since the death of Henri, Max had been, in the eye of English law, the owner of the English copyrights, and Max is, and has been at all material times, a British subject by naturalisation.

The defence having raised these matters, a reply was put in, and the question of the title was disputed at considerable length during the trial in the court below, which lasted for nineteen days. The learned judge found that the transfer under the anti-Jewish legislation in Germany to Dr. Hermann and Dr. Petschull was a transfer to which these courts would pay no attention whatever, and that, accordingly, the claim of Max to have succeeded to the copyrights formerly owned by his father, as surviving partner of Peters, was well founded. Counsel for the plaintiffs has not challenged that finding, with the result that we have not been involved in these contentious matters and in the reading of the considerable body of evidence which the learned judge heard.

I now proceed to state, more precisely, what are the two points which alone are presented to us for determination. By way of preface I say this. In 1940, when the first licence to the plaintiffs was granted, there is no doubt that the copyrights were enemy-owned within the meaning of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939. On June 1, 1948, if the question had then been asked, a very natural answer would have been that they were probably still enemy-owned. As I have indicated, however, on the granting of letters of administration to the second defendant, Max Hinrichsen, dating back to 1942, we can now say, on the basis of the learned judge's judgment (which has not been contradicted) that on June 1, 1948, the copyrights must be taken to have been owned by Max, a British subject. The licences granted to the plaintiffs, by the orders of Feb. 19, 1940, and June 1, 1948,

were non-exclusive, *i.e.*, they did not grant the rights which they covered exclusively to the grantees, and they were also for limited periods. The grant not being exclusive, *prima facie* it appears clearly to follow that the exercise by the first defendants of the right to publish these works as a result of another licence, also non-exclusive, by the second defendant, would be no infringement if there was a right to grant such licences on the part of the second defendant. That rests on the simple proposition that one non-exclusive licensee cannot complain that another non-exclusive licensee is infringing the first non-exclusive licensee's grant. There are, therefore, two questions under the statute. The first is whether Max, admittedly now the owner of the copyrights, can grant to anyone a non-exclusive licence, or whether, as counsel for the plaintiffs has claimed, the effect of the Act of 1939 is to take away altogether, and for the whole term of the copyright until such time as the Act is repealed, all the rights of the copyright owner to deal with his own copyright? The second question is whether, on the date when the second licence was granted (as the copyrights must be taken to have then been non-enemy owned) there was any jurisdiction in the comptroller to make the order granting the licence. If there was not, then the order is ineffective and produces no rights. The learned judge decided both those points in favour of the defendants. On the first question, I take clearly the view that the making of the order and the Act of 1939 did not, either of them or together, take away the copyright owner's right to grant a licence, subject only to the terms of s. 2 (4) of the Act, and, therefore, that there was no infringement by either of the defendants of the non-exclusive licences granted by the comptroller.

As I have taken that view, it is unnecessary to express a concluded opinion on the other point of construction, *viz.*, whether the fact that at some time, however remote in the past, the copyrights have been owned by an enemy or an enemy subject is sufficient to vest in the comptroller the powers of the Act. I should, however, make it clear how the point arises. It emerges from the opening language of s. 2 (1) (a), which states the conditions on which the powers of the comptroller to make orders arise. The language is:

"Where—(a) an enemy or an enemy subject is, or has at any time since the beginning of Sept. 3, 1939, been, whether alone or jointly with any other person . . . the owner of a copyright . . ."

The learned judge took the view that, on the true construction of those words, it was necessary that, at the time the application was made to the comptroller for an order, there was an enemy or enemy subject who was, or had at any time since Sept. 3, 1939, been the owner of a copyright. On the other hand, it is contended by counsel for the plaintiffs that, according to the ordinary meaning of the words used, the condition is satisfied, and the jurisdiction of the comptroller arises, if at any time since Sept. 3, 1939, and for however short a time, the copyright has been owned by an enemy or enemy subject, whatever has since happened either to the original enemy-owner or a former enemy-owner, and whether or not at the time of the application the owner is or is not an enemy. The second view (that for which counsel for the plaintiffs contended) does, of course, seem startling. This Act, unlike many others passed about the same time, which have recently been considered in *Willcock v. Muckle* (1), is not limited in its duration by reference to "the emergency." True, it is an Act which was passed, as the long title states, " . . . to meet any emergency which may arise as a result of war," but it is an Act which has no automatic termination and no means whereby it can be terminated, and it will remain, therefore, on the statute book until repealed. Moreover, it is to be noted that, just as the Trading with the Enemy Act, 1914, remained unrepealed for twenty-five years until it was replaced by the Trading with the Enemy Act, 1939, so it may be that this Act will remain on the statute book for a long time. As one looks ahead into the future, it does, indeed, seem startling that this right in the comptroller to grant licences will persist for

years, simply because at some time, however short, the copyright owner or his predecessor in title might, for a short time, have been in, say, occupied France. There is, therefore, a strong ground for supposing that such a construction goes beyond the purpose of the Act. On the other hand, according to its ordinary sense, the language of s. 2 (1) (a) which I have cited, seems to imply the meaning given to it by counsel for the plaintiffs, and s. 2 (5) seems clearly to contemplate that at the date of the grant of the licence the copyright owner need not be

A an enemy. It is right to say that this point was not raised, as I understand it, except formally on the pleadings. It was not a point which counsel for the defendants had actually taken in argument. It was raised, rather, by the learned judge and debated between him and Mr. Shelley (who then appeared for the plaintiffs) in the course of Mr. Shelley's final speech, and, perhaps, because it so arose, the attention of the learned judge was not directed to *Re I. G. Farbenindustrie Akt.'s Agreement* (2), in which MORTON, J. ([1940] 4 All E.R. 490, and 58 R.P.C. 54) seems to have taken the view contended for by counsel for the plaintiffs in this case and contrary to that which appealed to WYNN-PARRY, J. As I have said, however, this particular point is no longer essential to the result. If we were to express a concluded opinion on it adverse to the defendants, we should leave them in the difficult position that they C could not appeal against it. On the other hand, I think, having regard to the argument and, in particular, to the view expressed by MORTON, J., in *Re I. G. Farbenindustrie Akt.'s Agreement* (2), it is right to say that I am not satisfied that the view taken by WYNN-PARRY, J., is well founded. I think, therefore, that the question should be left open for the judge of first instance, if and when D this matter comes again before the courts, to take his own independent view and not to feel himself bound by the view of WYNN-PARRY, J., any more than he would feel himself bound by the view of MORTON, J. It may well be, in view of the statement made to us by Mr. Bevan on behalf of the comptroller, that the actual significance of the point will not be great and will, as time goes on, recede altogether, but in the circumstances I propose to say no more on that point than I have done and I will turn to the other point.

E The argument of counsel for the plaintiffs has, I think, on analysis, come to this. He fully accepts that, if the result of the Act of 1939 is wholly to suspend for the entire term of the copyright all the rights of the copyright owner if he or his predecessor in title has been an enemy within the meaning of the Act, for however short a time, he must show that the result follows from the proper reading of the words, either expressly or by necessary implication. F As a matter of general principle such a taking away (for suspension is a taking away, in spite of the distinction which counsel for the plaintiffs sought to draw) of the rights of the owner must be clearly expressed in the Act, and, however beneficent the comptroller may be (and, indeed, though he may be quite infallible in his administration), an owner of copyright would, I think, not feel those considerations to be an entirely satisfactory compensation for the deprivation G of his own right to deal with his own property. Counsel for the plaintiffs starts by saying that the purpose of the Act of 1939 was to sterilise copyrights of the character named (I am not going to refer to patents and designs, for this case is concerned only with copyrights) and to put them into the beneficent hands of the comptroller, so that, for this long period of time, the profits of the copyright should always be available for the custodian of enemy property for H purposes connected with or arising out of the war. I do not accept that first premise. I think that the purpose of the Act was not to sterilise the rights of the parties, but to prevent their sterilisation, and that the Act was designed to put into the comptroller's hands a power to see that these copyrights could be used in the public interest although the person who alone could give the right to use them was prevented from doing so by his enemy status. (Again, I confine myself to copyrights, though the force of this may be even stronger with regard to patents). I, therefore, approach the Act with that in mind. Although, as

I have said, it is an Act which is not temporary in the same sense as some of the Acts passed about this time were temporary, it is an Act which, according to the long title, was designed to meet emergencies arising out of the war and we should not, therefore, unless forced so to do, give it a construction which would appear to extend far beyond the mischief which, according to its own expression, it was designed to remedy.

I think counsel for the plaintiffs fairly admitted that his case really rested on the following contention (for he could find no words which, in terms, suspended all the rights of the owner). He said that, since the comptroller was given, by s. 2 (2) (a) of the Act, the right to make orders granting exclusive licences, therefore, he must exclusively have the right to grant any licences. Verbally, that proposition sounds attractive, but, logically, it is, I venture to think, unsound. It is, of course, to be borne in mind that an exclusive licence by no means comprehends only a licence covering the whole of the rights of the copyright for the whole of the term of the copyright, though the right to grant an exclusive licence would, no doubt, comprehend that particular transaction, however unlikely in practice it may be. As I have said, however, the proposition itself is, I think, unsound, and when one looks at s. 2 (2), s. 2 (3) and s. 2 (4), and also, indeed, at the other sections to which we were referred, all the indications are, I think, the other way. As we are dealing with musical copyrights, it is, perhaps, not inappropriate to say that, reading s. 2 (2), s. 2 (3) and s. 2 (4), the indications appear in a *crescendo*. In s. 2 (2) (b) there is power given to make an order

“ . . . notwithstanding that a licence, whether exclusive or otherwise (not being an exclusive licence granted by virtue of the powers conferred by this section), is in force in relation thereto . . . ”

That, I think, is consistent with the view (contrary to that for which counsel for the plaintiffs contended) that licences are contemplated after the impact of the Act, being licences granted by the owner (as well, indeed, as by the comptroller himself), the exception being only in the case of exclusive licences granted by the comptroller. The matter is more forcible when one comes to s. 2 (3), which provides that:

“ Where . . . the comptroller makes an order granting a licence in relation to a . . . copyright in relation to which any other licence has been granted otherwise than by an order . . . ”

made under s. 2, then he is given the power to vary those other licences, a power similar to the power conferred on him by s. 1 (2), but limited in that case to “ pre-taint ” licences (as they have been called), *viz.*, licences granted before the impact of the Act. It may be that s. 2 (3) is not entirely conclusive against the contention of counsel for the plaintiffs, because there may be substance in the distinction which he drew between the circumstances in which the comptroller could make a variation under s. 1 (2) and those in which he could make one under s. 2 (3)—though I think that at this stage counsel for the plaintiffs has got on very thin ice. When, however, we come to s. 2 (4) and read what I have ventured in anticipation to call the *forte*, I think the ice gives way under him altogether. Section 2 (4) states:

“ An order granting a licence under this section shall, without prejudice to any other method of enforcement, operate as if it were embodied in a deed granting the licence which . . . the owner of the copyright . . . had executed with full capacity so to do, and the order shall accordingly operate to take away from any such party any right in relation thereto the exercise whereof would be inconsistent with the exercise of the licence in accordance with and subject to the terms on which it is granted.”

Counsel for the plaintiffs has sought to escape from that very formidable difficulty by saying: “ Well, the sub-section is purely procedural. It is intended

to give a right of action to the statutory licensee against the copyright owner, and, although the sub-section says 'the order shall take away the owner's rights so far as is necessary,' that is in no way in conflict with the proposition that the Act has already suspended all the rights." Counsel draws distinction between taking away the rights and their total suspension by saying that, although a person's rights are totally suspended, he has only to go to the comptroller and obtain a licence from him and then he can himself exercise his rights. That argument wholly fails to satisfy me. I think s. 2 (4), and, in particular, the final words thereof, make it quite plain that what the licence granted under the order does is what s. 2 (4) says that it does, *viz.*, *pro tanto* it takes away the rights of the owner as though he had made a grant in the terms of the order. I think, were it otherwise, it would be a little shocking. The suggestion that the existence of this control would have the effect, during the whole term of the copyright, of completely taking away from the owner all his rights of dealing with his own property is one which no court could accept unless the words used were absolutely compelling. I certainly have failed to find any such compulsion in s. 2 (4).

I need not travel through the other parts of the Act which have been mentioned. Suffice it to say that there is nothing anywhere else which I can find capable of being the smallest comfort to the argument of counsel for the plaintiffs. It was suggested by both counsel on behalf of the plaintiffs with apparent equanimity that the Act contemplates that, perhaps half a century hence, a copyright owner could come with his hat in his hand and obtain from the comptroller, out of the goodness of his heart, the right to operate his own copyright, and then it was suggested that that privilege which the copyright owner might obtain, if he were lucky, would be qualified in that he would have to pay royalties to the Custodian of Enemy Property in respect of the exercise of the rights relating to his own copyright. I am not surprised that WYNN-PARRY, J., rejected this argument with some vigour. I think it is a bad argument and I also reject it. For these reasons I think that the appeal ought to be dismissed.

JENKINS, L.J.: I entirely agree. So far as these proceedings are concerned, the only interest which the plaintiffs have in the two copyrights is the interest of statutory licensees under the two orders made by the comptroller pursuant to the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939. By s. 2 (5) of the Act (which I will call for brevity the Copyright Act, 1939), the plaintiffs, as statutory licensees, are empowered to sue for infringement in their own name as though they were the owners of the copyright, subject to provisions as to the joinder of the actual owner to which I need not refer in detail. Nevertheless, it is incumbent on them, in order to succeed, to establish that there has, in fact, been an infringement. On the facts, which have been fully stated by SIR RAYMOND EVERSHED, M.R., they clearly cannot do that unless they can show that the authority given by Max Hinrichsen to the defendant company to use these copyrights was not a valid authority. On the facts, which SIR RAYMOND EVERSHED, M.R., has stated, it is clear that Max, as personal representative of his father, was able to give the authority which he gave, and that there is no reason in law why it should be held invalid unless a reason is to be found in the Copyright Act itself.

As SIR RAYMOND EVERSHED, M.R., has said, this Act, in so far as it operates to take away rights in property, must be strictly construed and must not be taken to interfere with proprietary rights further or otherwise than it is either expressly or by necessary implication found to do when its provisions are examined. The relevant provisions have been fully discussed by SIR RAYMOND EVERSHED, M.R., and I need not go into them again at length. Section 1 (2) enables the comptroller, in certain cases, to revoke or vary licences granting interests in copyrights. That sub-section, it is agreed, is directed, or, at all

events, primarily directed, to cases in which copyrights were subject to licences before any question of enemy ownership entered into the case. Speaking for myself, I am not entirely satisfied that what I may describe as a "post-commencement of hostilities" licence might not, in some circumstances, come within the purview of s. 1 (2), but, at all events, its primary intention is as I have mentioned. Be that as it may, there is clearly nothing whatever in s. 1 to indicate that, subject to the restrictions imposed by the Trading with the Enemy Act, 1939, it is not possible for a licence to be granted otherwise than by the comptroller in respect of a copyright owned or formerly owned by an enemy. Section 2 (1) of the Copyright Act, 1939, empowers the comptroller to grant licences in respect of copyrights in the circumstances in which the section is applicable, *i.e.*, the circumstances of ownership or interest on the part of an enemy or an enemy subject, to which SIR RAYMOND EVERSHED, M.R., has referred. There is nothing whatever in this sub-section to prohibit the granting of licences by other persons, if they are otherwise lawfully entitled to do so. Section 2 (2) empowers the comptroller (a) to grant an exclusive licence and

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"(b) to make an order granting a licence . . . notwithstanding that a licence, whether exclusive or otherwise (not being an exclusive licence granted by virtue of the powers conferred by this section), is in force in relation thereto; and (c) to make an order granting a licence on any terms that the comptroller may think expedient."

This sub-section is in the nature of a further definition of the extent of the power to grant licences conferred on the comptroller. Again, there is nothing in it to show that no other person can, in any circumstances, grant a licence, as counsel for the plaintiffs invites us to hold. As SIR RAYMOND EVERSHED, M.R., has said, s. 2 (2) (b) contains some indication contrary to the argument of counsel for the plaintiffs, in that it enables the comptroller to make his grant notwithstanding that a licence, whether exclusive or non-exclusive, not being an exclusive licence granted by virtue of the powers conferred by the section, is in force in relation thereto. Section 2 (3), again, contains indications contrary to the contention of counsel for the plaintiffs, and s. 2 (4) is, to my mind, well-nigh conclusive against it.

Taking all these indications together, it seems to me that, not only can it not be said that the powers conferred on the comptroller by the Copyright Act, 1939, are such that the Act itself by necessary implication ousts all the rights of the actual owner of a copyright, but there are, on the contrary, strong indications the other way. In my judgment, on the true construction of the Copyright Act, 1939, its effect is that, subject to the restrictions imposed by the Trading with the Enemy Act, 1939, owners of copyrights to which the Copyright Act, 1939, applies are still free to exercise their rights unless and until some licence affecting them is granted by the comptroller. Such a licence, when granted, ousts any exercise of the owner's rights which would be inconsistent with the terms of that licence, and, to a like extent, overrides any licence previously granted by the owner, but, unless and until the comptroller has moved in the matter and has granted a licence, the owner's rights, in my judgment, remain as they were. When a licence has been granted, its terms must be looked at to see how far the owner's rights are restricted. Where, as in the present case, a mere non-exclusive licence has been granted, then there is nothing in the Act to prevent the owner, if not disqualified by some provision of the Trading with the Enemy Act, 1939, from himself exercising the copyright or granting non-exclusive licences in respect of it. Accordingly, I agree that the appeal fails and should be dismissed.

BIRKETT, L.J.: I agree with the two judgments which have been delivered.

Appeal dismissed.

Solicitors: *Frere, Cholmeley & Nicholson* (for the plaintiffs); *Kaufman & Seigal* (for the defendants). [Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

R. v. FULHAM, HAMMERSMITH AND KENSINGTON RENT TRIBUNAL. *Ex parte* MARKS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Devlin, J.J.), June 21, 22, July 9, 1951.]

Rent Control—Furnished house—Reduction of rent—Reduction below amount of standard rent—Attachment of rent to premises in rem—Reduction “affecting” Rent Restrictions Acts—Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 2 (2), s. 3 (2), s. 7.

On Sept. 1, 1939, a dwelling-house was let unfurnished at a weekly rent of £3 3s., which rent was the standard rent under the Rent Restrictions Acts, 1920 to 1939. In July, 1950, the landlord let the premises furnished, with certain services, at a weekly rent of £2 15s. Later, the tenant applied to a rent tribunal which reduced the rent to £1 5s. On an application by the landlord for an order of *certiorari* to quash the decision of the tribunal,

Held: both the standard rent and the rent fixed by a rent tribunal and registered under the Furnished Houses (Rent Control) Act, 1946, s. 2 (2) and s. 3 (2), attached to the premises *in rem*; it followed that, by fixing a rent below the standard rent the rent tribunal was doing something which “affected” the provisions of the Rent Restrictions Acts, 1920 to 1939, contrary to the provisions of s. 7 of the Act of 1946 and was beyond its jurisdiction even though the premises the rent of which was fixed were now let furnished; and, therefore, *certiorari* must go.

R. v. Paddington & St. Marylebone Rent Tribunal. Ex p. Bedrock Investments, Ltd. ([1948] 2 All E.R. 528), applied.

FOR THE FURNISHED HOUSES (RENT CONTROL) ACT, 1946, s. 7, see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1090.

Case referred to:

(1) *R. v. Paddington & St. Marylebone Rent Tribunal. Ex p. Bedrock Investments, Ltd.*, [1948] 2 All E.R. 528; [1948] 2 K.B. 413; [1949] L.J.R. 284; 112 J.P. 367; 2nd Digest Supp.

Motion for an order of *certiorari* to bring up and quash an order of the Fulham, Hammersmith and Kensington Rent Tribunal, made on Sept. 15, 1950, reducing the rent of a furnished letting to an amount below the standard rent.

De Ferrars for the applicant.

J. P. Ashworth for the tribunal.

Cur. adv. vult.

July 9. **HILBERY, J.**, read the following judgment. This is an application for an order of *certiorari* to remove into the High Court and to quash a decision of a rent tribunal given on the application of one D. G. Vallis concerning premises comprising a ground floor back room and kitchen with use of a bathroom and forming part of No. 20, Chepstow Villas, London, W., on the ground that the decision was one which the rent tribunal had no jurisdiction to make inasmuch as it reduced the rent of the said premises below the “standard rent” of those premises.

On Jan. 24, 1938, No. 20, Chepstow Villas, was already divided into flats let separately. The flat on the ground floor was the subject of this application. That flat was, and is, a separate dwelling to which the Rent Restrictions Acts, 1920 to 1939, apply. On that date the applicant, Rose Adela Marks, became the owner of No. 20, Chepstow Villas. The standard rent of this ground floor flat was then, and still is, £3 3s. per week. The applicant let the flat unfurnished from February, 1938, to February, 1940, to Ruby Journet at the standard rent of £3 3s. per week. In July, 1950, on the representation of a young woman who shortly afterwards became the wife of Mr. Vallis that she was about to be married and in urgent need of furnished accommodation in which to live with

her husband, the applicant furnished the flat and agreed to let it to the said young woman and her husband after their marriage. In accordance with that arrangement the flat was let furnished together with the use of a bathroom and w.c., electric light, hot water, and the benefit of the maintenance by the applicant of common parts of the premises, at a rent of £2 15s. per week. On July 28 notice to quit the premises was given to the tenants. Mr. Vallis thereupon made an application to the Fulham, Hammersmith and Kensington Rent Tribunal. Particulars of his application are not before the court, but on Sept. 13, 1950, the tribunal announced their decision reducing the rent of the premises from £2 15s. per week to £1 5s. per week, and further ordered no variation in the period in respect of which the rent was so fixed.

Before us it was contended for the applicant that, as there was—and it was conceded there was—under the Rent Restrictions Acts, 1920 to 1939, a standard rent of the premises in question at the date of the application by Mr. Vallis, the rent tribunal had no jurisdiction to reduce the rent of the premises furnished below that standard rent and that the case was covered by the decision of the Court of Appeal in *R. v. Paddington & St. Marylebone Rent Tribunal. Ex p. Bedrock Investments, Ltd.* (1). For the tribunal it was contended that their decision only decided the rent of the premises as furnished premises, and, therefore, did not affect any provision of the Rent Restrictions Acts, 1920 to 1939, and was not a decision which they were precluded from giving by reason of s. 7 of the Furnished Houses (Rent Control) Act, 1946.

In my view, this case is covered both by the decision in *R. v. Paddington & St. Marylebone Rent Tribunal. Ex p. Bedrock Investments, Ltd.* (1) and on principle. The headnote to that case correctly states what was the precise decision in that case, namely, that:

“Where a dwelling-house to which the Rent Restriction Acts apply is let under a contract which also brings the premises within the Furnished Houses (Rent Control) Act, 1946, a rent tribunal under that Act has no jurisdiction to reduce the rent of the premises below the standard rent, since to do so would ‘affect’ provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, contrary to the provisions contained in s. 7 of the Furnished Houses (Rent Control) Act, 1946.”

In giving that decision, the members of the Court of Appeal summarised their views of the situation which arises when a rent tribunal sitting under the Act of 1946 purports to reduce the registered rent of premises which are within that Act to a level below the standard rent, in a passage in the judgment of the court as follows ([1948] 2 All E.R. 531):

“In our judgment, the question involved does, in fact, depend on the true construction of s. 7 of the Act of 1946, and, in particular, on the meaning which is to be attributed to the word ‘affects’ as it appears in the section. As to this it is to be borne in mind that complicated and, in some ways, intricate machinery had been devised through the medium of the Acts of 1920 to 1939 for the purpose of protecting tenants from the actual or potential avarice of landlords. Security from dispossession had also to be achieved, but with this we are not immediately concerned. The legislative provisions which are relevant for present purposes are those which were evolved over a considerable period, by a process of trial and error, with the object of imposing a ‘ceiling’ on the rent which a landlord could legitimately require his tenants to pay for the occupation of premises that came within the Acts. In our judgment, those provisions are included among the provisions which are to remain unaffected by the Act of 1946. Counsel for the landlords argued that some of those provisions are not only affected, but are overruled if the tribunals set up under the Act of 1946 purport to reduce the contractual or registered rent of premises which are within the Act to a level below the standard rent.”

In a concluding passage of that judgment the court further pronounced on this subject in the following terms (*ibid.*, 533):

A "All these considerations can lead only to the conclusion that a reduction by a tribunal of a contractual rent to a level below that of the standard rent does affect the provisions of the Rent Restrictions Acts, namely, the provisions under which the standard rent is determined, and, if need be, apportioned, and under which it may, in certain circumstances, be increased. Those provisions are 'affected' in the sense that they would be disturbed, and even overridden, if the rent tribunal is right. If the tribunal's argument is sound, the simple decision of the rent tribunals could substitute a lower 'ceiling' of rent for the 'standard' rent permitted by the Rent Restrictions Acts. The latter, as we have already said, is the subject of careful and elaborate legislation which, although drastically restrictive of landlords' rights, is not unmindful of them altogether, and the standard rent, with the permitted increases, presumably represents the return which the legislature regarded, and still regards, as proper for a landlord of controlled premises to receive. We cannot but think that, if Parliament had intended by the Act of 1946 to authorise the tribunals set up thereunder, in their discretion and by their unappealable decision, to reduce the standard rent and to override the permitted increases, they would have expressed that intention in clear and definite terms, and it is to be supposed that they would, moreover, have provided that one member at least of each tribunal should be a person having legal qualifications. We are, however, satisfied that the language of s. 7 of the Act sufficiently shows that such was not the intention of the legislature, which was, on the contrary, that the Act should be supplementary to, but (except as to s. 9 and s. 10 of the Act of 1920) in no way destructive of, the Rent Restrictions Acts of 1920 to 1939."

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E It is said that those passages were not necessary to the decision of that particular case, and it is true that the premises in question in that case came within both the Act of 1946 and the Rent Restrictions Acts. Although the passages which I have quoted may, therefore, be said to go beyond the narrower point which was being decided, they are obviously intended as a considered declaration and authoritative statement by that court for the guidance of rent tribunals sitting under the Act of 1946. In the present case when the rent tribunal decided to register a rent for the premises in question below the standard rent of those premises they were doing that which the Court of Appeal had declared they could not lawfully do. They were introducing a new prohibition which was an interference with the control set up by the Rent Restrictions Acts, and, therefore, affected the provisions of those Acts.

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G Apart from this authority the contention of the tribunal that the rent fixed by this tribunal and entered on the register is only of those premises as furnished premises and so does not offend against s. 7 as affecting any provisions of the Rent Restrictions Acts, 1920 to 1939, appears to me to be also answered in principle. By s. 4 of the Furnished Houses (Rent Control) Act, 1946, it is the rent payable for "the premises" which is entered in the register kept under the provisions of the Act, and by s. 9 a person who requires or receives any payment or any consideration in contravention of s. 4 is made guilty of an offence and liable on summary conviction to fine or imprisonment or both. Section 4 is, therefore, a penal section and must be construed strictly. It certainly does not contain any express words qualifying the word "premises" by any such word as "furnished." It is to be noticed, in considering whether the intention of the Act is that the rent fixed by the tribunal shall attach *in rem* to the premises, as opposed to merely altering the rent payable under the contract for the furnished letting, particulars of which have to be entered

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in the register, that, by s. 2, the local authority as well as either party to the contract may refer the contract to the tribunal for the district. It has been decided that the standard rent under the Rent Restrictions Acts attaches to the premises *in rem*, and, if, as it would seem, the rent fixed and registered by a tribunal sitting under the Act of 1946 also attaches to the premises *in rem*, then when such a tribunal registers a rent lower than the standard rent it necessarily is doing something which affects the provisions of the Rent Restrictions Acts, 1920 to 1939, and something which it has no power to do. It was said that this conclusion cannot be right because, if it were, where a rent tribunal under the Act of 1946 had fixed and registered a rent the premises could not thereafter be let for business purposes at other than the rent thus fixed. The fallacy in this contention lies in the fact that, if it were right, it would be equally an objection to saying that the standard rent under the Rent Restrictions Acts could not be said to attach to the premises *in rem*, but the courts have said it does. The fact is that a letting of the premises as business premises makes a difference in the *res* to which the standard rent or a rent fixed and registered under the Act of 1946 applies. The order must issue and the record be brought up to be quashed.

DEVLIN, J. (read by LORD GODDARD, C.J.): I agree that this application should succeed. The question is the same as that which was determined in *R. v. Paddington & St. Marylebone Rent Tribunal. Ex p. Bedrock Investments, Ltd.* (1), namely: Does an order of a tribunal under the Act of 1946 reducing the contractual or registered rent below the standard rent of a dwelling-house affect any provision of the Rent Restrictions Acts? The answer turns on the meaning to be given to the word "affect." In the case referred to the court was considering a partly furnished flat, if I may use that term as a convenient label to describe a flat in which a part of the rent, not amounting to a substantial portion, is attributable to the use of furniture or to attendance. One of the examples examined in the case was a flat in this category which had a standard rent of £70 and a rent determined under the Act of 1946 of £50. The Rent Restrictions Acts are, in effect, saying in relation to that flat: "You may not charge more than £70", and the Act of 1946 is saying: "You may not charge more than £50." If the Rent Restrictions Acts by implication said: "You may charge as much as £70," the Act of 1946 would clearly be affecting its provisions, for it would be taking away from the landlord a right granted to him by the Rent Restrictions Acts, but in the view of the Court of Appeal the Rent Restrictions Acts did not, on their proper construction, imply the grant of any such right. Accordingly, it was necessary for the court, if the landlord was to succeed, to give a wider meaning to the word "affect."

There is nothing logically abhorrent in the idea of a double prohibition. The party who is subject to it is caught by whichever limit is the lower. The later Act which imposes the lower figure does not clash directly with the earlier Act. It cannot even be said, in the case of these Acts, that the higher prohibition is rendered otiose, for there is provision in each Act for altering the figures, and their relation to each other is not, therefore, constant. In effecting the prohibition, it might be that at one time one statute was operative and at another the other statute. There was, therefore, in *R. v. Paddington & St. Marylebone Rent Tribunal. Ex p. Bedrock Investments, Ltd.* (1), no direct clash and no absolute incompatibility between the two Acts. The Court of Appeal in its judgment uses the words "overrule" and "override" in contexts which show that they are intended *a fortiori*. The "affection" which the Court of Appeal found to exist was something less than that. I think it may fairly be summarised as an interference with the scheme of control set up by the Rent Restrictions Acts. The Act of 1946 introduced a new restriction which affected the operation of that scheme of control. It is true that some of the reasoning in the judgment turned on the terms of the Increase of Rent and Mortgage Interest (Restrictions)

Act, 1920, s. 12 (3), which requires the judge in a proper case to apportion the standard rent and makes the apportionment "final and conclusive." The court did not base its judgment solely on the effect of s. 12 (3) and the broad principle which it applied is stated at the end of the judgment. The provisions of the Rent Restrictions Acts, it is said, would be disturbed, and even over-ridden, if the appellants' argument were right. It is pointed out that the standard rent is the subject of careful and elaborate legislation and that the Act of 1946 was intended to be supplementary to that legislation.

The distinction between the present case and *R. v. Paddington & St. Marylebone Rent Tribunal. Ex p. Bedrock Investments, Ltd.* (1), is that the flat in this case is fully furnished, and while in that state is not affected by any provision of the Rent Restrictions Acts. If the reasoning in *R. v. Paddington & St.*

Marylebone Rent Tribunal. Ex p. Bedrock Investments, Ltd. (1) had depended on the application to the flat of some specific provision in the Rent Restrictions Acts, this distinction might be sound. If, for example, the *ratio decidendi* had turned entirely on the apportionment section, s. 12, the case would not apply, but for the reasons I have given I think that the decision in the case was wider than that and that the question which I have to ask myself is whether the

flat in this case is within the scheme of control set up by the Rent Restrictions Acts, and, if so, whether the decision of the tribunal interferes with it. I think it is taking too superficial a view to treat this flat, because it is now furnished, as altogether outside the scope of the Rent Restrictions Acts. It has fallen under the control of those Acts. A standard rent has attached to it, and attaches, as it is sometimes said, *in rem*. So long as the flat is let furnished, it escapes

the operation of the Acts, but, once having come within the Acts, it is subject to what might be described as a conditional prohibition. Take a flat let fully furnished at £150 which has a standard rent of £100, and the furnished rent of which is reduced under the Act of 1946 to £50. In relation to that flat the Rent Restrictions Acts are saying: "If you remove your furniture, you may not let the flat for more than £100," and the Act of 1946 is saying: "If you leave your furniture where it is, you may not let the flat for more than £50."

This latter prohibition seems to me to be an interference with the scheme of control operative under the Rent Restrictions Acts, none the less so because the flat in its furnished state is only contingently under their sway. As the Court of Appeal pointed out in *R. v. Paddington & St. Marylebone Rent Tribunal. Ex p. Bedrock Investments, Ltd.* (1), the standard rent must be treated as representing the return which the legislature regards as proper for a landlord of

unfurnished or partly furnished premises to receive. If by adding more to what he grants, the landlord receives less, the Act of 1946 ceases to be, as in the view of the Court of Appeal it ought to be, supplementary to the control devised by the Rent Restrictions Acts, and becomes a major force. The contrary view, though this is, perhaps, only a matter of comment, would also lead to the absurdity that the landlord in this case could remove a part of the furniture so as to reduce the flat to the condition of a partly furnished flat, and then come back to the tribunal and demand, because of what she had taken away, that the rent should be increased.

I have reached this conclusion without construing literally s. 4 of the Act of 1946 as applying to the premises in any and every condition and whether let furnished or not. I have treated it as applying only to premises which fall within the scope of the Act, *i.e.*, either fully furnished or partly furnished. If I had treated it as applying to premises even when they become unfurnished, *R. v. Paddington & St. Marylebone Rent Tribunal. Ex p. Bedrock Investments, Ltd.* (1) would plainly apply, as counsel for the tribunal conceded, for the existence of the figure on the register would prevent the landlord from obtaining his standard rent. There is a passage in the judgment (though I think it is *obiter*, because it is dealing only with an example) that states the view of the

court that in such circumstances s. 4 would apply. I am, however, impressed by the argument that it is necessary to read some limitation into s. 4. The point is considered in MEGARRY'S RENT ACTS, 6th ed., p. 367. I need say no more than that I express no concluded opinion on it.

LORD GODDARD, C.J.: I agree with both the judgments which have been delivered and that the order for *certiorari* must go.

Order for certiorari.

Solicitors: *T. Richards & Co.* (for the applicant); *Solicitor, Ministry of Health* (for the tribunal).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

NOTE.

In the Estate of GALBRAITH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), July 11, 1951.]

Probate—Revocation of grant—Executors incapable of performing duties.

MOTION to revoke the probate of the will, dated May 13, 1929, of Juanita Galbraith, together with three codicils thereto, dated June 23, 1932, Oct. 22, 1934, and May 7, 1936, respectively, and to grant letters of administration *de bonis non* together with the will and codicils to the applicant, Peter Musson, a great-nephew of the deceased. The deceased died on Mar. 11, 1945, and probate of the will and codicils was granted on June 2, 1945, to the executors named therein. The application was made on the ground that the two surviving executors were unable to continue to perform their duties by reason of advanced age and physical and mental infirmity.

Case referred to:

(1) *In the Goods of Loveday*, [1900] P. 154; 69 L.J.P. 48; 82 L.T. 692; 23 Digest 245, 2996.

M. Morgan Gibbon for the applicant.

KARMINSKI, J.: The application is a novel one in that there appears to be no reported case in which both executors have been removed in this way, but in the present case there is the clearest evidence that both the surviving executors are of advanced age and suffering from such a degree of physical and mental infirmity as makes a continuance of their duties impossible. For reasons due to conditions in the Argentine, the estate has not yet been wound up, and I have to consider the object of the court in looking after the estate, in looking after the proper representation, and, not least, in looking after the interest of the parties beneficially interested. Applying the principles laid down by SIR FRANCIS JEUNE, P., in *In the Goods of Loveday* (1), I think it right to make an order in the terms of the motion.

Solicitors: *Birkbeck, Julius, Edwards & Coburn* (for the applicant).

R.H.W.

SHANKLIN PIER, LTD. v. DETEL PRODUCTS, LTD.

[KING'S BENCH DIVISION (McNair, J.), June 18, 19, 20, 21, 22, July 6, 1951.]

Warranty—Consideration—Third party caused to enter into contract with warrantor.

A Paint manufacturers represented to the owners of a pier that a paint which they manufactured was suitable for re-painting the pier. In reliance on this representation the pier owners specified that contractors under a contract with them to re-paint the pier should use the paint. The paint proved to be a failure and the pier owners suffered loss in consequence.

B HELD: on the facts the representation was a warranty; the consideration for the warranty was that the plaintiffs should cause the contractors to enter into a contract with the manufacturers for the supply of the paint for re-painting the pier; and, therefore, the warranty was enforceable and the paint manufacturers were liable in damages for its breach.

Drury v. Victor Buckland, Ltd. ([1941] 1 All E.R. 269), distinguished.

C AS TO WARRANTIES ON SALE OF GOODS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 52-73, paras. 64-84; and FOR CASES, see DIGEST, Vol. 39, pp. 479-481, Nos. 1017-1027, and Digest Supps.

Cases referred to:

- (1) *Crosse v. Gardner*, (1688), Carth. 90; 90 E.R. 656; 39 Digest 419, 515.
- (2) *Medina v. Stoughton*, (1700), 1 Salk. 210; 91 E.R. 188; 39 Digest 419, 516.
- (3) *Drury v. Victor Buckland, Ltd.*, [1941] 1 All E.R. 269; 2nd Digest Supp.
- (4) *Brown v. Sheen & Richmond Car Sales, Ltd.*, [1950] 1 All E.R. 1102.
- (5) *Parker v. Oloxo, Ltd. & Senior*, [1937] 3 All E.R. 524; Digest Supp.

ACTION for damages for breach of warranty.

E The plaintiffs were owners of Shanklin pier, Isle of Wight, and they alleged that, in consideration of an express warranty as to the qualities of a paint manufactured by the defendants, they had specified that such paint should be used by contractors under a contract to re-paint the pier. The paint proved a failure and they claimed damages for breach of the warranty. The defendants contended that they gave no such warranty, and further said, that, even if they had given the warranty, it would have provided no cause of action because the defendants were not parties to the contract for the painting of the pier.

F *Diplock, K.C.*, and *J. C. Leonard* for the plaintiffs.

Shelley, K.C., and *Aldous* for the defendants.

Cur. adv. vult.

G July 6. **MCAIR, J.**, read the following judgment. This case raises an interesting and comparatively novel question whether or not an enforceable warranty can arise as between parties other than parties to the main contract for the sale of the article in respect of which the warranty is alleged to have been given.

H The plaintiffs, Shanklin Pier, Ltd., are and were at all material times the owners of a pier at Shanklin, in the Isle of Wight, which, during the war, was partly demolished and allowed to fall into disrepair. In or about July, 1946, they had in mind to have this pier repaired and re-painted, and for this purpose they entered into a contract with their contractors, George M. Carter (Erectors), Ltd., to have the necessary repairs effected and to have the whole pier re-painted with two coats of bitumastic or bituminous paint. Under this contract they had the right to vary the specification. In these circumstances, their claim in this action against the defendants, Detel Products, Ltd., is that, in consideration of their specifying that their contractors should use for re-painting the pier two coats of a paint known as "D.M.U.", manufactured by the defendants, the defendants warranted that the D.M.U. paint would be suitable for re-painting

the pier, would give a surface impervious to dampness, would prevent corrosion and the creeping of rust, and would have a life of seven to ten years. They further say that, in reliance on this warranty, they duly specified that their contractors should use D.M.U. paint for re-painting the pier in lieu of the bituminous paint originally specified, and that their contractors bought quantities of the paint from the defendants and used it on the pier, that contrary to the warranty the paint was not suitable for re-painting the pier or for the protection of the pier from damp or corrosion or rust, and that its life was of a very short duration, with the result that the plaintiffs were put to extra expense amounting to £4,127 10s. The defence, stated broadly, is that no such warranty was ever given, and that, if given, it would give rise to no cause of action between these parties. Accordingly, the first question which I have to determine is whether any such warranty was ever given.

[HIS LORDSHIP reviewed the evidence and continued:] In the result, I am satisfied that, if a direct contract of purchase and sale of the D.M.U. had then been made between the plaintiffs and the defendants, the correct conclusion on the facts would have been that the defendants gave to the plaintiffs the warranties substantially in the form alleged in the statement of claim. In reaching this conclusion, I adopt the principle, stated by HOLT, C.J., in *Crosse v. Gardner* (1) and *Medina v. Stoughton* (2), that an affirmation at the time of sale is a warranty, provided it appear on evidence to have been so intended. Before considering the question of law resulting from this finding, I can state the remainder of the narrative briefly. On the faith of these warranties, the plaintiffs in due course caused the specification in the original contract to be amended by the substitution of two coats of D.M.U. without any superimposed decoration or finishing paint, in lieu of the two coats of bituminous paint originally specified, having obtained from their contractors estimates of the extra cost involved. The necessary D.M.U. was purchased by the contractors, and, as the repairs were completed and the old work was prepared for re-painting, the D.M.U. was applied and the property in the D.M.U. then, if not before, passed to the plaintiffs. Within a short time it proved to be unsatisfactory, and it was decided to carry out an extensive process of flame cleaning of the old parts of the structure at a cost of £4,127 10s., in order to remove all traces of bitumen. Notwithstanding this additional expenditure, the paint proved to be a complete failure.

Counsel for the defendants submitted that in law a warranty can give rise to no enforceable cause of action except between the same parties as the parties to the main contract in relation to which the warranty is given. In principle, this submission seems to me to be unsound. If, as is elementary, the consideration for the warranty in the usual case is the entering into of the main contract in relation to which the warranty is given, I see no reason why there may not be an enforceable warranty between A and B supported by the consideration that B should cause C to enter into a contract with A or that B should do some other act for the benefit of A. In support of this proposition, however, counsel for the defendants relied on the decision of the Court of Appeal in *Drury v. Victor Buckland, Ltd.* (3), and, particularly, on the judgment of SCOTT, L.J.

In that case the plaintiff, who had been approached by an agent of the defendants, dealers in refrigerating machines, agreed to purchase such a machine. As she was unable or unwilling to pay forthwith the whole of the purchase price, the deal was put through by the defendants selling the machine to a finance company who in turn entered into a hire-purchase agreement with the plaintiff, under which she eventually, when the whole of the hire-purchase instalments had been paid, acquired title to the machine. The machine proving unsatisfactory, the plaintiff sued the defendants, claiming damages for breach of the implied warranty or condition under s. 14 (1) of the Sale of Goods Act, 1893. This claim failed, SCOTT, L.J., saying ([1941] 1 All E.R. 273):

"It was a sale by the Buckland company to the hire-purchase company. The property passed to them on the terms that they would get paid by the hire-purchase company . . . Therefore, the claim against them . . . for breach of warranty is a cause of action unsupported by any contract of sale which would carry it . . ."

A This judgment can readily be understood in relation to its subject-matter, namely, an implied statutory condition or warranty arising out of a contract of sale, and one can well understand its being said that, as there is no contract of sale between the plaintiff and defendants, no implied warranty or condition can arise between them, but I do not read it as affording any support for the wider proposition for which counsel for the defendants here contended.

B The same view of the effect of this judgment as I have indicated was, I think, taken by JONES, J., in *Brown v. Sheen & Richmond Car Sales, Ltd.* (4). The learned judge there entered judgment against a motor car dealer on an express oral warranty given in relation to the purchase of a car, the transaction, as in *Drury v. Victor Buckland, Ltd.* (3) being carried through with the assistance of a finance company. Counsel for the defendants sought to distinguish that case on the ground that in the statement of facts it is stated that "the plaintiff agreed to buy" the motor car from the defendants, but the pleadings in the case, which I have examined, lend no support to the suggestion that there was in any legal sense any agreement to sell between the plaintiff and the defendants. The judgment of HILBERY, J., in *Parker v. Oloxo, Ltd. & Senior* (5) ([1937] 3 All E.R. 529), also, I think, negatives the defendants' submission in this case. Accordingly, in my judgment, the plaintiffs are entitled to recover against the defendants £4,127 10s., as damages for breach of the express warranties alleged.

Judgment for the plaintiffs.

Solicitors: *Cripps, Harries, Hall & Co.* (for the plaintiffs); *P. H. Brashier & Co.* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

ST. AUBYN (L.M.) AND OTHERS v. ATTORNEY-GENERAL (NO. 2).

F [HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord Oaksey, Lord Radcliffe, Lord Tucker), April 17, 18, 19, 23, 24, 25, 26, 30, May 1, July 12, 1951.]

G *Estate Duty—Determination of life interest—Exclusion of deceased from benefit "by contract or otherwise"—"Property in which the interest subsisted"—Transfer of assets of settlement to company for cash payable partly by instalments—Trustees transferring some cash and title to instalments to life tenant absolutely—Trustees and life tenant purchasing shares of company—Extinguishment of life tenant's interest in assets remaining settled—Application of "statutory hypothesis"—Finance Act, 1940 (c. 29), s. 43 (1), s. 56 (1), (2).*
Estate Duty—Company—"Transfer" to company—"Benefits" from company—Transfer by direction of tenant for life—Exercise of general power of appointment—Fiduciary capacity—Transfer of securities and equitable interests forming part of settled fund—Transfer of settled land—Subscription for shares—Loans to deceased by company—Finance Act, 1940 (c. 29), s. 46 (1), s. 47 (1), (2), s. 58 (2), (4), (5).

H *Settled Land Acts—Power of tenant for life to direct change of investment—Settled Land Act, 1925 (c. 18), s. 73.*

Under a re-settlement dated Apr. 26, 1879, and a deed-poll dated Jan. 9, 1905, certain freehold estates, investments representing capital moneys, and equitable interests were held on such trusts as the deceased and P. should

by deed or deeds jointly appoint, and, in default and pending such appointment, in trust for the deceased for life with remainders over. On Mar. 21, 1927, a company limited by shares was registered with a nominal capital of £200,000 divided into two hundred thousand shares of £1 each, with power to issue any part of its capital with preferential rights, and each of the seven subscribers to the memorandum took one ordinary share as nominee of the trustees of the re-settlement. By a deed-poll dated Mar. 23, 1927, the deceased and P., in exercise of their joint general power of appointment, varied the provisions of the re-settlement in such a way as to authorise the sale of the settled property to the company in consideration wholly or partly of a capital sum of money payable by instalments or of debentures or other securities, shares or stock of the company. On Mar. 24, 1927, an agreement was made between the deceased, P., and the company whereby it was agreed that the whole of the settled property should be sold to the company in consideration of (a) £950,000 to be paid in cash by the company to the trustees on completion of the sale, and (b) £750,000 to be paid by the company to the trustees by forty half-yearly instalments of £18,750 each without interest (unless default were made in payment of instalments). The sale was completed, the deceased, as tenant for life under the Settled Land Act, 1925, conveying the legal estate in the freehold land and the trustees of the re-settlement conveying the equitable interests and the investments (the deceased joining in the conveyance of the equitable interests and directing the transaction as tenant for life), and the company paying £950,000 to the trustees by means of a cheque drawn by the company against an advance made by its bankers for the purpose. Out of the money so obtained, the trustees expended £850,000 in subscribing for ordinary shares of the company and the seven shares already held by the subscribers to the memorandum as nominees of the trustees, which made the trustees, in effect, the holders of fifty thousand ordinary shares of the company. By a deed-poll dated Mar. 28, 1927, the deceased and P., in exercise of their joint general power of appointment, directed and appointed that a sum of £100,000, the balance of the £950,000, advanced by the trustees to the deceased, and the said sum of £750,000 payable by the company to the trustees by forty half-yearly instalments as aforesaid (and any interest thereon) should be held in trust for the deceased absolutely instead of for his life only. The trustees thereupon paid over the said sum of £100,000 to the deceased who immediately paid the like amount to the company in consideration of the issue to him of one hundred thousand preference shares of £1 each fully paid. On Mar. 29, 1927, by a further deed-poll, the deceased and P., in further exercise of their joint general power of appointment, extinguished the deceased's life interest in the property remaining subject to the trusts of the re-settlement and declared other trusts which excluded the deceased from all benefit.

The result of all the above transactions was that the property remaining settled consisted of fifty thousand ordinary shares of the company, in which the deceased had no interest, and that the £100,000 used by the deceased for the purchase of one hundred thousand preference shares of £1 each of the company and the forty half-yearly instalments of £18,750, had become the absolute property of the deceased. All the property which was previously comprised in the settlement had been vested in the company. On Nov. 10, 1940, the deceased died, and it was admitted that estate duty was payable in respect of his one hundred thousand preference shares and of the remaining instalments of the sum of £750,000 then due, which were the deceased's absolute property. The Crown also claimed (a) under the Finance Act, 1940, s. 43, against the trustees for estate duty in respect of the fifty thousand shares which remained settled, and, alternatively,

(b) under s. 46 of the Act of 1940 against the company for estate duty on that proportion of the company's assets corresponding to the benefits accruing to the deceased from the company during the last three years of the deceased's life.

HELD: (i) notwithstanding the enlargement of the deceased's life interest to an absolute interest in the £100,000 and the instalments of the purchase money, the fifty thousand shares were thereafter retained to the entire exclusion of the deceased and of any benefit to him by contract or otherwise within the meaning of s. 43 (2) of the Act of 1940, and, therefore, s. 43 (1) did not operate so as to preserve the presumptive claim for duty in respect of the fifty thousand shares for more than three years from the date of the release of the deceased's life interest therein, nor was the application of s. 43 in any way affected by s. 56 (2) of the Act of 1940 because, even applying the "statutory hypothesis" in accordance with s. 56 (1), the instalments, the preference shares, and the ordinary shares remained separate and distinguishable interests or properties.

A.-G. v. Worrall ([1895] 1 Q.B. 99), *Munro v. Stamp Duties Comr.* ([1934] A.C. 61) and *New South Wales Stamp Duties Comr. v. Perpetual Trustee Co., Ltd.* ([1943] 1 All E.R. 525), applied.

(ii) (LORD SIMONDS and LORD OAKSEY *dissentientibus*) the transfer of the investments and equitable interests to the company was a "transfer" by the deceased for the purposes of s. 46 (1), for, although in so far as the deceased was exercising the power which he had under the Settled Land Act, 1925, s. 73, to direct a change of investment, he effected the transaction in a fiduciary capacity not imposed by a disposition made by himself, the deed of appointment of Mar. 23, 1927, was not effected in a fiduciary capacity and that deed was the first step in a series of associated transactions within s. 58 (2) of the Act of 1940 of which the actual transfer was another, but (LORD NORMAND and LORD RADCLIFFE *dissentientibus*) the transfer of the settled land to the company was not a "transfer" within s. 46 (1) because it was an actual transfer by the deceased in pursuance of his powers under the Settled Land Act, 1925, and was, therefore, effected solely in a fiduciary capacity not imposed by a disposition made by the deceased, nor (LORD RADCLIFFE and LORD TUCKER *dissentientibus*) was the payment to the company by the deceased of £100,000 as a subscription for preference shares such a transfer.

(iii) having regard to s. 47 (1) and (2) of the Act of 1940, loans made by the company to the deceased during the statutory period at four per cent. per annum interest constituted "benefits" within s. 46 (1).

Decision of the COURT OF APPEAL ([1950] 1 All E.R. 951), reversed.

FOR THE FINANCE ACT, 1940, s. 43, s. 46, s. 56, s. 58, see HALSBURY'S STATUTES, Second Edn., Vol. 9, pp. 470, 474, 486, 487.

Cases referred to:

- (1) *A.-G. v. Worrall*, [1895] 1 Q.B. 99; 64 L.J.Q.B. 141; 71 L.T. 807; 59 J.P. 467; 21 Digest 12, 54.
- (2) *Grey (Earl) v. A.-G.*, [1900] A.C. 124; 69 L.J.Q.B. 308; 82 L.T. 62; 21 Digest 12, 51.
- (3) *Munro v. Stamp Duties Comr.*, [1934] A.C. 61; 103 L.J.P.C. 18; 150 L.T. 145; Digest Supp.
- (4) *New South Wales Stamp Duties Comr. v. Perpetual Trustee Co., Ltd.*, [1943] 1 All E.R. 525; [1943] A.C. 425; 112 L.J.P.C. 55; 169 L.T. 414; 2nd Digest Supp.
- (5) *Re Cochrane*, [1905] 2 I.R. 626; *affd.* C.A. [1906] 2 I.R. 200; 21 Digest 17, 83 i.

- (6) *Re Micklethwait*, (1855), 11 Exch. 452; 25 L.J.Ex. 19; 156 E.R. 908; 21 Digest 110, 824.
- (7) *Tennant v. Smith*, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 56 J.P. 596; 3 Tax Cas. 158; 28 Digest 17, 87.

APPEAL by the taxpayers and CROSS-APPEAL by the Crown from an order of the Court of Appeal, dated Apr. 5, 1950, and reported [1950] 1 All E.R. 951, reversing an order of CROOM-JOHNSON, J., dated May 20, 1949, made on an English information laid by the Attorney-General. A

The Crown claimed estate duty under the Finance Act, 1894, s. 1, by virtue of the provisions of the Finance Act, 1940, s. 43, if and so far as necessary supplemented by s. 56 (2) of that Act, or, alternatively, by virtue of s. 46 of that Act. CROOM-JOHNSON, J., rejected the arguments of the Crown, and gave judgment for the taxpayers with costs. The Court of Appeal allowed the Crown's appeal in respect of the claim by virtue of s. 43 and s. 56 (2). B

Sir Andrew Clark, K.C., S. Pascoe Hayward, K.C., and N. C. Armitage for the taxpayers.

The Attorney-General (Sir Frank Soskice, K.C.), Upjohn, K.C., and J. H. Stamp for the Crown. C

The House took time for consideration.

July 12. The following opinions were read.

LORD SIMONDS: My Lords, this appeal and cross-appeal are brought from an order of the Court of Appeal, by which that court, as to the subject-matter of the appeal, reversed an order of CROOM-JOHNSON, J., and, as to the subject-matter of the cross-appeal, thought fit to make no order. The facts of the case are somewhat involved, but present no real difficulty. It is in the application to them of the relevant sections of the Finance Act, 1940, that I have found it impossible to reach any conclusion that is wholly satisfactory. I will give a broad outline of the relevant facts supplementing it as occasion demands. D

Immediately before the execution by the late Lord St. Levan, who died on Nov. 10, 1940, and to whom I will refer as Lord St. Levan, of the instruments dated in March, 1927, which are next mentioned, he was, under a re-settlement dated Apr. 26, 1879, tenant for life in possession of certain settled property consisting of (a) freehold lands in the counties of Devon and Cornwall, (b) investments representing capital moneys arising under the re-settlement, and (c) equitable interests which by virtue of the Law of Property Act, 1925, represented certain undivided shares in land which at the date when that Act came into operation were subject to the re-settlement. The whole of the settled property was, under the re-settlement and a deed-poll dated Jan. 9, 1905, subject to an overriding general power of appointment exercisable by Lord St. Levan and Sydney Alexander Ponsonby (hereinafter called "Mr. Ponsonby") who was one of the trustees of the re-settlement, but had no beneficial interest thereunder. The subsequent limitations of the re-settlement, as varied by the said deed-poll and other instruments, were such as to cause the settled property to devolve together with the barony of St. Levan, which on the death of Lord St. Levan without having had a son devolved on and is now held by his nephew, Francis Cecil St. Aubyn. On Mar. 21, 1927, St. Aubyn Estates, Ltd. (hereinafter called "the company") was incorporated under the Companies Acts, 1908 to 1917, (by the name of St. Aubyn Settled Properties, Ltd., which was afterwards changed) with a nominal capital of £200,000 divided into two hundred thousand shares of £1 each with power to issue any part of its capital with such preferential rights as might be thought expedient. The company's memorandum of association was subscribed by seven persons, including Lord St. Levan and Mr. Ponsonby, each of whom agreed to take one share. These seven shares were held by the subscribers as nominees of the trustees of the re-settlement. E F G H

- By the company's articles of association it was provided that Lord St. Levan should be the governing director of the company. By a deed-poll dated Mar. 23, 1927, Lord St. Levan and Mr. Ponsonby exercised their overriding power of appointment in such manner as to authorise the transactions next mentioned. By an agreement dated Mar. 24, 1927, to which Lord St. Levan, Mr. Ponsonby, and the company were parties it was agreed that the whole of the settled property
- A should be sold to the company for £1,700,000 of which £950,000 was to be paid to the trustees of the re-settlement (hereinafter called "the trustees") in cash on completion of the sale (which was to take place on Mar. 26, 1927) and the balance of £750,000 was to be paid to the trustees in cash by forty half-yearly instalments of £18,750 each (the first payment to be made on June 24, 1927) without interest except that any instalment not paid within twenty-one
- B days of becoming due was to carry interest at five per cent. per annum from the date on which it ought to be paid until actual payment thereof. On the same date (Mar. 24, 1927) the company allotted one hundred thousand seven per cent. cumulative non-participating preference shares of £1 each to Lord St. Levan at par and 49,993 ordinary shares to the trustees at a premium of £16 a share. By a deed dated Mar. 25, 1927, Lord St. Levan as tenant for life
- C directed, and he and Mr. Ponsonby in exercise of their overriding power of appointment ratified such direction, that the trustees should invest the capital money subject to the re-settlement in ordinary shares of the company at the premium required by the company. On Mar. 26, 1927, the sale to the company of the freehold lands and equitable interests which I have already mentioned was completed by two conveyances of that date. The sales to the company
- D of the investments already mentioned were completed on or about the same date by appropriate separate instruments. The consideration payable immediately in cash (£950,000) was so paid, but £850,000 was immediately repaid by the trustees to the company in consideration of the issue to them or their nominees of fifty thousand ordinary shares of the company (including the shares for which the memorandum had been subscribed) at the price of £17 a share.
- E The balance of £100,000 was dealt with as hereafter stated.

- The net result of the transactions so far described was that the property formerly subject to the re-settlement had been converted into (a) fifty thousand fully paid ordinary shares of the company, (b) the right to receive from the company a capital sum of £750,000 by the instalments already mentioned, and (c) the above mentioned sum of £100,000 paid by the company to the trustees.
- F By a deed-poll dated Mar. 28, 1927, Lord St. Levan and Mr. Ponsonby, in exercise of their overriding power, appointed that the said sum of £100,000 and the said sum of £750,000 payable by instalments and any interest which might become payable in respect of any instalment should be held on trust for Lord St. Levan, and that he should be entitled thereto for his own sole use and benefit instead of for his life only. The trustees thereupon paid over the said
- G sum of £100,000 to Lord St. Levan and he immediately paid the like amount to the company in consideration of the issue to him of one hundred thousand preference shares fully paid. By a further, and final, deed-poll dated Mar. 29, 1927, Lord St. Levan and Mr. Ponsonby in exercise of their overriding power appointed new trusts of (in effect) the whole of the property then remaining subject to the re-settlement, *i.e.*, the £50,000 issued ordinary shares of the
- H company. The terms of the new trusts so declared were somewhat complicated, but they admittedly had the effect of extinguishing the life interest of Lord St. Levan in the fifty thousand ordinary shares and of excluding him from all benefit so far as those shares and the income thereof were concerned.

The following further facts are not now in dispute: (a) that the trustees are to be regarded for the purposes of s. 43 (2) (a) of the Finance Act, 1940, as having assumed *bona fide* possession and enjoyment of the fifty thousand ordinary shares immediately after the determination by the deed-poll of Mar. 29,

1927, of the late Lord St. Levan's life interest therein; (b) that the company is a company to which s. 56 of the Finance Act, 1940, applies and was concerned in associated operations (as defined by s. 59 of that Act) of which the determination of Lord St. Levan's life interest was one.

Lord St. Levan having, as I have said, died on Nov. 10, 1940, claims for estate duty were made against his executors in respect of the outstanding instalments of the purchase money and the one hundred thousand preference shares which he still retained, and these claims were admitted and paid. But other claims also were made which are the subject of the present appeal and cross-appeal. They were (a) a claim under the Finance Act, 1940, s. 43, against the appellants, the present trustees of the re-settlement, for estate duty on the fifty thousand ordinary shares of the company, and, alternatively, (b) a claim under s. 46 of that Act against the company for estate duty on a proportion of the company's assets corresponding to the benefits accruing to Lord St. Levan from the company. These claims were not admitted, and proceedings were, accordingly, begun by English information for their enforcement. On May 20, 1949, CROOM-JOHNSON, J., dismissed the information in regard to both claims. His Majesty's Attorney-General appealed to the Court of Appeal which allowed the appeal under claim (a), but made no order on claim (b). From that order the appellant trustees have appealed to this House in respect of claim (a), and in respect of claim (b) the Attorney-General has similarly appealed. To his appeal the trustees and the company are respondents. The two claims are for the purpose of the present proceedings admitted to be strictly alternative and it was for that reason that the Court of Appeal, having decided in favour of claim (a), refused to make any order on claim (b). In the result your Lordships are deprived of the assistance which you would otherwise have had from the consideration by the learned judges of the Court of Appeal of the very difficult problems that arise under the latter claim.

The two claims, my Lords, are not only alternative but wholly independent of each other, and I find it convenient to deal with them separately. I have said that the first claim arises under the Finance Act, 1940, s. 43, but this claim must be considered under two aspects. For the Crown, while contending that the claim would be valid even if s. 43 stood alone, invoke also the provisions of s. 56 if their primary claim fails. I propose, therefore, first, to consider the question whether there is a valid claim under s. 43 and for the time being to disregard s. 56. Section 43, so far as relevant and in force at the death of Lord St. Levan, provided:

"(1) Subject to the provisions of this section, where an interest limited to cease on a death has been disposed of or has determined, whether by surrender, assurance, divesting, forfeiture or in any other manner . . . and whether for value or not, after becoming an interest in possession,—(a) if apart from the disposition or determination the property in which the interest subsisted would have passed on the death under s. 1 of the Finance Act, 1894, that property shall be deemed by virtue of this section to be included as to the whole thereof in the property passing on the death . . . (2) Where the relevant disposition or determination was *bona fide* effected or suffered three years before the death . . . the preceding subsection shall not have effect—(a) if *bona fide* possession and enjoyment of the property in which the interest subsisted was assumed immediately thereafter by the person becoming entitled by virtue of or upon the disposition or determination and thenceforward retained to the entire exclusion of the person who had the interest and of any benefit to him by contract or otherwise . . ."

I apply the provisions of this section to the facts that I have stated. On Mar. 27, 1927, Lord St. Levan had an interest in possession limited to cease on his death in the settled property which on that date had assumed the form

of (i) fifty thousand ordinary shares of the company, and (ii) £750,000 payable in the instalments that I have mentioned, and (iii) the sum of £100,000 paid or immediately payable by the company. But he had also jointly with Mr. Ponsonby an overriding general power of appointment which could be exercised so as to vest all or any part of the settled property in him absolutely. They so exercised it as to vest in him the properties I have numbered (ii) and (iii), and, when they had done so, he surrendered his life interest in the ordinary shares. It is agreed that *bona fide* possession and enjoyment of the shares was assumed immediately thereafter by the persons becoming entitled on the determination of Lord St. Levan's interest. But was it—and this is the only question—thenceforth retained to the entire exclusion of Lord St. Levan and of any benefit to him by contract or otherwise? I cannot think that any doubt could be entertained on this matter but for the use which the Crown seeks to make of certain decisions, particularly *A.-G. v. Worrall* (1) and *Earl Grey v. A.-G.* (2), to which I will refer later. If A, being the owner in fee of an estate in Yorkshire and an estate in Wiltshire, gives outright to B his estate in Yorkshire, it is an irrelevant circumstance that he retains his estate in Wiltshire: equally it is irrelevant, if, being tenant for life of the two estates, he surrenders his interest in one and retains it in the other, and equally so, if, his interest being not in two geographically separate estates but in land and capital moneys subject to the same settlement, he surrenders his interest in the one form of property and retains it in the other. But let it be supposed that he is neither the owner in fee, nor the tenant for life, and nothing more, but that he is tenant for life with an overriding general power of appointment, by virtue of which he can dispose of all or any part of the settled property at his absolute discretion. I cannot doubt that, if he chooses so to exercise the power as to make some part of the settled property his own, it is wholly irrelevant that by a contemporaneous or later transaction he surrenders his life interest in other parts of it. It is true that he has disposed of his life interest in one part of the property and it is true that he has enlarged his life interest in the other part of it into an absolute interest, but these two truths do not add up to the proposition that the property in which he has surrendered his interest is not retained by the donees to the entire exclusion of him and of any benefit to him by contract or otherwise. I do not think that the examples that I have given of cases where duty would not be exigible in respect of property in which a life interest had been surrendered were or could be seriously challenged. If so, it can only be due to a radical misconception of the facts in the present case that the learned Attorney-General pressed the claim under s. 43 unaided by s. 56. For though truly the overriding power of appointment was not vested in Lord St. Levan alone, there is nothing to suggest that there was a bargain of any kind between him and Mr. Ponsonby. They were together masters of the situation, and, if they thought fit to appoint to Lord St. Levan an absolute interest in part of the settled property, the effect, so far as s. 43 is concerned, is precisely the same as if Lord St. Levan had had the sole power and had exercised it. It is not necessary to determine what the result might be if there had been a bargain between Lord St. Levan and the remaindermen or even between Lord St. Levan and Mr. Ponsonby. It is sufficient that these two in their united wisdom thought fit to do what he in his single wisdom, had he had the sole power, might have done. I am, therefore, of opinion that the claim for duty on the ordinary shares, so far as it is based on s. 43 alone, is not well founded. I will defer my observations on the cases, which I have mentioned, until an attempt has been made to discover the scope and effect of s. 56.

Section 56 of the Finance Act, 1940, so far as relevant, provides as follows (the sub-sections being inverted for the sake of clarity):

“(2) Where a company to which this section applies was concerned in the disposition or determination of an interest limited to cease on a death

effected or suffered as mentioned in sub-s. (2) of s. 43 of this Act . . . or was concerned in any one or more of associated operations of which the disposition or determination . . . formed one, the conditions as to the entire exclusion of the person who had the interest . . . and of any benefit to him, specified in the said sub-s. (2) . . . shall be treated as having been satisfied if and only if they would have been so treated in the circumstances aforesaid."

A

The "circumstances aforesaid" so referred to are those stated in sub-s. (1) of the same s. 56 in the following words:

" . . . the following circumstances, namely, if the assets of the company had been held by it on trust for the members thereof and any other person to whom it is under any liability incurred otherwise than for the purposes of the business of the company wholly and exclusively, in accordance with the rights attaching to the shares in and debentures of the company and the terms on which any such liability was incurred, and if the company had acted in the capacity of a trustee only with power to carry on the business of the company and to employ the assets of the company therein."

B

C

It is, as I have said, admitted that the company is a company to which the section applies. The assets of the company consisted of the settled property or the property for the time being representing it, and the members were at the relevant date (*i.e.*, immediately before the surrender by Lord St. Levan of his life interest in the ordinary shares) the trustees as holders of the ordinary shares and Lord St. Levan as holder of the preference shares and as the person to whom the company owed the instalments of purchase money. This flows from the definitions of "member" and "debenture" in the Act. Then—and here I paraphrase the sub-section—the conditions as to the entire exclusion of Lord St. Levan from the property in which he surrenders his interest, *i.e.*, the ordinary shares, and of any benefit to him by contract or otherwise are only satisfied, if they would have been so treated, *i.e.*, would have been satisfied, if the company had held its assets on trust for the trustees and Lord St. Levan in accordance with the rights attaching to the ordinary and preference shares and the debenture.

D

E

My Lords, I must admit that I find this a bewildering conception. The Court of Appeal in a judgment delivered by JENKINS, L.J., found it possible to give a meaning to the section and summarised its conclusion in words which I think it worth while to quote. They said ([1950] 1 All E.R. 961):

F

"We think that for this purpose 'the property in which the interest subsisted' within the meaning of s. 43 (2) (a) must be taken as being the settled property as it stood before the sale to the company, the subsequent creation of the different equitable interests which the statutory hypothesis supposes being merely in the nature of a preliminary carving up of the property into the appropriate beneficial interests with a view to securing the desired benefit to the deceased out of it on the intended determination of his life interest. But, even if we are wrong in this, and 'the property in which the interest subsisted' must, as counsel for the taxpayers contended, be considered as consisting only of the residue of the property remaining after provision for the other interests, we are satisfied that the benefit taken by the deceased in the shape of the creation and vesting in him of the right to receive the half-yearly instalments, though on this view not taking effect out of the 'property in which the interest subsisted,' was on the facts so clearly referable to and connected with the determination of the deceased's life interest in that property as to constitute a fatal objection to exemption under s. 43 (2)."

G

H

It had been stated earlier in the judgment that the application of the statutory hypothesis (as it was conveniently called) was to eliminate completely the element of sale from the trustees to the company and the consequent conversion of the property and to make the case stand for the purpose of s. 43 as if the property had been transferred to the company as trustee on trust (i) to pay thereout to the trustees £750,000 by the instalments and on the dates mentioned to be held by them as capital moneys on trust for Lord St. Levan for life with remainders over, (ii) subject thereto to raise and pay to Lord St. Levan £100,000 on whatever future event should be taken as corresponding for the purposes of the hypothetical trust to the winding-up of the company and in the meantime to pay him interest on that sum at seven per cent. per annum out of the net income of the property, and (iii) subject thereto on trust both as to income and capital for the trustees on trust for Lord St. Levan for life with remainders over in accordance with the terms of the settlement. And this view is emphasised by saying that the right to receive the instalments of the £750,000 is converted into "an equitable interest charged by way of primary trust on the entire income and capital of the settled property as it stood before the sale to the defendant company."

My Lords, I will assume that the Court of Appeal rightly stated the effect of applying the statutory hypothesis to the facts of this case. The question whether duty is exigible still remains one of great difficulty. Whatever the words, which have appeared in a series of Acts, might have meant to your Lordships if the matter were *res integra*, it cannot in face of the decision in *A.-G. v. Worrall* (1) be denied that it is possible for possession and enjoyment of property not to be retained by the donee to the entire exclusion of the donor or of any benefit to him by contract or otherwise, though the donor himself no longer has any sort of interest in it. But the words, and particularly the word "exclusion," are singularly inapt to cover a benefit which does not arise by way of reservation out of that which is given, and I am not disposed to travel further than I am constrained by authority along a line of interpretation which appears to me difficult to justify.

Two recent cases in the Privy Council are of great assistance on this matter. In *Munro v. Stamp Duties Comr.* (3) the facts were that the owner of a large area of land in New South Wales, on which he carried on the business of a grazier, in 1909 agreed with his six children that thereafter the business should be carried on by him and them as partners at will, the business to be managed by him and each partner to get a share of the profits. In 1913 he transferred by way of gift to his children or to trustees for them all his right, title and interest in the land. He remained a partner in the business until his death in 1929, and duty was then claimed in respect of the land because, as it was said, it had not been retained by the donees to the entire exclusion of him or of "any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not." But on this LORD TOMLIN, delivering the judgment of the Board, said ([1934] A.C. 67):

"... what was comprised in the gift was, in the case of each of the gifts to the children and the trustees, the property shorn of the right which belonged to the partnership, and upon this footing it is in their Lordships' opinion plain that the donee in each case assumed *bona fide* possession and enjoyment of the gift immediately upon the gift and thenceforward retained it to the exclusion of the donor. Further, the benefit which the donor had as a member of the partnership in the right to which the gift was subject was not in their Lordships' opinion a benefit referable in any way to the gift. It was referable to the agreement of 1909 and nothing else, and was not therefore such a benefit as is contemplated by s. 102 (2) (d)."

Here are words of great significance. The benefit, if it is to attract duty to the subject of the gift, must be a benefit referable to it. The words are not easy

to construe, but they clearly import that the owner of property may in certain circumstances retain a benefit when he makes a gift and yet the subject-matter of the gift be not dutiable.

More important is *New South Wales Stamp Duties Comr. v. Perpetual Trustee Co., Ltd.* (4), for in that case the Judicial Committee took the opportunity of reviewing the earlier cases and in particular *Worrall's* case (1), *Grey's* case (2), and *Re Cochrane* (5), and it is to the latter case that I must first turn, for the judgment of the Irish Court of Appeal was expressly approved by LORD RUSSELL OF KILLOWEN delivering the opinion of the Board and its bearing on the case now under appeal will be seen to be immediate. For that reason, I venture to repeat the facts substantially as stated by him. Sir Henry Cochrane was the mortgagee of estates in Mayo in a sum of £15,000 with interest at 4½ per cent. The mortgage debt and securities having been vested in trustees, Sir Henry, by an indenture made in 1902, declared that they were to stand possessed thereof in trust out of the income to pay in each year to his daughter, Mrs. Day, the sum of £575 for her life, and after death on trust as to the principal sum for her children as therein mentioned with power to Mrs. Day to appoint an annual sum to a surviving husband during his life. If no child of Mrs. Day attained a vested interest in the trust funds, they were to be held in trust for Sir Henry absolutely and there was also a trust of the balance, if any, of the yearly income for Sir Henry absolutely. The trustees received the interest of the mortgage which amounted to £675 per annum and paid £575 to Mrs. Day and the balance to Sir Henry. In March, 1904, he directed them to pay the whole income to Mrs. Day, but, as he died within a year thereafter, this direction could not affect the claim to duty which the Crown made in respect of the entire sum of £15,000 as property passing on his death under the Finance Act, 1894, s. 2 (1) (c). It was held by PALLES, C.B., and his decision was affirmed by the Court of Appeal, which consisted of WALKER, L.C., and FITZGIBBON and HOLMES, L.JJ., that duty was payable, not in respect of the £15,000, but only in respect of the values of Sir Henry's interest in the balance of income and his contingent interest in the principal sum. It is important to see how LORD RUSSELL OF KILLOWEN summarises the judgment of the Chief Baron. He says ([1943] 1 All E.R. 531):

"Gift in the context meant beneficial gift. A person who declares trusts of property only gives the beneficial interests covered by the trusts. Everything else he retains and does not give; and there is an entire exclusion of the donor from the property taken under the disposition of the gift. Sir Henry Cochrane obtained no benefit either by way of reservation out of the gift, or collaterally in reference to the gift."

Then, after citing HOLMES, L.J., he said (*ibid.*):

"If *Re Cochrane* (5) was rightly decided, as their Lordships think it was, it covers the present case."

LORD RUSSELL then proceeded to a close analysis of *Earl Grey v. A.-G.* (2), convincingly showed that it was not inconsistent with *Re Cochrane* (5), and said of it (*ibid.*, 533):

"There is nothing laid down as law in that case which conflicts with the view that the entire exclusion of the donor from possession and enjoyment which is contemplated by s. 11 (1) of the Act of 1889 is entire exclusion from possession and enjoyment of the beneficial interest in property which has been given by the gift, and that possession and enjoyment by the donor of some beneficial interest therein which he has not included in the gift is not inconsistent with the entire exclusion from possession and enjoyment which the sub-section requires."

It followed from the approval given to the decision in *Re Cochrane* (5) that the claim against the Perpetual Trustee Co. failed. In that case a settlor vested

certain shares in trustees, of whom he was himself one, on trusts for the benefit of an infant son but with a resulting trust for himself if the son did not attain the age of twenty-one. It was contended that as the settlor (a) was a trustee and (b) had an equitable interest in reversion, there was not an entire exclusion of him and of any benefit to him of whatsoever kind and in any way whatsoever. The contention failed because the settlor

A “in his capacity as donor . . . was entirely excluded from possession and enjoyment of what he had given to his son . . . In the interval between the gift and his death, the settlor received no benefit of any kind or in any way from the shares, nor did he receive any benefit whatsoever which was in any way attributable to the gift.”

B As DIXON, J., said in the *Perpetual Trustee Co.* case in the High Court of Australia (64 C.L.R. 511):

“The settlement contained nothing defeating, revoking or destroying any interest given. It contained no reservation out of the interest given and no recompense or benefit in reference to the interest given.”

C It appears to me, my Lords, that this is nothing but the logical application to a more complex situation of the proposition which I venture to think was self evident, *viz.*, that the life tenant of two separate pieces of property can surrender his life interest in one and retain it in the other without duty becoming exigible in respect of the former. The question is what he has given: it may be a life interest in part of the settled property; it may be a part of the income of settled funds and that part may be a fixed sum which is payable in priority or the residue after the prior payment of a fixed sum thereout. I venture to think that much of the argument that was addressed to the House in this case and much of the confusion that has arisen in the past on this admittedly difficult branch of the law have been due to the failure to bear in mind that that of which enjoyment is to be assumed and retained and from which there is to be exclusion of the donor and any benefit to him by contract or otherwise is that

E which is truly given, a proposition which is obvious enough in the case of two separate estates but more difficult to follow and apply where trusts are declared of a single property which are not completely exhaustive in favour of a donee. It should at least be clear from the judgment of LORD RUSSELL OF KILLOWEN that by retaining something which he has never given a donor does not bring himself within the mischief of the section. I venture to repeat in other words

F what I have already said when dealing with s. 43 alone, for its underlying principle is not altered by an alliance with s. 56. In the simplest analysis, if A gives to B all his estates in Wiltshire except Blackacre, he does not except Blackacre out of what he has given: he just does not give Blackacre. And if it can be regarded as a “benefit” to him that he does not give but keeps Blackacre, it is a benefit which is in no relevant sense (to use the language of LORD TOMLIN) “referable” or (to use that of LORD RUSSELL) “attributable” to the gift that he made of the rest of the Wiltshire estate. Applying this principle to the artificial situation created by the statutory hypothesis, I see no reason for saying that that which Lord St. Levan gave was not retained by the donee to the entire exclusion of him and of any benefit to him by contract or otherwise. To avoid misunderstanding I must add that different considerations arise where the donor obtains some benefit which is “referable” to the gift or “attributable” to it. Thus, if in the present case there had been a bargain by which in consideration of the surrender of his life interest in part of the settled property Lord St. Levan had been enabled to enlarge his life interest in another part of it, it might well be that, following *Worrall's* case (1), I should be bound to hold that he had not been excluded from the surrendered part. But, as I have already pointed out, here was no bargain of any kind. What Lord St. Levan chose to give he gave, and what to keep he kept. He

made no bargain and he was entirely excluded from, and obtained no benefit referable to, that which he gave.

My Lords, in order to test the claim under s. 43 aided by s. 56 I have been content to assume that the statutory hypothesis requires that the trusts on which the company is to be deemed to hold its assets should be written out in the terms advocated by the Crown and accepted by the Court of Appeal. Even on this footing I am satisfied that the claim must fail if the principle established in the cases that I have cited is applied. But I am far from being convinced that I am entitled to write out the trusts in a manner so favourable to the Crown's contention. It would, perhaps, be beyond the wit of the most skilful conveyancer to set out with any degree of accuracy the trusts which should correspond with the rights of the members of the company as that word is defined, for the legal relations in which the members stand to each other and to the company cannot be transmuted into those of trustee and *cestui que* trust. I need not, however, pursue this matter, since I hold that even on the ground which the Crown has chosen the claim for estate duty on the ordinary shares of the company fails and the appeal must be allowed.

The alternative claim which arises under the Finance Act, 1940, s. 46, must now be considered. It involves the consideration of provisions which are, I think, of unrivalled complexity and difficulty and couched in language so tortuous and obscure that I am tempted to reject them as meaningless. I must set out, not only s. 46, but certain other sections which have to be read with it. They are as follows:

" 46 (1) Where a person dying after the commencement of this Act has made to a company to which this section applies a transfer of any property (other than an interest limited to cease on his death or property which he transferred in a fiduciary capacity), and any benefits accruing to the deceased from the company accrued to him in the three years ending with his death, the assets of the company shall be deemed for the purposes of estate duty to be included in the property passing on his death to an extent determined, in accordance with sub-s. (2) of this section, by reference to the proportion that the aggregate amount of the benefits accruing to the deceased from the company bore to the net income of the company. (2) The proportion aforesaid shall be ascertained for each accounting year that fell wholly or partly within the three years ending with the death, by comparing the aggregate amount of the benefits accruing to the deceased from the company which accrued to him in that year with the net income of the company for that year, and the extent to which the assets of the company are to be deemed to be included in the property passing on the death shall be the average of the proportions so ascertained: . . . 47 (1) The following shall be treated as benefits accruing to the deceased from the company, that is to say—(a) any income of the company, and any periodical payment out of the resources or at the expense of the company, which the deceased received for his own benefit whether directly or indirectly, and any enjoyment in specie of land or other property of the company or of a right thereover which the deceased had for his own benefit whether directly or indirectly; . . . (2) In this Part of this Act the expression 'periodical payment' means a payment by way of dividend or interest, a payment by way of remuneration not being a single lump sum payment, and any other payment being one of a series of payments, whether interconnected or not, whether of the same or of varying amounts and whether payable at regular intervals or otherwise . . . 58 (2) A person shall be deemed for the purposes of this Part of this Act to have made a transfer of property to a company if the property came to be included in the resources of the company by the effect of a disposition made by him or with his consent or of any associated operations of which such a disposition

formed one . . . (4) References in this Part of this Act to a disposition's being made by any person, to a power's being exercised or exercisable by any person, or to any other act's being done by any person, include references to its being made, or being exercised or exercisable, or being done, by him and another jointly or by another at his direction . . . (5) References in this Part of this Act to a person having any power or control or doing any act in a fiduciary capacity shall be construed as references to his having that power or control or doing that act in a fiduciary capacity imposed on him otherwise than by a disposition made by him and in such a capacity only."

A

The claim of the Crown rests on two conditions—first, it must be shown that Lord St. Levan transferred property to the company and did so in some other than a fiduciary capacity (for this I will coin the expression "non-fiduciary capacity"), and, secondly, that benefits accrued to him from the company in the three years ending with his death. On the first of these questions numerous points arise for discussion. What property was transferred to the company by Lord St. Levan? So far as he transferred it, did he do so in a fiduciary capacity? What is the effect of the ratification and confirmation or further assurance by Lord St. Levan and Mr. Ponsonby contained in the several deeds of conveyance or transfer? What is the effect of the several sub-sections of s. 58 which I have set out and how do they operate *inter se*? These and other points I must deal with *seriatim*.

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The first point arises on the subscription by Lord St. Levan for one hundred thousand preference shares. For these he paid cash according to the ordinary use of language. Did he then "transfer property" to the company within the meaning of s. 46? My Lords, I have no hesitation in saying that the payment of cash to a company on a subscription for shares is not a transfer of property to the company. No one, lawyer, business man, or man in the street, was ever heard to use such language to describe such an act and I decline to stretch the plain meaning of words in an Act of Parliament in order to comply with what is said to be its purpose. LORD WENSLEYDALE's familiar words in *Re Micklethwait* (6) (11 Exch. 456), which were cited by LORD HALSBURY, L.C., in *Tennant v. Smith* (7) ([1892] A.C. 154), may again be repeated:

"It is a well-established rule, that the subject is not to be taxed without clear words for that purpose; and also, that every Act of Parliament must be read according to the natural construction of its words."

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LORD HALSBURY adds that in a taxing Act it is impossible to assume any intention or governing purpose in the Acts to do more than take such tax as the statute imposes: it must be seen whether the tax is expressly imposed. This is true doctrine which I must bear in mind as I listen to the constant refrain of learned counsel for the Crown that this or that is just the transaction at which this or that section is aimed. The question is not at what transaction the section is according to some alleged general purpose aimed, but what transaction its language according to its natural meaning fairly and squarely hits. Applying this, the one and only proper test, I say that when Lord St. Levan paid for his shares he did not transfer property to the company.

H

The next point arises in this way. The conveyance of the settled land to the company, to which I have already referred, took the form of a grant by Lord St. Levan in exercise of (to put it shortly) his Settled Land Act powers and the extended powers given by the St. Aubyn settlement and the deed-poll of Mar. 23, 1927. It is beyond question, first, that this grant operated to convey the fee to the company, and, secondly, that the grant by Lord St. Levan as tenant for life, whether made in pursuance of statutory or extended powers, was a transfer by him in a fiduciary capacity. But the conveyance contained not only a grant by Lord St. Levan. By it also he and Mr. Ponsonby in exercise of their general power of appointment "by way of ratification"

appointed and confirmed unto the company the land which he had granted. Therefore, it was said, the property was transferred, not by Lord St. Levan in a fiduciary capacity, but by him and Mr. Ponsonby in a non-fiduciary capacity. This is not a valid argument. The ratification and confirmation and appointment could have no operation in law except to the extent to which the grant by Lord St. Levan was ineffective to convey the fee. *Ex concessis* that grant was wholly effective: therefore the ratification, etc., effected no transfer of property nor anything else.

The same point arises, but with a refinement on it, in regard to the investments representing capital moneys of the settlement. These were transferred to the company by the trustees by the usual deeds of transfer. The trustees, no doubt, acted in a fiduciary capacity, but they acted (a) on the direction of Lord St. Levan as tenant for life and (b) on the exercise by Lord St. Levan and Mr. Ponsonby of their joint power of appointment "by way of ratification." Then, the argument runs, under s. 58 (4) the transfer by the trustees becomes the transfer of those who directed it, and those who directed were not only Lord St. Levan as tenant for life but he and Mr. Ponsonby in exercise of a non-fiduciary power. If Lord St. Levan was competent to direct the transfer under the Settled Land Act or under the extended powers given to him by the deed of Mar. 23, 1927, then the argument fails for the reasons given in regard to the settled land, for the direction by Lord St. Levan and Mr. Ponsonby added nothing to that already given by Lord St. Levan.

But at this point the argument opened a question of a far-reaching character, which I am sorry to have to decide without the assistance of judges who have a greater familiarity with such problems. It is the broad question whether it is competent for a tenant for life to direct the trustees to change an investment of capital moneys into another investment authorised by the Act or by the settlement. On this question, counsel on either side agreed in saying that there was no direct authority and they agreed too that the reason for that was that the answer was clear. But unfortunately here harmony ended, for the clear answer given on the one side was the exact opposite of the clear answer given on the other. It falls, therefore, to your Lordships to determine a question which I should have expected to find well settled long ago.

Part III of the Settled Land Act, 1925, which is entitled "Investment or other application of capital money," provides by s. 73 (1) that capital money arising under the Act shall, subject as therein mentioned, be invested or otherwise applied "wholly in one, or partly in one and partly in another or others, of the following modes". Then follow twenty-one so-called modes, of which the first is

"... investment in government securities, or in other securities in which the trustees of the settlement are by the settlement or by law authorised to invest trust money of the settlement, with power to vary the investment into or for any other such securities;"

and the others are the numerous forms of application which experience had shown to be necessary or expedient. So far there is nothing to indicate with whom the direction or initiative lies. This is to be found in s. 75, which provides by sub-s. (1) that

"Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into court at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the court, as the case may be, accordingly."

At this stage the tenant for life, having exercised his option for payment to the trustees or into court, appears to leave the scene. But sub-s. (2) provides that:

"The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof

according to the discretion of the trustees . . . and any investment shall be in the names or under the control of the trustees."

Sub-section (3) provides that:

"The investment or other application under the direction of the court shall be made on the application of the tenant for life, or of the trustees."

Sub-section (4) provides that

A "Any investment or other application shall not during the subsistence of the beneficial interest of the tenant for life be altered without his consent."

I do not think that any assistance is to be got from sub-s. (5) or sub-s. (6), but sub-s. (7) provides:

B "Those securities [*i.e.*, the securities representing capital money] may be converted into money, which shall be capital money arising under this Act."

By definition in s. 117 (1) (ii) "capital money arising under this Act," unless the context otherwise requires, means

C "capital money arising under the powers and provisions of this Act or the Acts replaced by this Act, and receivable for the trusts and purposes of the settlement and includes securities representing capital money."

On these sections the contention of the Crown is that the tenant for life, having under s. 75 (2) directed the application of capital money in the mode first mentioned, *viz.*, in investment in authorised securities, has no power to direct a change of investment into other authorised securities, that the power to vary rests with the trustees and that, though under s. 75 (4) they cannot exercise that power without the consent of the tenant for life, he has no power of direction. On the other hand, it is argued that, just as the tenant for life has the initial power of direction and the further power (which is not denied) of directing that investments shall be realised and the proceeds applied in some authorised mode of application, *e.g.*, in discharge of incumbrances, so he has power to direct that an investment shall be realised and the proceeds shall be invested in other investments, or, in other words, that the words "with power to vary" which occur in s. 73 (1) (i) do not confer a power on the trustees apart from the tenant for life, but merely indicate that the right of the tenant for life to direct is not exhausted when he has directed that the mode of application of capital money shall be the investment in securities.

F My Lords, between these two views both of which are, I think, possible, I choose the latter without hesitation. It would be at once illogical and inconsistent with the scheme of the Settled Land Act to give to the tenant for life the right to say whether capital money should be applied in investments in securities or (say) in the discharge of incumbrances (s. 73 (1) (ii)), or in the purchase of land in fee simple (s. 73 (1) (xi)) and the right, too, to direct the sale of securities and the application of the proceeds in some other mode, but to deny him the right to direct a variation of investment. It is not, I think, inconsistent with this view that s. 75 (4) contemplates the consent of the tenant for life, which pre-supposes action initiated by the trustees, for under s. 75 (2) the trustees may in default of direction by the tenant for life act at their own discretion and s. 75 (4) is apt to cover such a case. Nor can I disregard s. 75 (7). If securities can be converted into money (which I take to be something that can and must be done at the discretion of the tenant for life) the proceeds become capital money of which the tenant for life can direct the application, and, if he directs the investment in securities, he can choose the securities so long as they are authorised. I am, therefore, of opinion that a tenant for life can direct an exchange of investments, assuming always that he acts within and according to his statutory or extended powers, and, coming from the general to the

particular, I am of opinion that Lord St. Levan was competent to give the direction, to which I have referred, in regard to the investments forming part of the settled property. Accordingly the ratification and appointment by himself and Mr. Ponsonby added nothing to his direction. It was that which was effective, and it was given by him in a fiduciary capacity.

The same point was raised also in regard to a third class of property which was transferred to the company, *viz.*, the property which has been called "the equitable interests." What I have already said covers this class of property also and I do not think it necessary further to explain why this property, too, was transferred to the company by Lord St. Levan in a fiduciary capacity.

So far, my Lords, I have endeavoured to interpret and apply s. 46 of the Act to the facts of this case with only an oblique glance at s. 58. But now I must turn to the contentions of the Crown which are based on that section and first to a contention based on sub-s. (5). That sub-section provides that

"References in this Part of this Act to a person having any power or control or doing any act in a fiduciary capacity shall be construed as references to his having that power or control or doing that act in a fiduciary capacity imposed on him otherwise than by a disposition made by him and in such a capacity only."

It was urged on behalf of the Crown that, inasmuch as the additional powers by the exercise of which Lord St. Levan, as tenant for life, was enabled to transfer or direct the transfer of property to the company, owed their existence to a disposition made by him, *viz.*, the deed-poll of Mar. 23, therefore, the fiduciary capacity in which he exercised those powers was imposed on him by that disposition. I do not think that this argument is valid. Admittedly, he was a trustee of the powers, and, therefore, could only exercise them in a fiduciary capacity, but this flowed from the provisions of s. 107 of the Settled Land Act, 1925. It was Lord St. Levan who created the power, but the capacity in which he exercised it was imposed by the Act. Take any settlement that you will and suppose that the tenant for life exercises a power conferred on him by the settlement in extension of his powers under the Settled Land Act. Whether the settlement is made by himself or another, it could not be said that the fiduciary capacity in which he exercised the power was "imposed" by the settlement. The word "impose" is, I think, apt to describe a consequence which flows from a statutory provision but inapt to describe a power voluntarily created.

The next contention that I must notice is founded on s. 58 (2) which must be read in conjunction with s. 58 (4). Section 58 (2) provides that

"A person shall be deemed for the purposes of this Part of this Act to have made a transfer of property to a company if the property came to be included in the resources of the company by the effect of a disposition made by him or with his consent or of any associated operations of which such a disposition formed one."

The argument here is that it was by the effect of a disposition made by Lord St. Levan in a non-fiduciary capacity, *viz.*, the deed-poll of Mar. 23, or at least by the effect of associated operations of which that disposition formed one, that the property came to be included in the resources of the company, and that, therefore, Lord St. Levan must be deemed to have transferred the property to the company within s. 46 and to have done so in a non-fiduciary capacity. Here it is regrettably necessary to make further distinctions, for there were, as I have already pointed out, different species of property, and they demand separate consideration. First, it was urged that the cash paid by Lord St. Levan for the preference shares was caught by the sub-section. I have already expressed the view, which is, I understand, held by the majority of your Lordships, that s. 46 does not cover a cash subscription for shares. If this is so, it is,

I think, impossible to say that the cash is "property included in the resources of the company" which anyone is deemed to have transferred. The transaction is outside the purview of the section and the sub-section.

Next, the argument turned to the land. This was a kind of property which was in fact and in law transferred by Lord St. Levan himself to the company. The sale and the conveyance were made by him as tenant for life and were, therefore, made by him in a fiduciary capacity. I see no room for what I may call a deeming provision when that which is to be deemed has effectively taken place without it. Lord St. Levan transferred the property in a fiduciary capacity. The sub-section does not, in my opinion, entitle me to deem him to have transferred it in a non-fiduciary capacity.

Next, and more difficult, come two other kinds of property which I can take together, the investments representing capital moneys and the equitable interests, and I must now turn to s. 58 (4). This sub-section, so far as relevant, provides as follows:

"References in this Part of this Act to a disposition's being made by any person . . . or to any other act's being done by any person, include references to its being made . . . or being done, by him and another jointly or by another at his direction . . ."

I have already expressed the opinion and will assume that it was competent for Lord St. Levan as tenant for life to direct the trustees of the settlement to invest capital moneys in the purchase of or in exchange for shares of the company, and that the effect of the deed of Mar. 25 was that he validly exercised that power of direction with the result already pointed out that the confirmatory direction by him and Mr. Ponsonby in exercise of the overriding power added nothing to it. If so, the act of the trustees in transferring the investments was an act done by another at his direction, and, accordingly, it was under this sub-section his act: it was he who transferred the property, and *ex concessis* he transferred it in a fiduciary capacity, for he was acting in exercise of additional Settled Land Act powers. But here comes the crux. If sub-s. (2) stood alone, and sub-s. (4) had not been enacted, I could not avoid the conclusion that Lord St. Levan must be "deemed" to have transferred the investments. The deeming provision would not (as it was in the case of the land) be excluded by an actual transfer, and, even though the direction to transfer was given in a fiduciary capacity, that could not alter the fact that the property became included in the resources of the company, not, as in the case of the land, by an actual transfer by Lord St. Levan, but by a series of operations of which the exercise of the non-fiduciary overriding power was one. But sub-s. (2) does not stand alone and the question is what part sub-s. (4) is to play. The latter, like the former, is in effect a deeming provision. Am I then to say that as the result of sub-s. (4) Lord St. Levan was for the purposes of s. 46 the actual transferor of the investments, just as he was of the land, so as to exclude the operation of the deeming provision of sub-s. (2)? Or am I to say that sub-s. (4) is to be denied any operation where sub-s. (2) would without it be brought into play? It may be urged that as sub-s. (2) expressly does, but sub-s. (4) does not, refer to transfers, the former section should apply. But this is a very tenuous thread on which to hang a taxpayer, for sub-s. (4) does not the less apply to transfers because it uses general words such as "disposition" and "act" which cover both transfers and other operations. I have come after much hesitation to the conclusion that the provisions of sub-s. (4) must prevail. It is, I think, a sub-section which is intended and is apt to cover every case: its language is absolutely general: it does not open as it might by a saving reference to sub-s. (2) and it should not be restricted unless it is necessary to do so in order to give some meaning to that sub-section. But this clearly is not necessary, for sub-s. (2) has in any case ample scope where no question arises as to the capacity, fiduciary or non-fiduciary, in which a transfer is made, but the question is

whether that which was done, by whomsoever done, amounted to transfer.

My Lords, having come to the conclusion that Lord St. Levan did not transfer any property to the company within the meaning of s. 46 except in a fiduciary capacity, I am of opinion that on this ground the alternative claim for duty which is made against the company fails and the cross-appeal of the Crown must be dismissed. But in case your Lordships take a different view on this very difficult question, it is right that I should state my opinion on the further question whether any and what benefit within the meaning of the section accrued to Lord St. Levan from the company in the three years ending with his death. That some benefit so accrued to him is admitted by the company, for he received the proper instalments of the sum of £750,000 which were payable within those years and he also received dividends on the preference shares. But a dispute has arisen in regard to certain sums received by Lord St. Levan from the company in the circumstances which I must now state. By a mortgage deed dated Jan. 30, 1933, and made between Lord St. Levan, of the one part, and the company, of the other part, the company covenanted to advance to Lord St. Levan on every Mar. 25, June 24, Sept. 29 and Dec. 25, during the joint lives of Lord St. Levan and his nephew, Francis Cecil St. Aubyn (now the third Baron St. Levan), at four per cent. interest a sum of £500 unless and until Lord St. Levan should give notice to the company that he did not require such advance to be made, and it was thereby agreed that payment of the said sums and of the interest thereon should not be required by the company until the expiration of a period of two years from the death of Lord St. Levan unless he or his personal representatives should desire to repay the same previously and in the meantime interest becoming due thereon should be added to the principal money and carry interest accordingly, and the said deed contained a provision for deduction of the said debt by instalments from any instalment of the said sum of £750,000 remaining outstanding at the expiration of the period of two years and for charging the same on such instalments. By another like deed dated Aug. 4, 1936, the company covenanted to advance to Lord St. Levan on every Jan. 1 and July 1 during the same joint lives a further sum of £500 on the same terms as the advances to be made under the said deed of Jan. 30, 1933. Pursuant to the said deeds the company advanced to Lord St. Levan in each of the three years preceding his death sums amounting in all to £3,000 all of which with the interest thereon remained due and owing at his death.

The question is whether the advances so made were "benefits" within the meaning of s. 46. The argument for the Crown is a simple one. Under s. 47 (which I have already cited) any periodical payment out of the resources of the company is to be "treated as a benefit", the loans or advances were payments made to Lord St. Levan out of the resources of the company and they were made periodically, and they were received by Lord St. Levan for his own benefit directly or indirectly. Therefore, they were "benefits." The company, on the other hand, appeals once more to the plain use of ordinary words and denies that a man can fairly be said to receive for his own benefit a sum which he receives by way of loan and has to repay, and further relies on the omission of loan from a definition which refers to payment by way of dividend or interest or by way of remuneration or any other payment. The latter argument may derive some force from the contention of the Crown that a transaction of loan was just what the section was aimed at. But, perhaps, that contention had only become common form by the time this stage of the case had been reached. My Lords, here again is a question on which I find it impossible to express a confident opinion. It is indeed strange that no reference is made to a transaction of loan and the result of holding such a transaction to be a benefit must, as learned counsel for the Crown was constrained to admit, have strange results. But I have come to the conclusion, nevertheless, that

the contention of the Crown must be upheld. I cannot escape from the fact that as each periodical loan was made to Lord St. Levan there was a payment to and receipt by him. And I cannot think that he received it any the less for his own benefit because he had, or his estate had, at a later date to repay it. He had the beneficial use of what he received and can fairly be said to have received it for his own benefit. I may add that I do not find it possible to find in the definition of periodical payment any genus of payments created from which by the application of the *ejusdem generis* rule a loan could be excluded, nor can I get any assistance from the provisions of sched. VII to the Act to which reference was made. I am, therefore, of opinion that the loans were "benefits" within s. 46. But this is only relevant if Lord St. Levan transferred property to the company within the same section except in a fiduciary capacity, and this, in my opinion, he did not.

It follows from what I have said that, in my opinion, the appeal should be allowed with costs and the cross-appeal dismissed with costs and the judgment of CROOM-JOHNSON, J., restored.

LORD NORMAND (read by LORD TUCKER): My Lords, I have had the advantage of reading the opinions of my noble and learned friends, LORD SIMONDS and LORD RADCLIFFE, and I am in agreement with them at all points where they are at one. It will, therefore, be possible for me to deal with the case without trespassing for long on your Lordships' patience.

On the Crown's claim under s. 43 and s. 56 of the Finance Act, 1940, I can state my view quite briefly. After the death of Lord Amherst on Mar. 7, 1927, there was vested in Lord St. Levan and Mr. Ponsonby a joint power of appointment over all the property comprised in the settlement which they were free to exercise for the personal benefit of Lord St. Levan. Mr. Ponsonby was not a trustee in relation to that power, and Lord St. Levan was the effective *dominus* of the settled property. He also had the powers of a tenant for life under the Settled Land Act, 1925. His powers, derived from one or the other of these sources, enabled him to bring about an enlargement of the powers of investment and a realisation and re-investment of the settled property, to appropriate to himself in fee the whole or any part of the property or of substituted investments of the proceeds, and to make a gift or settlement of such part as he did not appropriate in favour of persons selected by him. By his exercise of these powers, the original settled property—the lands, equitable interests and investments—were sold to the company, part of the price was invested in the ordinary shares of the company and the balance was appropriated by Lord St. Levan, who also re-settled the ordinary shares in trust in such a way as to extinguish his life interest and to exclude himself from all further interest in them. In substance and in form, therefore, he took part of the trust property as his own absolutely, and made a gift of what remained under trust to donees selected by himself. Admittedly, the trustees for the donees immediately assumed *bona fide* possession and enjoyment of the ordinary shares of the company. These shares were an item of property separate from the part of the purchase price which had not been invested in them, and which was represented by the preference shares of the company and a *jus crediti* in a balance payable by the company, both owned by Lord St. Levan. If Lord St. Levan had been the holder of debentures and preference and ordinary shares in the company and had transferred the ordinary shares, whether by gift or for value, the transferee thenceforth would have retained possession and enjoyment of the ordinary shares to the entire exclusion of Lord St. Levan and of any benefit to him by contract or otherwise. The present case is in no way different from that, and the effect of the transactions is that the possession and enjoyment of the ordinary shares by the trustees were retained by them to the entire exclusion of Lord St. Levan and of every benefit to him by contract or otherwise. The application of the statutory hypothesis as provided for by

s. 56 can in this respect make no difference. The fictional mutation of the company into a trust and of the company's creditors and shareholders into beneficiaries, however far it is carried, still leaves the beneficial rights representing the ordinary shares and the beneficial rights representing the preference shares and the instalments separate items of property, and the beneficial rights representing the ordinary shares are, when the statutory hypothesis is applied, still enjoyed by the donees thereof to the entire exclusion of Lord St. Levan and of any benefit to him. On the case law of this branch of the appeal I need say nothing since it has been fully dealt with by my noble and learned friends.

The Crown's cross-appeal and claim under s. 46 and the sections which have to be read with it, as set out in the opinion of my noble and learned friend LORD SIMONDS, raise questions of some difficulty. The first point is whether Lord St. Levan, when he paid £100,000 for the preference shares in the company made a transfer of property within the meaning of s. 46. My opinion is that "transfer of property" are not the usual words which would be naturally selected to describe a payment of money, though it cannot be denied that money is property or that payment is a transfer. I think that if it had been intended to strike at money payments the simple words necessary to make that intention clear would have been added.

The next question is whether Lord St. Levan made a transfer to the company of the lands, equitable interests and investments which formed the original settled property otherwise than in a fiduciary capacity (s. 46 (1)). The precise wording of the sub-section is of importance. If the question had been whether Lord St. Levan transferred the lands, to take the clearest case, otherwise than in a fiduciary capacity, the answer might well have been that he did not. For it was he who transferred the lands by the conveyance of Mar. 26, 1927, and he did so in pursuance of the fiduciary power imposed on a tenant for life by the Settled Land Act, 1925. It could then have been argued with some plausibility that the inquiry was complete, and that there was neither necessity nor justification for pursuing it further by recourse to a provision under which a person may be deemed to have made a transfer of property. But when the inquiry is whether Lord St. Levan made a transfer of the lands, the answer may be different. I find it impossible to read s. 46 and the related sections without being forced to recognise that the same party may make more than one transfer within their meaning, and that the making of one such transfer otherwise than in a fiduciary character satisfies *pro tanto* the conditions for charging the company's assets under s. 46. It is no answer that the same party made another transfer in a fiduciary capacity. Now, by the appointment of Mar. 23, 1927, Lord St. Levan made a disposition, as defined in s. 59, by the effect of which the lands, equitable interests and investments, came to be included in the resources of the company, and, therefore, he must be deemed to have made a transfer of the property to the company (s. 58 (2)). Admittedly, this transfer was not made in a fiduciary capacity. A further disposition was necessary to complete the transfer of the property to the company, but I think that the whole trust property came to be included in the company's resources by the effect of the appointment of Mar. 23, for without it the sale of the trust property to the company would not have been carried out. Lastly, I see no way of escaping the conclusion that the advances made under the deeds of Jan. 30, 1933, and Aug. 4, 1936, were periodical payments, and, therefore, benefits within the meaning of s. 47, despite the arbitrary results and crude anomalies to which such a conclusion may lead. For these reasons I would concur in my noble and learned friend LORD RADCLIFFE's proposals for disposing of the appeal and cross-appeal.

LORD SIMONDS: My Lords, my noble and learned friend LORD OAKSEY, who is unable to be here today, has asked me to say that he concurs at all points in the opinion which I have delivered.

LORD RADCLIFFE: My Lords, the original appeal relates to the Crown's claim to estate duty under the Finance Act, 1940, s. 43, that claim being assisted or encumbered by the provisions of s. 56 of the same Act. It is, no doubt, convenient to dispose of the questions which are involved in that appeal before going on to deal with the cross-appeal of the Crown. No one could suppose that s. 43 is anything but an obscure section. So was s. 11 of the Finance Act, 1900, the statutory parent of the present enactment. So were s. 35 and s. 39 of the Finance Act, 1930, which extended the scope, without elucidating the meaning, of the charge imposed by the Act of 1900. All these sections have now disappeared and their place is taken by s. 43 and the accompanying provisions of the Finance Act, 1940. But there still appears as a condition on which freedom from duty depends that difficult phrase about *bona fide* possession and enjoyment of the property being assumed and

"thenceforward retained to the entire exclusion of the person who had the interest and of any benefit to him by contract or otherwise."

There was very general uncertainty as to what, if not all, benefits were intended to be covered by these words, and as to the circumstances in which, if there were indeed any circumstances, a person might legitimately be found in the enjoyment of some contractual benefit after the termination of the limited interest without involving the property in continuing liability for duty. I think it regrettable that when, in 1940, opportunity was found to wipe out the old sections and to enact a new set of provisions, opportunity was not at the same time found to make those provisions more readily intelligible. I can appreciate that at any rate some of the transactions with which s. 43 and s. 56 appear to be concerned are deplorable from the point of view of those interested in revenue collection, but for all that the taxpayer is entitled to be told with some reasonable certainty in what circumstances and under what conditions liability to tax is incurred or else to be told explicitly that the circumstances and conditions of liability are just those which the Inland Revenue Commissioners in their administrative discretion may consider appropriate. The seventeen sections which constitute Part IV of the Finance Act, 1940, are expressed with what proves on investigation to be a vagueness so diffuse and so ambiguous that they may well produce in practice the second alternative while adopting in form the requirements of the first. This would be an unfortunate situation to have brought about. The prayer of Ajax—'Εν δὲ Φαει: καὶ ὀλεσσον—has been heard before in your Lordships' House, but I think its appeal is even stronger when obscurity is created by deliberate legislation, than when it arises from the less wilful confusions of the common law.

My Lords, I have formed the opinion that the fate of this appeal must turn on the meaning that you attribute to the phrase which appears in sub-s. (2) (a) of s. 43:

"if *bona fide* possession and enjoyment of the property in which the interest subsisted was assumed immediately thereafter by the person becoming entitled by virtue of or upon the disposition or determination and thenceforward retained to the entire exclusion of the person who had the interest and of any benefit to him by contract or otherwise."

For the facts of this case, complicated as they may seem, come down to a simple legal issue. Those facts have been fully stated in the opinion of my noble and learned friend, LORD SIMONDS, and it is quite unnecessary for me to travel through them again. What it comes down to is this. The Crown's claim is for estate duty on the ordinary shares of St. Aubyn Estates, Ltd. Those shares constitute the property in which the deceased had a life interest at the date when he and Mr. Ponsonby executed the deed-poll of Mar. 29, 1927; and it is because that deed had the effect of determining his life interest in that property that the Crown prefers its claim under s. 43. So far there is nothing in

controversy. The appellants, however, maintain that on Mar. 29 the deceased was immediately, and thereafter continued to be, excluded from any possession or enjoyment of those ordinary shares, since the whole beneficial interest in them belonged to others than himself, and that the possession and enjoyment so taken by or on behalf of those others was such as to exclude him from any benefit by contract or otherwise. This is where the whole controversy comes. For the Crown, while not disputing that after the deed of Mar. 29 the whole beneficial interest in the ordinary shares belonged to others than the deceased, contends that the existence of those interests of which he had become the absolute owner by virtue of the deed of Mar. 28, 1927, made it impossible to say that the possession and enjoyment of the ordinary shares which had been assumed by or on behalf of those others was retained to the entire exclusion of any benefit to the deceased by contract or otherwise.

At first sight it is difficult to see any basis for this contention. No right or interest that was left to Lord St. Levan after Mar. 29 interfered with the new owners' full possession and enjoyment of that "bundle of rights" which constituted the ordinary shares and which formed the property in which he had given up his life interest. It is true that, putting aside his ownership of the preference shares, he continued to enjoy the benefit of the company's contract to pay such part of the purchase price as was to be discharged by half-yearly instalments of £18,750 each. Certainly this was a benefit by contract: certainly the right to receive this money in this way had been created as one step in the series of transactions which began with the deed of Mar. 23 and ended with the deed of Mar. 29, 1927. Moreover, I do not think it necessary to treat it as less than certain that Lord St. Levan and Mr. Ponsonby, the joint authors of all that was brought about at that time, intended from the first that the benefit of this contract, when created, should become the absolute property of Lord St. Levan and that the ordinary shares should be resigned to follow the trusts declared by their deed of Mar. 29 to the exclusion of any further interest of Lord St. Levan in those shares. But unless it is a valid proposition of law that for the purposes of s. 43 *bona fide* possession and enjoyment of property is not assumed and retained to the entire exclusion of any benefit to a person by contract or otherwise merely because it is found that after releasing a limited interest in the property that person continues to enjoy a contractual benefit created as part of the whole scheme in which that release is involved, I do not see that the recital of the facts that I have set out above brings the Crown any nearer to establishing its case under s. 43. I am afraid that there is a good deal that is yet to be said on this appeal, but in substance the case for the Crown stands or falls by that proposition. If it is right, the wording of the section is indeed inapt to express its meaning, for to adopt it requires no more than to ascertain whether the deceased was left in possession of any contractual benefit at all at the end of the transaction and gives no significance to the question whether that benefit, whatever it is, is such as to trench on the possession and enjoyment of the property in which the interest has been surrendered. My own view is that the whole proposition is fallacious. Nor do I think it the better founded if the qualification is introduced that a benefit by contract, to be within the mischief of the section, must be "referable to" the transaction by which the life interest is determined. Your Lordships were invited to accept that qualification because the words in question had been used by LORD TOMLIN when delivering the opinion of the Judicial Committee in *Munro v. Stamp Duties Comr.* (3). But there is a difference between using words to explain a point and using words to define a proposition, and the words "referable to" are in themselves of too ambiguous an import to afford any satisfactory gloss on the meaning of the section.

There is this much, and not more than this much, to be said for the proposition advanced by the Crown. It was decided long ago in *A.-G. v. Worrall* (1) that

a contractual benefit may interfere with the exclusive possession and enjoyment required by such a provision (in that case, the Customs and Inland Revenue Act, 1889, s. 11 (1)) even though it does not amount to a reservation out of the property that is the subject of the gift. My Lords, so it may. For my part, I see nothing in the decision of *Worrall's* case (1) that cannot readily be accepted as good law. But what did it decide? A father had made a present to his son of a sum of about £24,000 secured on mortgage, and the son had bought in the

- A equity of redemption for a small sum. In return for his father's gift the son had covenanted to pay him an annuity of £735 per annum during his life. In effect, the son was returning to the father the income on the property given during the remainder of the father's life. It seems to me reasonable enough for a court to hold in those circumstances that the son had not obtained the enjoyment of what was given free from a contractual benefit to the father which
- B encumbered the enjoyment of the very thing that was given. To hold otherwise would have been to stop at the mere form of the transaction. Even if I did not think that *Worrall's* case (1) was rightly decided, as I do, I should not think it right at this date to suggest that it ought to be overruled. It has stood too long and has been too often relied on. But I think it a very mistaken form of reasoning to deduce from a decision that a benefit, to be within the
- C mischief of the section, need not necessarily be by way of reservation out of the subject-matter of a gift the general proposition that all benefits are within the mischief of the section, whether they are by way of reservation out of the subject-matter of the gift or not. To deny the validity of one general proposition is not to assert the general validity of its opposite. I suggest, therefore, that your Lordships can safely put aside the case of *A.-G. v. Worrall* (1) as
- D having no further bearing on this appeal than that of showing that the benefit of the instalment payments which Lord St. Levan retained was not without the mischief of the section merely because the company's contract to pay them was neither a charge on nor a reservation out of the property which consisted of the ordinary shares. But it leaves unresolved the essential question whether that benefit was nevertheless within the mischief of the section. I do not
- E believe that there is any great difficulty in answering that question. I think that in this, as in other cases arising on similar legislative provisions, there are two matters that have to be attended to before the answer can be given. The first is: How did the deceased come to be in enjoyment of that benefit by contract the existence of which is said to compromise the possession and enjoyment of the property released? The second is: What precisely is the pro-
- F perty the life or other interest in which has been determined? On the first point the answer is plain. The deceased enjoyed that contractual benefit because he decided to create it and to take it for himself. This is not a case in which he had to bargain to get what he wanted, nor is it a case in which by some ambiguous arrangement he took back in substance a part of that of which he had affected to dispose. The whole of this scheme was brought about by an
- G exercise of the powers of the deceased alone or of the deceased in conjunction with Mr. Ponsonby. Between them they brought the company into being, created the instalment debt, the preference and the ordinary shares, secured that the instalment debt, the cash and the ordinary shares should become the property held on the trusts of the re-settlement instead of the land, investment and other interests transferred to the company, and then withdrew the cash
- H and the instalment debt to become the deceased's absolute property and put an end to any further interest of his in the ordinary shares. Nor can there be any doubt about the answer to the second point. It was the ordinary shares in which the life interest was determined, not the ordinary shares as they might have been had some scheme been operated other than that which was in fact adopted, but the ordinary shares as in fact they were, shares in a company which had acquired assets on the terms of paying for them in part by the satisfaction of this instalment debt.

Now, if that was the situation, the possession and enjoyment of the rights which constituted the ordinary shares were only affected by the existence of the instalment debt in the sense that the half-yearly payment of the instalments reduced the resources which, had there been no debt, would have been available for the benefit of the shareholders of the company. But I think that there is formidable authority against the view that in such a situation the possession and enjoyment of the relevant property is not exclusive of a benefit to the donor or releasor of such property. A man may have an arrangement which gives him contractual benefits that affect an estate and may subsequently make a gift of his interest in that estate. If he does, the donee has possession and enjoyment of what is given to the entire exclusion of the donor or of any benefit to him. That is the *Munro* case (3). Shares may be made the subject of a trust for another person, the maker of the trust having the right under it to be one of the trustees, to retain in his control the voting power in respect of the shares and to take an ultimate resulting interest, yet that benefit does not bring the property within the mischief of a similar provision. That is the *Perpetual Trustee Co.* case (4). No more is possession and enjoyment of a gift compromised if a man vests property in trustees on trust to provide out of it certain limited benefits for a donee, but subject thereto on trust for himself. That is the *Cochrane* case (5). All these decisions proceed on a common principle, namely, that it is the possession and enjoyment of the actual property given that has to be taken account of, and that if that property is, as it may be, a limited equitable interest or an equitable interest distinct from another such interest which is not given or an interest in property subject to an interest that is retained, it is of no consequence for this purpose that the retained interest remains in the beneficial enjoyment of the person who provides the gift.

My Lords, I think that the application of that principle is sufficient to destroy the Crown's claim under s. 43. In substance the position of Lord St. Levan was the position of a man who creates a rentcharge in his own favour on property which is in his absolute disposition and then makes a gift of that property subject to that charge. Nothing is then given except the interest so charged. Is possession and enjoyment of what is given exclusive of the donor or of any benefit to him, despite his continued receipt of the amounts secured by his charge? I conclude that it is, for I cannot imagine that, had the law been otherwise, the case of *Earl Grey v. A.-G.* (2) would have taken the course that it did. In that case Earl Grey had at least created a rentcharge for himself on parting with his estates, but I think that the judgments in the Court of Appeal make it plain that it was not because he had done that, but because he had done and secured for himself so much more than that, that liability for duty attached. The explanation of that decision which was offered by the Irish Court of Appeal in the *Cochrane* case (5) makes it turn on the existence of the covenants which the transferor had secured for himself by the transaction and which left him still the effective master of all that he had transferred, and the reasoning of LORD RUSSELL in the *Perpetual Trustee* case (4) seems to me to be directed to making the same point. I agree with those views, and I cannot more aptly conclude my opinion on this part of the appeal than by quoting what LORD RUSSELL there says on this point (see [1943] 1 All E.R. 533):

" . . . the entire exclusion of the donor from possession and enjoyment which is contemplated . . . is entire exclusion from possession and enjoyment of the beneficial interest in property which has been given by the gift, and . . . possession and enjoyment by the donor of some beneficial interest therein which he has not included in the gift is not inconsistent with the entire exclusion from possession and enjoyment which the sub-section requires."

Hitherto I have made no reference to s. 56. I have not done so because, in face of the considerations which I regard as the determining considerations in this matter and which I have tried to set before your Lordships, I do not see what difference it makes whether s. 56 (2) is applied or not. But, since it was the existence of this section that caused the Court of Appeal to decide the appeal in favour of the Crown, a decision to which, I gather, they would not have come had s. 43 been unfortified by s. 56, I must state briefly why it is that I do not regard that section as having any importance in this case. It introduces what has been called "the statutory hypothesis"; but it introduces that hypothesis for a limited purpose only. The property on which estate duty is claimed remains the same: the ordinary shares. The property in which the life interest has been determined remains the same: the ordinary shares. It is only when the further question arises under s. 43 (2) (a) whether possession and enjoyment of that property has been assumed and retained to the exclusion of the releasor and of any benefit to him that the statutory hypothesis comes in to test the exclusion by asking whether, even if it has been completely achieved in circumstances as they are, it would have been equally true to say that it was achieved if the company had been trustee of its property to give effect to equitable rights analogous to those in fact created by the shares and "debentures" of the company. If the answer would have been "No" in the imaginary state of things postulated by the hypothesis, then the protection of s. 43 (2) (a) cannot be invoked by the taxpayer.

Of course, this is a clumsy device. It is impossible to say with any precision what are the equitable rights which ought to be thought of as analogous to the existing rights represented by shares and "debentures." It is particularly difficult in the case of shares, for the section throws no light on the extent to which one is supposed to retain or to discard the managerial powers to which the rights of ordinary and other shareholders are subject but which they may ultimately control. But I do not think that it is necessary for the present purpose to investigate these details or to try to resolve them. It can certainly be accepted that, on the assumptions required by the hypothesis, the company holds all its assets as a trust fund on trust in the first place to make thereout the payments to Lord St. Levan required by the instalment debt, subject thereto to make such payments to the preference shareholders as may correspond to the rights that they would have as preference shareholders, and subject thereto on such trusts for the ordinary shareholders as may correspond to their share rights, but not so as to prejudice or destroy the prior equitable rights. Thus, there is one trust fund and different sets of equitable rights to be satisfied out of that fund. Thus, too, the imaginary situation on Mar. 29, 1927, was that Lord St. Levan had the equitable rights in that trust fund corresponding to the preference shares and the instalments and he had surrendered to those interested under the re-settlement his life interest in the equitable rights in the trust fund corresponding to the ordinary shares. If it were enough, for the Crown to succeed, that it should be possible to point out that after Mar. 29 Lord St. Levan continued to enjoy an interest in the same trust fund as was bound in equity to satisfy those other equitable rights in which he had determined his life interest, then s. 56 would be very important in this case. I think that the Court of Appeal held that it was enough. Here I part company with them, and the sentence that I have already quoted from LORD RUSSELL'S opinion in the *Perpetual Trustee* case (4) as a summary of existing authority shows why I do. In brief, I do not think that turning the instalments into one kind of equitable right in property and the preference and ordinary shares into other kinds of equitable rights in property, as the statutory hypothesis does, makes them any the less distinguishable interests or properties than they were in their actual non-hypothetical form.

I must now come to the Crown's cross-appeal under s. 46. It raises three principal questions. The first is whether Lord St. Levan "made a transfer"

of any property to St. Aubyn Estates, Ltd. The second is, whether, if he did, that was property which he "transferred in a fiduciary capacity." The third is whether, if he did make a transfer of some property and did not make that transfer in a fiduciary capacity only, any "benefits" accrued to him from the company within the three years ending with his death. It is, perhaps, sufficient to say, since at this stage we are dealing with matters of principle only, that if the first question is answered in the affirmative, the second in the negative and the third in the affirmative, s. 46 has imposed a charge of estate duty, payable by the company and arising on the death of Lord St. Levan. A

The first question requires that your Lordships should consider the manner in which three separate classes of property came to be included in the resources of the company—the freehold lands; the investments representing capital moneys and the equitable interests and rights in respect of undivided shares of land, these interests and rights being considered as one class with the investments for the present purpose; and, thirdly, the moneys paid on the subscription of Lord St. Levan's one hundred thousand preference shares. It is convenient to deal first with the investments in relation both to the first and to the second questions, since the consideration of their case raises most of the difficulties of interpretation that affect the others, and one at least that is peculiar to themselves. If the word "transfer" is taken in its primary sense, a person makes a transfer of property to another person if he does the act or executes the instrument which divests him of the property and at the same time vests it in that other person. In this sense, the only persons who made a transfer of the investments to the company were Mr. Drummond and Mr. Ponsonby, the trustees of the St. Levan re-settlement. If s. 46 stood alone, that would, I think, conclude the matter. Lord St. Levan would not have made this transfer. But s. 58 imposes various interpretations of the language of the preceding sections to which interpretations effect must be given, and, as I see it, it is in applying those interpretations and in discerning the true inter-relation between them that the first major difficulty is encountered. For, in one way or another, they do certainly constitute Lord St. Levan a transferor. To begin with, there is s. 58 (2). There is more than one reason why it should be considered before s. 58 (4). It comes the earlier in the section. It deals explicitly with the subject of "transfer" which sub-s. (4) does not. And, since it refers to a disposition being made by a person, it incorporates within its own provisions all the extended or artificial meanings of that phrase which sub-s. (4) itself lays down. Now sub-s. (2) is concerned to declare what persons are to be "deemed" to have made a transfer of property to a company. It identifies them, rather unhappily, not so much by what they have done as by the results of what they or other persons have done. The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible. I think that it is in the last of these three ways that it is used in s. 58 (2), for the sub-section begins its description of the class of persons who are to be deemed to have made a transfer with the person the effect of whose own disposition has been to add the property transferred to the resources of the company and ends with the person who has done no more than make a disposition which is "associated" with operations that have had a similar result. If I apply to Lord St. Levan this statutory conception of a transferor, I find this consequence. The investments were transferred to the company at his direction, for he so directed as tenant for life when he and Mr. Ponsonby jointly executed the deed of appointment dated Mar. 25, 1927. It will save time in this very long opinion if I say that I accept the company's argument that under the Settled Land Act, 1925, he had power to direct the trustees of the re-settlement to change the investments that repre- B C D E F G H

sented capital moneys, and that this power had to be exercised by him in a fiduciary manner. I have had an opportunity of reading in advance the opinion of my noble and learned friend LORD SIMONDS and I am in full agreement with what he says on this point. By virtue of this operation, then, Lord St. Levan is deemed to have made a transfer of those investments to the company, for they came to be included in the resources of the company "by the effect of" a disposition made at his direction, and this by sub-s. (4) is the same thing as a disposition made by him. But that is not the only way in which s. 58 (2) requires that he must be deemed to have made a transfer, for it was the execution of the deed of appointment dated Mar. 23, 1927, made by him and Mr. Ponsonby that alone made possible the transfer of the investments to the company in the manner in which and for the consideration for which they were in fact transferred. This deed, which was the first step in the whole scheme, was a disposition which formed one of a series of associated operations of which the actual transfer of the investments was another, and on this ground also, therefore, I think that the Crown is entitled to treat Lord St. Levan as a person who made a transfer to the company.

There remain two points that have to be disposed of before an answer can be given to the problems which are raised by s. 46. One is this. If the supposititious transfer by Lord St. Levan which arises by virtue of the fact that he directed the transfer of the investments is exempted from recognition for the purposes of s. 46 by the further supposition that he made such a transfer in a fiduciary capacity, does this prevent Lord St. Levan from being treated as having made a transfer by virtue of the appointment dated Mar. 23, 1927? On no view can that act be said to have been done in a fiduciary capacity. My Lords, I can only say that I can see no reason why, if one way of looking at the position involves no liability, that should prevent it being looked at in another way that does involve liability. A provision that is drawn in the form of s. 58 (2) brings it about that quite different acts may independently of each other constitute a person a transferor on the occasion of a single transfer. If they do, the alternative is this. Either the subject is entitled to select that act the circumstances of which suit his interest best as leading to exemption from or reduction of duty and to insist that the Crown's claim succeed or fail by consideration of those circumstances, or the Crown is entitled to found on either or both of the acts and to succeed if its claim is good by either test. I think that the latter is the right alternative, for I think that it accords with what are in effect the cumulative provisions of s. 58 (2) and that an option of this sort is not unusual in taxing statutes. In my opinion, therefore, Lord St. Levan did make a transfer of the investments to the company for the purposes of s. 46 because he and Mr. Ponsonby executed the appointment dated Mar. 23, 1927.

The second question is, whether, in so far as he was a transferor by virtue of having given a direction as tenant for life for the change of investment that led to the investments representing capital moneys being exchanged for ordinary shares of the company, he made that supposititious transfer "in a fiduciary capacity" within the meaning of s. 46. That he acted in a fiduciary capacity I have already accepted, and, though the Act is wholly obscure on this point, I think that when a person is a supposititious transferor by virtue of a supposititious transfer, the act, whatever it may be, that makes him subject to the supposition must itself be treated as a transfer in order to see whether the supposititious transfer was made "in a fiduciary capacity" or not. The effect of s. 58 (5) is to impose a special meaning on the words "fiduciary capacity." It must be a fiduciary capacity imposed on the actor otherwise than by a disposition made by him and no other sort of capacity. I have felt some doubt whether the circumstance that Lord St. Levan created the power of investment by making the appointment of Mar. 23, 1927, did not result in the fiduciary capacity in which he gave his direction being imposed by a disposition made by him. But your Lordships, I believe, are unanimous in rejecting this construction of s. 58 (5)

and it is with something less than regret that I waive my doubts in the matter and accept the view that in giving the direction Lord St. Levan made a supposititious transfer in a fiduciary capacity only and that, regarded in this way, his transfer is exempted from recognition under s. 46. But, as I have already said, I think that he was a supposititious transferor of the investments in another way, and, as such, did not act in a fiduciary capacity.

So much for the investments, and it was conceded that the equitable interests in undivided shares of land are for this purpose governed by the same considerations as apply to the investments. So I think that those too were transferred by Lord St. Levan. Then there is the settled land. Its situation is different from that of the investments in that Lord St. Levan was himself the conveying party, and, therefore, made a transfer to the company in the ordinary sense. This he was in a position to do because the freehold in fee simple had been vested in him by the operation of the Settled Land Act, 1925, to hold the same on trust to give effect to the equitable interests from time to time subsisting under the settlement. He sold the land as tenant for life and transferred as trustee to give effect to the sale that he had made, and in this case I do not think that he could possibly be said to have imposed the fiduciary capacity in which he transferred by any disposition made by himself, for in fact the re-settlement of 1879 neither vested in him an estate in fee simple nor gave him a power of sale. It was the Act of 1925 that both transferred the fee simple to him and enacted that he should hold it as a trustee. Therefore, when he came to transfer it he acted in a fiduciary capacity imposed on him otherwise than by a disposition made by himself. But for s. 58 (2), that would be enough to exempt the transfer of the settled land from the operation of s. 46. That sub-section, however, raises the same difficulty as I have discussed in relation to the investments. If it were no more than a provision supplementary to s. 46, in the sense that it was so drawn as to apply only to cases which s. 46 did not cover by its own terms, it might be proper to ignore it in a case where, as here, s. 46 did, in the natural and ordinary sense of "transfer", apply. But, as I have said, I do not think that s. 58 (2) can be regarded in this way. It applies directly to Lord St. Levan, for the settled land came to be included in the resources of the company by the effect of his conveyance. It applies to him also in the extended sense, for the transfer that he made was one of a series of associated operations of which the appointment dated Mar. 23, 1927, was one: without that appointment that transfer could never have been made, as it was, for a consideration consisting in part of payment by instalments. Here again, therefore, Lord St. Levan can be treated as a transferor in two distinct ways, one, as actual transferor but in a fiduciary capacity, the other, as supposititious transferor but acting, as such, not in a fiduciary capacity. Here again I think that the Crown is entitled to choose whichever way of presenting the matter under s. 58 (2) may better suit its case and, accordingly, I think that there was a transfer of the settled land also for the purposes of s. 46.

Lastly, there is the £100,000 which Lord St. Levan paid as his subscription for the preference shares. My Lords, I must say quite briefly that, in my opinion, when he did this, he made a transfer of £100,000 to the company within the meaning of this statute. Certainly the company got £100,000 as part of their resources—first a cheque, then a credit with Messrs. Glyn, Mills & Co. Certainly Lord St. Levan, by giving the cheque which led to the transfer of bank credit, reduced his own credit by an equivalent amount. I have spoken of Lord St. Levan as having given a cheque for £100,000, for I assume that he must have. In any event he must have given some authority to the bankers to debit his account with £100,000 and to credit the company with a like amount, and that is, I think, sufficient for the purpose. Whatever form the authority took, it was a disposition made by him and it was an essential part of the transaction by which the company's resources were augmented by this £100,000. I am bound to say that in that state of affairs Lord St. Levan seems to me plainly to have

made a transfer of £100,000 to the company for the purposes of s. 46 as interpreted by s. 58 (2).

- One question remains on which I must express my opinion. It only arises if your Lordships should consider, as I do, that one or more items of property were transferred by Lord St. Levan within the meaning of s. 46. During the three years preceding his death he received from the company sums amounting in the aggregate to £3,000 in each year by way of loan. These loans carried interest at the rate of four per cent. per annum, but the company could not call for repayment of either principal or interest until the expiration of two years after Lord St. Levan's death. Were the sums so received "benefits" accruing to him from the company within the meaning of s. 46? I would answer this question by saying that they were benefits because s. 47 of the Act has declared them so to be. That section does in terms declare that among the things to be treated as benefits accruing to a deceased transferor from a company are any periodical payments out of the resources of the company which the deceased received for his own benefit. A man receives for his own benefit moneys paid to him on an advance by way of loan, not the less because the transaction involves an obligation to repay an equivalent amount at a future date with interest in the meantime. A "periodical payment" is defined by s. 47 (2) in terms which give it the widest possible scope and show at any rate that a payment may be a benefit by way of periodical payment even though it is made in consideration of services rendered or by way of interest on money lent. I can appreciate the force of several criticisms if loans are treated as benefits for this purpose. To have money advanced to one is, no doubt, a benefit, but to treat the whole sum advanced as itself the benefit seems a curious procedure. Yet the statute makes no provision for any valuation of the benefit, since it treats the payment itself as being the benefit. The procedure becomes the more curious when it is discovered that a payment made in respect of a loan without interest is treated as equivalent to other payments made in respect of loans at normal interest, high interest or even exorbitant interest. A loan made within the statutory period and repaid before death is treated as equivalent to a loan still outstanding. I appreciate the force of these criticisms, as I do of other criticisms that might be levelled at the width of the definition of "periodical payments." But I am unable to find in the wording of the Act any warrant for allowing them to cut down what seems to me the arbitrary interpretation that is deliberately imposed on us. It is not as if these criticisms depended on obscure or complicated considerations. They are fairly obvious, and I think that the only possible conclusion is that the legislature, intending to prescribe for a branch of enterprise that may often involve what are at least highly artificial operations, decided to impose its charge in the widest and most comprehensive terms—a decision which excludes the more normal distinctions between what is reasonable and what is unreasonable and the usual connotations of the English language. For these reasons I would be in favour of allowing the cross-appeal of the Crown and of making a declaration to the effect that for the purposes of s. 46 Lord St. Levan made a transfer of (a) the investments and the equitable interests in undivided shares of land, (b) the settled freeholds, and (c) the £100,000 paid as subscription for the preference shares, and a further declaration that the moneys advanced to him on loan during the statutory period are benefits within the meaning of the same section.

LORD TUCKER: My Lords, I have nothing to add to what has already been said in stating my agreement with the view which is held by all your Lordships that for the reasons which have been given the appeal in the present case should be allowed.

With regard to the cross-appeal and dealing first with the investments and equitable interests, I have formed the view—accepting as I do that Lord St. Levan as tenant for life had power under the Settled Land Act, 1925, to direct a change of investment of the capital moneys—that by the joint effect of s. 58 (2)

and s. 58 (4) of the Finance Act, 1940, he must be deemed to have made a transfer, but I think such transfer was made by him in a fiduciary capacity, because the act which results in the notional transfer was done in a fiduciary capacity so that the resulting transfer must be regarded as having been made in that capacity. It was, moreover, in my view, a fiduciary capacity imposed on him solely by the provisions of the Settled Land Act, 1925. But Lord St. Levan must, I think, also be deemed to have made a transfer of the investments by reason of the deed of appointment of Mar. 23, 1927, made by him and Mr. Ponsonby without which the subsequent direction and transfer could not have been given and made. In executing this deed he was clearly not acting in a fiduciary capacity and this act on his part was, accordingly, sufficient to bring it within s. 58 (2). I agree with the view that if one operation which is within sub-s. (2) was performed in a fiduciary capacity and another operation within the sub-section in a non-fiduciary capacity the taxpayer cannot avoid the consequence that the second operation becomes by the "deeming" process a transfer within s. 46 (1).

My Lords, I do not deal in greater detail with this aspect of the case as I am content to say that the reasoning of my noble and learned friend LORD RADCLIFFE on the inter-relation of sub-s. (2) and sub-s. (4) of s. 58 and the results that follow therefrom appear to me convincing. When, however, I come to apply these sub-sections to the transfer of the lands the position seems to me wholly different. Here Lord St. Levan was himself the conveying party. He was, I think, for the reasons which have been stated acting in a fiduciary capacity imposed on him by the Settled Land Act and in such capacity only. Like my noble and learned friend on the Woolsack I can see no ground for calling in aid a "deeming" section when that which is to be deemed has, in fact, taken place without its assistance. If the notional transfer is to supersede the real transfer with consequences detrimental to the taxpayer this should I think be made plain by unambiguous language. As to the £100,000 paid for the preference shares, I agree that to refer to money paid by way of subscription for shares as a transfer of property to the company is an unusual use of words, none the less, not without some doubt, I have come to the conclusion that the words in their present context are wide enough to include payment in cash or by cheque. It must be remembered that the companies referred to are only those to which the section applies and that one of the commonest ways in which benefits of the kind enumerated in s. 47 are obtained is as a result of payment of money. Furthermore s. 58 (2) once again requires consideration, and, although it does not elucidate the meaning of the word "property", it would be odd if a sum of money which "comes to be included in the resources of the company" is not property. Some support for this view is, I think, also to be obtained from s. 51.

My Lords, I am accordingly of opinion that there have been transfers of property within the meaning of s. 46 which are not exempted by the terms of that section in the case of the investments and equitable interests and in the case of the £100,000 paid for the preference shares, but that the transfer of the lands is exempted. With regard to the benefits accruing to the deceased from the company, I agree that the sums amounting to £3,000 advanced to Lord St. Levan during the three years preceding his death were benefits which accrued to him from the company. I feel considerable doubt whether they come within the definition of periodical payments in s. 47 (2), a definition which on the Crown's construction would include loans which had been repaid at the date of death, but I do regard s. 47, not as containing an exhaustive definition of the word "benefits", but merely as enumerating certain matters which are "to be treated as benefits." It does not, I think, exclude other transactions, such as the present, which in the circumstances of particular cases may clearly confer benefits on the deceased in the natural and ordinary meaning of that word. I would, accordingly, allow both appeal and cross-appeal. *Appeal and cross-appeal allowed.*

Solicitors: *Dawson & Co.* (for the taxpayers); *Solicitor of Inland Revenue.*

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

FRANK v. FRANK.

[COURT OF APPEAL (Somervell, Denning and Hodson, L.JJ.), July 5, 6, 1951.]

Divorce—Insanity—Incurable unsoundness of mind—Care and treatment “continuously” for five years—Detention in hospitals in England and Scotland—No order in force during period of removal—Supreme Court of Judicature Act, 1925 (c. 49), s. 176 (d) (as substituted by Matrimonial Causes Act, 1937 (c. 57), s. 2)—Matrimonial Causes Act, 1937 (c. 57), s. 3 (a) (as amended by Law Reform (Miscellaneous Provisions) Act, 1949 (c. 100), s. 3 (a)).

On Oct. 12, 1945, a reception order was made under the Lunacy Act, 1890, against a wife, and on Oct. 16, 1945, she was received into a mental hospital in England where she remained under care and treatment until Dec. 23, 1946. On that date she was discharged, not improved, and taken to a mental hospital in Scotland to which she was admitted under an emergency certificate followed by an order made under the Lunacy (Scotland) Acts, 1857 to 1919. On Mar. 25, 1948, she was discharged from the Scottish hospital, and returned to England, arriving at a hospital on the same day. An order was made by the relieving officer, followed by a reception order dated Mar. 29, 1948, when she was admitted to another hospital where she still was on Nov. 18, 1950, when the husband petitioned for divorce on the ground that the wife was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

HELD: the fact that the wife's detention occurred partly under Scottish and partly under English law and that there was a gap during her transfer from the one country to the other during which no order was in force did not break the continuity of the five-years period during which she was under care and treatment, and, therefore, the husband was entitled to a decree.

EDITORIAL NOTE. Section 176 (d) of the Supreme Court of Judicature (Consolidation) Act, 1925, as substituted by s. 2 of the Matrimonial Causes Act, 1937, is now reproduced in s. 1 (1) (d) of the Matrimonial Causes Act, 1950; and s. 3 of the Act of 1937, as amended by the Law Reform (Miscellaneous Provisions) Act, 1949, s. 3, is reproduced in s. 1 (2) of the Act of 1950.

AS TO INSANITY AS A GROUND FOR DIVORCE, see HALSBURY, Hailsham Edn., 1951 Supplement, Vol. 10, p. 36; and FOR CASES, see DIGEST Supps.

Cases referred to:

- (1) *Murray v. Murray*, [1940] 4 All E.R. 250; [1941] P. 1; 110 L.J.P. 1; 164 L.T. 199; 104 J.P. 447; 2nd Digest Supp.
- (2) *Crutchfield v. Crutchfield*, [1946] 2 All E.R. 730 n.; [1948] L.J.R. 99; 2nd Digest Supp.
- (3) *Benson v. Benson*, [1941] 2 All E.R. 335; [1941] P. 90; 110 L.J.P. 43; 165 L.T. 172; 2nd Digest Supp.

APPEAL by the husband from an order of Mr. Commissioner BUSH JAMES, K.C., dated Apr. 27, 1951, dismissing his petition for divorce on the ground of his wife's insanity. The commissioner found that the wife, who between Oct. 12, 1945, and Nov. 18, 1950, the date of the presentation of the petition, had been detained in mental hospitals in England and Scotland, had not been continuously under care and treatment for a period of at least five years within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 176 (d), as substituted by the Matrimonial Causes Act, 1937, s. 2.

John Latey for the husband.

Horner for the Official Solicitor, acting as guardian *ad litem* of the wife.

SOMERVELL, L.J.: This is an appeal by the husband from a decision of Mr. Commissioner BUSH JAMES, K.C., which raises a question of the construction of s. 3 (a) of the Matrimonial Causes Act, 1937. On Oct. 12, 1945,

a reception order was made against the wife and on Oct. 16, 1945, she was admitted to the county hospital at Whittingham, in England, where she was under care and treatment until Dec. 23, 1946. On that date, as her condition had not improved, she was discharged under escort, and was taken to the Crichton Royal Mental Hospital in Dumfries where she arrived on the same day. She was admitted on that day under an emergency certificate which was followed by a sheriff's order dated the following day under the provisions of the Lunacy (Scotland) Acts, 1857 to 1919. She remained there until Mar. 25, 1948, when, the treatment in Scotland not having effected any appreciable improvement, she returned to England, arriving at St. Pancras Hospital on the same day as she left Scotland. An order was made by the relieving officer, followed by a reception order dated Mar. 29, 1948. On Mar. 29, 1948, the wife was admitted to Banstead Hospital, and she has been there ever since. On Nov. 18, 1950, the husband petitioned for divorce on the ground of incurable insanity, and so, unless there has been, as is suggested, a break in continuity, more than five years have elapsed since the first reception order.

Unsound mind as a ground for a divorce appeared in our law for the first time in the Matrimonial Causes Act, 1937. By s. 2 it was provided that a divorce could be granted on the ground that the respondent

"(d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition."

Section 3 provided:

"... a person of unsound mind shall be deemed to be under care and treatment—(a) while he is detained in pursuance of any order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930 . . . (b) while he is receiving treatment as a voluntary patient under the Mental Treatment Act, 1930, being treatment which follows without any interval a period of such detention as aforesaid; and not otherwise."

Those last three words qualify both (a) and (b).

The detention covered by s. 3 was in pursuance of the English Lunacy Acts. Lunacy is one of those matters with regard to which Scotland has its own legislation. Section 3 of the Law Reform (Miscellaneous Provisions) Act, 1949, provides:

"Notwithstanding anything in s. 3 of the Matrimonial Causes Act, 1937, a person shall be deemed for the purposes of s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, to be under care and treatment—(a) while detained in pursuance of any order or warrant for his detention or custody as a lunatic under the Lunacy (Scotland) Acts, 1857 to 1919; (b) while detained in pursuance of any order for his detention or treatment as a person of unsound mind or a person suffering from mental illness made under any law for the time being in force in Northern Ireland, the Isle of Man or any of the Channel Islands (including any such law relating to criminal lunatics); or (c) while receiving mental treatment as a voluntary patient under the Mental Treatment Act, 1930, or under any such law as is mentioned in para. (b) of this section, being treatment which follows without any interval a period during which he was detained as mentioned in para. (a) or para. (b) of this section."

When a person of unsound mind is removed from one hospital to another in this country a removal order is made under the Lunacy and Mental Treatment Acts, and, if necessary, the person can be detained under it during the transit from the one hospital to the other. In the case of the transfer of a person of unsound mind from a hospital in England to a hospital in Scotland or *vice versa*, there is no order which makes detention under the Lunacy and Mental Treatment Acts operative during the journey from one to the other. The

question, therefore, is whether it can be said that the wife has been continuously under care and treatment. As care and treatment is defined in terms as being detained under one or other system of the lunacy laws it is said that during the journey from England to Scotland and Scotland to England there was no detention under those Acts. The learned commissioner decided that the care and treatment was not continuous, and he dismissed the petition. The commissioner relied on *Murray v. Murray* (1), in which in 1935 a wife, who was incurably of unsound mind, was discharged as not recovered from a mental hospital under s. 25 of the Lunacy Act, 1890, to be detained in a workhouse within the meaning of that Act. In 1939 the husband petitioned for the dissolution of his marriage under s. 2 (d) of the Matrimonial Causes Act, 1937, and SIR WILFRID GREENE, M.R., came to the conclusion that, once the wife had been transferred to the workhouse, owing to a failure to perform the conditions required by the Act she was not being lawfully detained under the Lunacy Act, 1890. He said ([1941] P. 11):

“ . . . it is impossible to say of this patient that she was detained in pursuance of an order at any moment of time after she left the Bexley Hospital. She was not being lawfully detained under the original reception order because that specified and only applied to Bexley. She was not being lawfully detained under s. 25 [of the Lunacy Act, 1890] because that section had not been complied with.”

There are observations about the importance of construing and applying the Lunacy and Mental Treatment Acts strictly with which I wholly agree, but that case does not really assist. One of the results of what happened was that during about four years of the relevant period there were no periodical reports on the wife as there would have been if she had been detained under an order.

The order of the relieving officer made in the present case when the wife came back to England from Scotland and after she had arrived at St. Pancras Hospital was made under s. 20 of the Lunacy Act, 1890, which provides:

“ If a . . . relieving officer . . . is satisfied that it is necessary for the public safety or the welfare of an alleged lunatic with regard to whom it is his duty to take any proceedings under this Act, that the alleged lunatic should, before any such proceedings can be taken, be placed under care and control [he] may remove the alleged lunatic to the workhouse [and have him or her detained] but no person shall be so detained for more than three days . . . ”

In *Crutchfield v. Crutchfield* (2) there had been such an order and under it the patient had been removed to a hospital. Afterwards she was transferred to a mental hospital as a voluntary patient. The question, therefore, arose whether her treatment as a voluntary patient followed without any interval a period during which she was detained in pursuance of an order under the Lunacy and Mental Treatment Acts, 1890 to 1930. JONES, J., decided that an order under s. 20 of the Lunacy Act, 1890, was not an order under the Lunacy and Mental Treatment Acts such as was contemplated in s. 3 (b) of the Matrimonial Causes Act, 1937.

The first question here is: Does the proper and natural construction of s. 3 (a) of the Matrimonial Causes Act, 1937, lead to the conclusion that Parliament intended that detention during the period of five years occurring as the result of orders under the different systems of law should be covered? I should have thought that the sub-section plainly contemplates that that contingency, if it arises, should be covered. It would be absurd to say, where one has, as here, provision that the detention can be in Scotland and in England, that Parliament did not intend that two and a half years in England and three and a half years in Scotland should satisfy the requirements for the five years' care and treatment.

The next question is: Does the fact that s. 2 (d) uses the word "continuously" make it impossible to say that the conditions have been fulfilled if the transfer from Scotland to England involves, as it did here, a gap in which the person is not detained under any order? On that point there is no direct authority, but in *Benson v. Benson* (3), on Sept. 29, 1933, the respondent wife was received as a temporary patient into a mental hospital under s. 5 of the Mental Treatment Act, 1930. On Mar. 1, 1934, the Board of Control directed, under s. 5 (13) of the Act, that the period of her treatment be extended for three months from Mar. 25, 1934. On May 30, 1934, she was discharged relieved and was admitted into another mental hospital as a voluntary patient. Though the point was not taken, I think it is plain that, on the facts as presented, there was a gap during the journey from the hospital which she had been in at Chester in respect of which the extension order had been made until she arrived as a voluntary patient at the hospital at Lancaster when she was not under any order, but it did not occur to either counsel or to LORD MERRIMAN, P., who tried that case, that that made any difference. Indeed, the learned President treated the respondent as leaving the first hospital and proceeding without any interruption direct to the hospital at Lancaster. The fact that the point did not occur to anybody there may be of some assistance in considering whether or not it is a good point in the present case. I do not think it is. Once one reaches the conclusion that Parliament must have intended that periods in England and Scotland could be added together to make up the period of five years, one has the solution to the problem which is raised in the present proceedings. It would, I think, be defeating the obvious intention of s. 2 (d) of the Act of 1937 if one treated as a breach of continuity something which must necessarily happen if the contemplated transfer between England and Scotland or Scotland and England takes place. The facts here are that the journeys were made direct. The wife was accompanied by a nurse, and the order made by the relieving officer when she arrived in England was, as it seems to me, made to regularise a detention until the medical officer had had proper time to examine the patient and sign the necessary certificate on which the reception order here is based. For those reasons, therefore, I think that this appeal must be allowed and that the husband is entitled to say that the wife has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

DENNING, L.J.: I agree. This is the familiar contest between a literal interpretation of an Act of Parliament and a liberal or reasonable interpretation of it. I can well understand that, in view of what was said in this court in *Murray v. Murray* (1), the commissioner felt compelled to give this Act a literal interpretation and to hold that the period of five years was broken because of the short periods while the wife was being transferred between different mental hospitals. I do not think, however, that we should stick to the letter of the statute when the general intention is clear. It was plainly not the intention of Parliament that the period of five years should be broken simply because of the necessary removal of a patient from one mental hospital to another. I agree that the appeal should be allowed.

HODSON, L.J.: I agree. I think the learned commissioner put too strict an interpretation on the word "continuously" and I think it right, on the facts of this case, to find that the wife was continuously under care and treatment notwithstanding the inevitable break between the two periods of certification, the one in England and the one in Scotland.

Appeal allowed. Decree nisi granted.

Solicitors: *Capel Cure, Glynn Barton & Co.* (for the husband); *Official Solicitor* (for the wife).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

Re LYONS. BARCLAYS BANK, LTD. *v.* LYONS AND OTHERS.

[CHANCERY DIVISION (Romer, J.), June 26, 27, July 11, 1951.]

Annuity—Annuity free of income tax—Business loss by annuitant—Relief under Income Tax Act, 1918 (c. 40), s. 34 (2)—Repayment to annuitant of tax paid on annuity—Liability of annuitant to account to trustees.

A By his will, dated Oct. 8, 1942, the testator gave his residuary estate to his trustees on trust to pay the sum of £10 each week free of income tax to his son M. during his life on protective trusts, and after M.'s death to pay a sum free of income tax to M.'s wife on protective trusts, and, subject thereto, on trust for M.'s children. The testator died on Mar. 25, 1946, and after his death the annuity was paid to M. out of dividends received by the trustees as income of the testator's residuary estate on which tax at the standard rate had been deducted at source. In the year 1946-47 M. sustained a business loss of £1,027, in respect of which he claimed relief under the Income Tax Act, 1918, s. 34 (1), and under s. 34 (2) he was repaid payments of tax aggregating £429 19s. 1d., of which £425 9s. 1d. represented the tax deducted at source on the gross annuity. C On the question whether M. was accountable to the trustees for the sum of £425 9s. 1d. or part of it,

D HELD: the testator's object in giving M. an annuity free of tax was to exonerate him from the burden of income tax and not from some other burden, such as a loss in his business, and, therefore, the benefit of the additional gift, *viz.*, the amount of the income tax payable on the annuity, could not be claimed in any year in which no tax on the annuity had been paid; it was immaterial that, under the administrative machinery prescribed by s. 34 (2) of the Income Tax Act, 1918, the liability to tax was ascertained and the tax was paid before any question of repayment under the sub-section could arise; and, therefore, M. was accountable to the trustees for so much of the sum recovered by him from the Inland Revenue as represented repayment of tax paid in respect of his annuity for that year. E

Re Pettit ([1922] 2 Ch. 765), applied.

Inland Revenue Comrs. v. Cook ([1945] 2 All E.R. 377), considered.

F AS TO EFFECT OF DIRECTION IN WILL TO PAY ANNUITY FREE OF INCOME TAX. see HALSBURY, Hailsham Edn., Vol. 28, pp. 215, 216, paras. 386-388; and FOR CASES, see DIGEST, Vol. 39, pp. 166-168, Nos. 572-593.

Cases referred to:

- (1) *Re Pettit*, [1922] 2 Ch. 765; 91 L.J.Ch. 732; 127 L.T. 491; 39 Digest 167, 587.
- G (2) *Re Kingcome*, [1936] 1 All E.R. 173; [1936] Ch. 566; 105 L.J.Ch. 209; 154 L.T. 462; Digest Supp.
- (3) *Hunter's Trustees v. Mitchell*, 1930 S.C. 978; Digest Supp.
- (4) *Inland Revenue Comrs. v. Cook*, [1945] 2 All E.R. 377; [1946] A.C. 1; 114 L.J.P.C. 69; 173 L.T. 211; 26 Tax Cas. 489; *affg.* 1944 S.C. 286; 2nd Digest Supp.
- H (5) *Michelham's Trustees v. Inland Revenue Comrs. Michelham (Executors of Dowager Lady) v. Inland Revenue Comrs.*, (1930), 144 L.T. 163; 15 Tax Cas. 737; Digest Supp.
- (6) *Re Williams*, [1945] 2 All E.R. 102; [1945] Ch. 320; 115 L.J.Ch. 101; 173 L.T. 132; 2nd Digest Supp.

ADJOURNED SUMMONS.

By the will of Henry Lyons the first defendant, Michael Lyons, was given an annuity of £10 a week free of income tax. The annuity was paid to him out

of income of residue on which income tax at the standard rate was deducted at source. In the years 1946-47 and 1947-48 the first defendant suffered business losses in respect of which he received relief under the Income Tax Act, 1918, s. 34 (2), being repaid sums paid by him in respect of income tax, including the tax paid in respect of the annuity for those years. The trustees took out a summons to determine, *inter alia*, whether the first defendant was liable to account to them for so much of the sums so repaid to him as were referable to the tax paid on the annuity for the two years. A

Droop for the trustees.

J. H. Stamp for the first defendant (the annuitant).

E. G. Wright for the second and third defendants (interested in the residuary estate).

Cur. adv. vult. B

July 11. **ROMER, J.**, read the following judgment. By his will, dated Oct. 8, 1942, the testator, Henry Lyons, devised and bequeathed his residuary real and personal estate to his trustees on trust to sell and convert the same and to pay his testamentary expenses, debts, legacies and death duties and to invest the residue of the proceeds of sale. By cl. 12 he directed his trustees, so far as material, to stand possessed of his residuary estate and the income thereof on trust to pay the sum of £10 each week free of income tax to his son Michael during his life on protective trusts and from and after Michael's death on trust to pay the sum of £8 each week free of income tax to his wife during her life on protective trusts, and, subject thereto, his trustees should stand possessed of the residuary estate on trust for all the children or child of Michael who should attain the age of twenty-one years. The testator died on Mar. 25, 1946, having made five codicils to his will, none of which is material for present purposes. The trustees paid Michael's annuity out of income of the testator's estate which had borne income tax at the standard rate by deduction at source, and a question has arisen whether, in the circumstances herein-after stated, Michael is liable to account for and pay to the trustees (either in whole or in part) sums recovered by him in respect of income tax for the years 1946-47 and 1947-48 and being referable to the tax paid to the revenue by deduction at source as aforesaid on his said annuity. C

In each of the income tax years 1946-47 and 1947-48 Michael sustained a substantial loss in his business in respect of which he claimed, and obtained, relief under the Income Tax Act, 1918, s. 34. In the year 1946-47 Michael's taxable income was: (a) annuity £945 9s. 1d. (being the gross annuity required to produce the net annuity of £10 a week for a year less tax at the standard rate of 9s. in the £); (b) wife's earned income, £97; (c) other income £43 11s. 11d., making an aggregate income of £1,086 1s. In the year 1946-47, £425 9s. 1d. was paid as tax on the said gross annuity (the net annuity being paid as aforesaid out of dividends received by the trustees which had borne tax) and £4 10s. tax on a dividend which had not borne tax. The revenue repaid to Michael the aforesaid payments of tax aggregating £429 19s. 1d. on a claim by him under the Income Tax Act, 1918, s. 34 (1), in respect of a business loss for that year of £1,027. In the year 1947-48 Michael's taxable income was: (a) annuity £963 12s. 9d. (being the gross annuity required to produce the net annuity for 53 weeks); (b) wife's earned income £242 10s.; (c) other income £12 10s.; less £28 18s. bank interest and £37 0s. 8d. taxed charges, leaving an aggregate income of £1,152 14s. 1d. In the year 1947-48, £433 12s. 9d. was paid as tax on the said gross annuity (the tax being actually paid as in the preceding year) and £5 12s. 6d. tax on a dividend. The revenue repaid to Michael £422 11s. 11d., being the said payments of tax aggregating £439 5s. 3d. (less a certain sum of £16 13s. 4d.) on a claim by Michael under s. 34 (1) of the Act of 1918 in respect of a business loss for that year of £1,152. If Michael had made no claim for repayment of tax under s. 34 (1) in each D
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of the said two years, he would have been entitled to a refund of the following sums: personal allowance of £180 at 9s., £81; first £50 of taxed income at 6s., £15; next £75 at 3s., £11 5s.; total £107 5s. Michael would also have been entitled to allowances in respect of his children and in respect of life insurance premiums paid by him, but the amount recoverable would have been less the earned income relief of his wife for each year. For convenience I will hereafter refer collectively to reliefs recoverable under the income tax legislation as the "statutory allowances."

In these circumstances there would, with reference to the two years above mentioned, appear to be three views of Michael's position in relation to the trustees of the testator's will. The first view is that Michael is under no obligation to account to the trustees for any of the income tax which was repaid to him by the revenue pursuant to s. 34 (2) of the Act of 1918. The second view is that he is accountable in accordance with the rule in *Re Pettit* (1) for so much of each of the sums of tax recovered as would be equal to the amount for which he would have been accountable to the trustees in respect of his statutory allowances attributable to his annuity for the year in respect of which such sum was recovered if he had made no claim under s. 34 (1). The third view is that he is accountable for so much of each of the said sums as represented repayment of tax paid by the trustees in respect of his annuity for the year in respect of which such sum was recovered. Counsel for Michael said that he did not dispute the limited liability to account involved in the second view. His reason for this concession is that Michael was under a fiduciary obligation to recover and pay over to the trustees that proportion of his statutory allowances to which they are entitled (see *Re Kingcome* (2)), and that the trustees should not in this respect be prejudiced by the fact that Michael successfully claimed total repayment of tax under s. 34 of the Act of 1918, a course which naturally precluded any claim for statutory allowances. Counsel for Michael contended, however, that the excess of repaid tax remaining after giving effect to the second view belongs to Michael. The foundation of his contention is that this excess forms part of Michael's annuity. He says, and rightly, that the tax paid by the trustees on his annuity forms part of Michael's income for surtax purposes, and that, inasmuch as Michael has to include the amount of such payments in his return of total income, so also should he be entitled to retain what counsel on his behalf acknowledges to be a windfall.

Counsel for Michael relied on certain judicial utterances of the highest authority as supporting his argument. In *Hunter's Trustees v. Mitchell* (3) LORD SANDS said (1930 S.C. 982):

" . . . when under a will an annuity is payable free of income tax, the amount of the tax is taken to be an additional gift, and is included in the income of the annuitant when, for revenue purposes, a return of total income is necessary. Further, the income from this source is not the annuity plus the tax upon it, but the amount of the annuity plus such sum that, when the tax is levied upon the total amount, the net amount left will be the amount of the annuity."

This citation was accepted by VISCOUNT MAUGHAM, LORD THANKERTON and LORD SIMONDS, in *Inland Revenue Comrs. v. Cook* (4), as being an accurate statement of the law. In *Cook's* case (4) a testatrix bequeathed an annuity of £100 "free of all deductions including income tax . . ." to the respondent, to whom the annuity had been paid by the trustees of the will out of income that had been brought into charge to tax. In the year ending Apr. 5, 1940, the gross amount of the payment was £153 16s. 11d., the balance after payment of the annuity being income tax accounted for to the Inland Revenue. The respondent, who had no other income, lodged a claim for repayment of £47 11s. 4d. tax, but the inspector of taxes, having learnt that she intended to hand over the returned tax to the trustees, disallowed the claim. It was

held by a majority of the House that the respondent was entitled to the repayment which she claimed, inasmuch as the sum of £53 16s. 11d., having been deducted at source, must be dealt with as if it had been paid by the respondent herself and that the Inland Revenue had no concern how the sum repaid to the respondent was applied by her. In his speech VISCOUNT MAUGHAM said ([1945] 2 All E.R. 380):

“ Gifts by will of annuities free from income tax have been common in both Scotland and England for many years, and have given rise to a large number of reported decisions. At an early stage there was a little hesitation in dealing with them, for it was and is apparent that a named annual sum cannot literally be given free from income tax, since the annuitant must normally pay income tax on his or her income, and what is sometimes called a benevolent construction had to be applied if the plain intention of the will was to be carried out. That intention could be achieved by the simple means of holding that the testator must have intended to give, in addition to the fixed annuity, such a sum as would enable the trustees in each year to discharge the income tax on the total amount of the fixed annuity and the additional sum and to pay the balance which in the normal case would be the exact amount of the stated annuity to the annuitant. Unless there is something special in the language of the will, which prevented that construction being adopted, that became the recognised construction in cases of gifts of annuities of fixed amounts free of income tax both in England and Scotland.”

After referring with approval to the statement of the rule by LORD SANDS (1930 S.C. 982) in *Hunter's Trustees v. Mitchell* (3), LORD MAUGHAM said (*ibid.*, 381):

“ The rule where it is properly applied is in my opinion a fair and just one. It carries out the intention of the testator. It has been applied in very numerous cases, and it is far too late to challenge it today. It is clear that it applies in the present case. I will only add that under the rule what is treated as being given to the annuitant is given, to use the language of that eminent judge the late LORD FLEMING (1944 S.C. at p. 295), in two annual constituents. The one is the annuity of £100, the other is ‘ just an addition to the gift of £100 ’ to enable the trustees to comply with the direction to pay that annuity free from income tax and it ‘ became in law part of her income ’.”

After further observations, LORD MAUGHAM continued (*ibid.*):

“ To make the position clear it may be desirable to point out that the amount of the annual benefits given on the true construction of the will to the annuitant was £100 plus the sum which might ultimately prove to be payable by her for income tax for that year so as to leave £100 for her personal behoof. In other words the annuity given to her was an amount equal to £100 plus an amount, say £x varying from year to year and liable to exemptions and abatements. The £x is none the less a constituent of her income because it may vary from year to year and (if payable) has to be paid in discharge of her income tax. The fact that the value of £x is unascertainable until after the end of the year when the deductions for abatements and exemptions, if any, will be ascertained does not occasion any practical difficulty.”

LORD THANKERTON said (*ibid.*, 385):

“ . . . the duty of the trustees is to provide by means of the additional gift a sum to meet the annuitant's liability for income tax . . . ”

LORD SIMONDS, after approving the proposition of law by LORD SANDS in *Hunter's Trustees v. Mitchell* (3), said (*ibid.*, 392):

" . . . it leaves entirely open the question what upon the true interpretation of a particular will is the amount of the tax which is the subject of the additional bequest."

A In *Michelham's Trustees v. Inland Revenue Comrs. Michelham (Executors of Dowager Lady) v. Inland Revenue Comrs.* (5) ROMER, L.J., expressed his view of a tax-free annuity, so far as the present point is concerned, as follows (144 L.T. 168):

B " . . . where a testator by his will purports to give an annuity free of income tax the will necessarily must be read as conferring upon the annuitant such an annuity as, after deduction of the tax therefrom, shall leave the clear sum mentioned by the testator."

C It is on statements of the law such as those which I have cited that counsel for Michael founds his contention that the sums paid by the trustees in the two relevant years in tax on Michael's annuity ought, except for the amounts of the statutory allowances, to be regarded as forming part of the annuity, with the result that, as they have been recovered, they belong to Michael just as much as does the annuity itself. It is, of course, fully established by the speeches in *Cook's* case (4), and it had, indeed, been established before, that, if a testator gives an annuity free of tax, he confers on the annuitant two benefits: (i) the amount of the annuity, and (ii) the amount of the tax payable on the annuity in the annuitant's hands. If income tax is ultimately found to be payable in respect of the annuity, having regard to the tax legislation and to the circumstances of the annuitant in any particular year, then the amount of that tax is regarded as a gift by the testator to the annuitant. I am unable, however, to regard the "additional gift" as a bequest in the full sense that that word ordinarily bears, for, in my judgment, it is a gift for a particular purpose and for no other, and, if it is not required to answer that purpose, it fails and cannot be applied to some other purpose instead. If counsel for Michael is right in his contention, the amounts which the trustees paid to the revenue in the relevant years would go, not in relief of Michael's tax liability (which was nil), but in relief of his business losses, and I can see no trace of an intention by the testator in his will that such losses should fall on his residuary legatees in exoneration of Michael himself. The object of the testator in giving Michael an annuity free of tax was surely to exonerate Michael from a particular burden, *i.e.*, tax, and not from some other burden such as a loss in his business.

G This conception of a tax-free annuity does not appear to me to be in the least inconsistent with any judicial utterances. On the contrary, it is, I think, supported by some of the observations of the law lords in *Cook's* case (4). For example, LORD THANKERTON, after pointing out the two stages in a taxpayer's liability to income tax, *viz.*, the sufferance of deduction at source at the standard rate and the subsequent adjustment when the taxpayer claims and obtains relief by repayment, said ([1945] 2 All E.R. 385):

H "The duty of the trustees in a case such as the present is to provide for the liability of the annuitant to tax under the first stage, and it is difficult to see why they are not to get the benefit of the later adjustment to which the provisional discharge of the taxpayer's liability is subject. The additional gift in such a case, either in whole—as in the present case—or in part, serves to meet a temporary tax liability, and, when the tax liability is ultimately ascertained, its service is terminated, and it should be *pro tanto* returned to the trust estate."

Then the noble Lord, for the purpose of illustration, made the assumption that, in the case which was before the House, there was no statutory machinery for collection at the source and said (*ibid.*):

"The annuitant would then be directly assessed on her total income, and there can be no doubt that her total income would be found to be £100, and she would be exempt from any liability to tax, with the result that the additional gift would become unnecessary in the particular year."

In *Re Williams* (6) UTHWATT, J., referred to the tax-free element in an annuity bequeathed free of tax as an "indemnity." He said ([1945] 2 All E.R. 104) that the question which usually arises in cases of this kind is

"... whether the reference to income tax is a reference to the standard rate of income tax merely as an arithmetical factor in the calculation of the gross amount of the annuity given by the will or whether the provision as to income tax merely indemnified the annuitant against such part of the annuitant's income tax (other than surtax) which is properly referable to the annuity . . . The practice of the court has been to assume that the annuitant is entitled to treat as his income for the purpose of calculating his reliefs and allowances the whole of the income tax paid for his account: and on that footing it has been held that the annuitant is bound to claim reliefs and allowances, in respect of his total income—he is indeed declared a trustee of this right to claim them—and to account to the paying hand for a rateable proportion of the sum received. The net result is that the annuitant receives only his indemnity."

Whether one regards the "additional gift" in a tax-free annuity as being a gift for a specific purpose or as an indemnity, I am unable to see how the annuitant can claim the benefit of it in any year in which no tax on his annuity has to be paid. The argument of counsel for Michael as to this is that in each of the relevant years Michael's liability to tax was ascertained, and tax had to be paid in discharge of such liability, before any question of a repayment of tax under s. 34 (2) of the Income Tax Act, 1918, could arise. It is true that the machinery prescribed by the section leads to this result and that it is only on the commissioners being satisfied of the amount of the loss and of the payment of tax on the aggregate amount of income that they are to give a certificate authorising repayment of so much of the sum paid for tax as would represent the tax on income equal to the amount of the loss. In my judgment, the administrative machinery of the section does not affect the matter. The question is not whether at any particular stage Michael was liable to tax, but whether he was ultimately liable and the answer to that question is that he was not. Accordingly, the purpose for which the testator made the "additional" bequest, or the burden against which he provided the indemnity (whichever may be the proper way of defining the position), never effectively arose.

Counsel for Michael described the tax repayments made by virtue of s. 34 as windfalls and claimed them for the annuitant as statutory alleviations of his business misfortunes. To accept his argument on behalf of Michael would result, in my opinion, in undermining the reasoning on which the judgment in *Re Pettit* (1) proceeded. In that case ROMER, J., referred to the position of trustees of a tax-free annuity paying tax thereon to the revenue at the standard rate and of the amount so paid proving in the end to be too little or too much and said ([1922] 2 Ch. 770):

"If the annuitant were liable to pay supertax it would be too little and the proper proportion of her supertax referable to her annuity would, when ascertained, have to be paid to her by the trustees and would so go to reduce the income payable to the residuary legatees. It might on the other hand turn out that the circumstances of the annuitant were such that she was not liable in respect of her income to the full rate of income

tax, that, in my opinion, being the true effect of the provisions for relief and abatement contained in the relevant taxing Acts. In that case the sum so set aside and the £428 11s. 5d. paid in the first instance to the revenue would be too much, and if, in consequence of this, the annuitant is repaid the excess by the Special Commissioners, I cannot understand on what ground it can be suggested that such excess should be retained by the annuitant who has not paid it, and not be handed back to the residuary legatees who have. If the annuitant were to retain the excess she would in the end have received out of the estate more than 20s. in the £ on the £1,000 given to her by the will."

In my judgment, accordingly, the whole of the sums recovered under s. 34 for the years 1946-47 and 1947-48 in respect of income tax paid by the trustees, is repayable to them. I would add that, had Michael carried forward his business losses under the Finance Act, 1926, s. 33, instead of claiming repayment of tax under s. 34 of the Act of 1918, different considerations might well have arisen. With that, however, I am not concerned, as he did not in fact do so. I will, therefore, make a declaration on questions 1 and 2 of the originating summons that the defendant Michael Lyons is accountable to the trustees of the testator's will for so much of each of the sums of £429 19s. 1d. and £422 11s. 11d., in the summons mentioned, as represented repayment of tax paid in respect of his annuity for the year in respect of which such sums were respectively recovered. Michael did not suffer a business loss in the year 1948-49 and in respect of such year question 3 of the summons asks (in effect) whether, in applying the rule in *Re Pettit* (1), what I have earlier referred to as the statutory allowances should or should not include reliefs from income tax (a) in respect of Michael's dependent children, and (b) in respect of life assurance premiums paid by him. Counsel for Michael rightly conceded that there is no logical ground for excluding these reliefs from the rule and I will make an affirmative declaration accordingly.

Declaration accordingly.

Solicitors: *Saville & Mannooch* (for the trustees and the second and third defendants); *Wright & Webb* (for the first defendant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

Re POWER'S SETTLEMENT TRUSTS. POWER AND OTHERS v. POWER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Birkett, L.JJ.), July 5, 9, 1951.]

Trust and Trustee—Additional trustee—Appointment—Appointment by appointor of himself—Trustee Act, 1925 (c. 19), s. 36 (6).

By virtue of a settlement dated Feb. 22, 1939, the defendant was "a person . . . nominated for the purpose of appointing new trustees by the instrument . . . creating the trust" within the Trustee Act, 1925, s. 36 (6). Although no vacancy had occurred, the defendant purported to appoint himself a trustee in addition to the three existing trustees of the settlement.

Held: the defendant had no power under s. 36 (6) to appoint himself an additional trustee, and the purported appointment was ineffective.

Re Sampson ([1906] 1 Ch. 435) and *dictum of DENNING, L.J., in Royal Crown Derby Porcelain Co., Ltd. v. Russell* ([1949] 1 All E.R. 755), applied. *Decision of WYNN-PARRY, J. ([1951] 1 All E.R. 932), affirmed.*

AS TO APPOINTMENT OF TRUSTEES UNDER STATUTORY POWER, see HALSBURY, Hailsham Edn., Vol. 33, pp. 171-176, paras. 296-307; and FOR CASES, see DIGEST, Vol. 43, pp. 680-682, Nos. 1106-1123.

Cases referred to:

- (1) *Re Sampson*, [1906] 1 Ch. 435; 75 L.J.Ch. 302; 94 L.T. 241; 43 Digest 681, 1110.
- (2) *Royal Crown Derby Porcelain Co., Ltd. v. Russell*, [1949] 1 All E.R. 749; [1949] 2 K.B. 417; 2nd Digest Supp.
- (3) *Montefiore v. Guedalla*, [1903] 2 Ch. 723; 73 L.J.Ch. 13; 89 L.T. 472; 43 Digest 678, 1086.

APPEAL by the defendant from an order of WYNN-PARRY, J., dated Apr. 4, 1951, and reported [1951] 1 All E.R. 932, declaring that the defendant, in whom was vested the statutory power of appointing additional trustees of a settlement under the Trustee Act, 1925, s. 36 (6), was not entitled under s. 36 (6) to appoint himself an additional trustee.

R. W. Jennings, K.C., and *T. A. C. Burgess* for the defendant.
Pennycuick, K.C., and *A. F. M. Berkeley* for the plaintiffs.

SIR RAYMOND EVERSHED, M.R.: The question raised in this appeal is whether the power conferred by the Trustee Act, 1925, s. 36 (6), to appoint additional trustees may be so exercised that the donor of the power can appoint himself. The problem has arisen because under the settlement in the name of which this case is entitled the defendant now has the statutory power to appoint new trustees. There has been no vacancy caused by any death or retirement. The existing trustees are three in number. The defendant has executed a document purporting to appoint himself as a fourth trustee additional to the three trustees who are the plaintiffs. His self-appointment appears not to be agreeable to the other trustees and these proceedings have consequently arisen.

As a matter of history, the Trustee Act, 1893, s. 10 (1), provided for the appointment of new trustees where a vacancy arose owing to death or retirement or other circumstances which are now referred to in s. 36 (1) of the Act of 1925. The formula which was used in s. 10 (1) was, so far as material, that the person or persons nominated for the purpose, or, if there were none, then the surviving or continuing trustees, might

“by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead . . .”

The question whether that form of words permitted an appointor, *i.e.*, the donee of the power, to appoint himself came on some few occasions before the Chancery Courts, and the resulting decisions of the Chancery judges were uniformly to the effect that the donee could not, by exercising that power, appoint himself. No case ever reached the Court of Appeal and it has been one of the arguments presented by counsel for the defendant that it is open to this court now to express disapproval of those earlier decisions. But there is no doubt that over a period of a generation or more the old sub-section had consistently been construed as I have mentioned.

The consolidating Act—the Trustee Act, 1925—which we have to construe, differed in two material respects from its predecessor of 1893. In the first place, the old s. 10 (1) is reproduced, but the new Act made it clear that in the events contemplated the donee of the power could appoint himself, for in parenthesis after the enabling words was inserted “whether or not being the persons exercising the power.” But the legislature also altered the formula of the enabling provision. Instead of employing the language of s. 10 (1)—“may, by writing, appoint another person or other persons”—the new Act by s. 36 (1) provided: “may, by writing, appoint one or more other persons”. Counsel for the defendant pointed out that as a formula that cannot be very much different in meaning, if, indeed, there is any. The new formula certainly has no merits as English by comparison with its predecessor, but the point remains that the formula was altered. Then s. 36 added a new power not previously in the

statute, *viz.*, a power within certain limits to add to the number of trustees which the settlor or testator had appointed. It provides:

A “(6) Where a sole trustee, other than a trust corporation, is or has been originally appointed to act in a trust, or where, in the case of any trust, there are not more than three trustees (none of them being a trust corporation) either original or substituted and whether appointed by the court or otherwise, then and in any such case—(a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or (b) if there is no such person, or no such person able and willing to act, then the trustee or trustees for the time being; may, by writing, appoint another person or other persons to be an additional trustee or additional trustees . . .”

B That is the sub-section which we are called on to construe, and it will be observed that there is no parenthesis such as appears in sub-s. (1). In sub-s. (6), the legislature retained the precise formula which was in the Act of 1893, “another person or other persons,” a formula which had been construed by the courts, in particular, in *Re Sampson* (1).

C What is the proper inference to be drawn from these differences in terminology? The main point advanced on behalf of the defendant (and certainly that which I found the more attractive), was that there was really no difference in significance between the two formulae, “one or more other persons,” and “another person or other persons,” and that, Parliament having in sub-s. (1) made it clear by the parenthesis that the former language was intended to include the appointor among the class of possible appointees, that parenthesis should be treated, so to speak, as a definition for all the sub-sections in s. 36, thus rendering it unnecessary to repeat it in sub-s. (6). The learned judge came to the conclusion, particularly in view of the decisions to which reference has been made (and which would in any case bind him), that the difference in sub-s. (6) was material, and that a donee of a power could not appoint himself when exercising his powers under that sub-section. He regretted the decision to which he felt constrained to come, because he thought that it was a capricious result that a donee could appoint himself if there were a vacancy, but could not appoint himself if there were not.

F After considering the arguments, I have come to the conclusion that the view of the construction taken by the learned judge was right. For my part, I feel less constraint and reluctance than he did. I agree with counsel for the defendant that, if the two meanings are equally open, the court should tend to avoid what might be thought to be capricious and to offend against what he described as a “consistent system” dealing with new appointments. But I have been persuaded that as a matter of construction the right conclusion is that which the learned judge reached.

G I arrive at my conclusion thus. I begin by accepting for the purposes of my argument, as counsel for the plaintiffs accepted, the statement of the rule of construction which is to be found in the judgment of DENNING, L.J., in *Royal Crown Derby Porcelain Co., Ltd. v. Russell* (2) ([1949] 1 All E.R. 755):

H “The true view is that the court will be slow to overrule a previous decision on the interpretation of a statute when it has long been acted on, and it will be more than usually slow to do so when Parliament has, since the decision, re-enacted the statute in the same terms, but if a decision is, in fact, shown to be erroneous, there is no rule of law which prevents it being overruled.”

Parliament in re-enacting s. 36 (1), as it seems to me, clearly recognised the validity of the decisions in the Chancery Courts, for by the parenthesis Parliament made it plain that a power or privilege was being given to the donee of the power which, apart from the parenthesis, he would not have. I think it

is not wholly insignificant that in making that change Parliament also varied the formula from "another person or other persons" to "one or more other persons." Having made that variation, they could, indeed, as counsel for the plaintiffs pointed out, have left out the word "other." That, however, is another matter. Parliament did change the formula slightly and inserted this parenthesis which must be taken to have put, as it were, the *imprimatur* of Parliament on the judicial decisions. But when Parliament came to formulate its new provision in sub-s. (6), it then went back, and adhered strictly, to the old formula already judicially interpreted as excluding the donee of the power from being himself an appointee.

I think that those circumstances make it right to reject the view which the defendant put forward that the parenthesis acts as some kind of a definition provision for the whole section. If it be said that there is natural sense in support of his proposition, I am not sure that there is not also equally powerful argument on the other side. In *Montefiore v. Guedalla* (3) BUCKLEY, J., said that, whether or no under the terms of the particular power a person authorised to appoint new trustees could appoint himself, it was a good *prima facie* rule of conduct that he should not do so. I think too that there is a real distinction between the case where a new trustee falls to be appointed because of a vacancy and the case where a power is given, there being no vacancy among those the settlor originally appointed or their successors, to make an addition to the number which the testator or settlor selected. If a donee of a power could appoint himself in the latter case he could, of course, do so the next day after the settlement. True he could the next day after the settlement appoint some other person, but I think it would be surprising, particularly in view of what BUCKLEY, J., called the salutary rule, if Parliament had intended to give a donee of such a power the right to appoint himself as an addition to the number of trustees selected by the settlor immediately the settlement was effected. I add, finally, that as a matter of English (though there is in this section in all conscience a certain amount of superfluity of language, so far as I can see) I think in its context in sub-s. (6) the formula "another person or other persons" is more easily construed so as to exclude from the possible appointees the person or persons making the appointment. If Parliament had intended to give such a power there were ample means at hand, for the words "another person or other persons to be" might have been omitted altogether without affecting the sense in the slightest. Having regard to the tendency to tautology which I think is not difficult to discern in this section, I do not place much reliance on that point.

For the reasons I have stated I conclude as a matter of construction that the defendant had not the power to appoint himself validly as a trustee in addition to the plaintiffs, and I think the appeal fails and should be dismissed.

JENKINS, L.J.: I agree.

BIRKETT, L.J.: I agree.

Appeal dismissed.

Solicitors: Woodcock, Ryland & Co., agents for Preston & Redman, Bournemouth (for the defendant); Collyer-Bristow & Co. (for the plaintiffs).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

DALE AND OTHERS v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Harman, J.), July 3, 4, 1951.]

resd. C.A. [1952] 2 All E.R. 89. *A contribution*—"Investment income"—Annuity to trustee conditional on his acting as such—Income Tax Act, 1918 (c. 40), s. 14 (3) (a)—Finance Act, 1948 (c. 49), s. 47 (1).

A The taxpayer, a trustee under a will, was entitled by the will to an annuity of £1,000 a year free of income tax and surtax "... so long as he shall continue to act as trustee ...". The duties of the trusteeship were onerous, and the taxpayer had been chosen for his special qualifications. He was assessed to the special contribution under s. 47 (1) of the Finance Act, 1948, on the basis that his income as trustee was investment, and not earned, income.

B HELD: the taxpayer was the holder of the office of trustee; the annuity paid to him was remuneration from that office and so was "earned income" within the meaning of s. 14 (3) (a) of the Income Tax Act, 1918; and, therefore, it was not "investment income" within s. 47 (1) of the Act of 1948 and the taxpayer was not liable for special contribution in respect of it.

C *Baxendale v. Murphy* ([1924] 2 K.B. 494); *Hearn v. Morgan. Pritchard v. Harding Lathom-Browne* ([1945] 2 All E.R. 480); and *Re Thorley* ([1891] 2 Ch. 613), considered.

FOR THE INCOME TAX ACT, 1918, s. 14 (3) (a), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 16; and FOR THE FINANCE ACT, 1948, s. 47 (1), see D *ibid.*, p. 842.

Cases referred to:

- (1) *Baxendale v. Murphy*, [1924] 2 K.B. 494; 93 L.J.K.B. 974; 132 L.T. 490; 9 Tax Cas. 76; 28 Digest 87, 497.
- (2) *Hearn v. Morgan. Pritchard v. Harding Lathom-Browne*, [1945] 2 All E.R. 480; 173 L.T. 361; 26 Tax Cas. 478; 2nd Digest Supp.
- E (3) *A.-G. v. Eyres*, [1909] 1 K.B. 723; 78 L.J.K.B. 384; 100 L.T. 396; 21 Digest 46, 297.
- (4) *Re White*, [1898] 2 Ch. 217; 67 L.J.Ch. 502; 78 L.T. 770; 24 Digest 603, 6341.
- (5) *Re Brown*, (1918), 62 Sol. Jo. 487; 23 Digest 419, 4910.
- F (6) *Re Thorley*, [1891] 2 Ch. 613; 60 L.J.Ch. 537; 64 L.T. 515; 21 Digest 52, 345.

CASE STATED by the Special Commissioners of Income Tax.

The taxpayer appealed to the Special Commissioners against an assessment to the special contribution made on him under the provisions of Part V of the Finance Act, 1948, on the footing that a tax-free annuity of £1,000 a year which he received as trustee of the will of Sir Henry Wellcome, deceased, was investment income. The trustees of the will appealed against a notice given to them under s. 60 (2) (a) of the Finance Act, 1948, under which they would be required to pay the proportion of the special contribution which was attributable to the trust income. The taxpayer also appealed against a "like notice" given to him under s. 60 (2) (a). The Special Commissioners considered that they were bound by *Baxendale v. Murphy* (1) to hold that the income was a bequest or a gift of an annuity by the testator, and that, accordingly, the source was not an office of profit held by the taxpayer and that the income was investment income. The taxpayer and the trustees now appealed to the court. The report is confined to the taxpayer's appeal.

Millard Tucker, K.C., and F. N. Bucher for the taxpayer.

Pennycuik, K.C., J. H. Stamp and R. P. Hills for the Crown.

HARMAN, J.: The taxpayer, Sir Henry Dale, was one of the trustees appointed by the will of the late Sir Henry Wellcome, under which an organisation called the "Wellcome Foundation" was set up as a charitable trust. To administer this the testator appointed persons whom he thought particularly qualified to act in various capacities. One of the qualifications required was knowledge in the medical and allied sciences. There is no doubt that the taxpayer was well qualified in this respect. He holds the Order of Merit, and he was at one time president of the Royal Society and chairman of the Scientific Advisory Committee to the War Cabinet. To each of the trustees the testator gave the sum of £1,000 a year free of tax

" . . . so long as he shall continue to act as trustee and shall not be in receipt of remuneration from the foundation."

The terms of the trusteeship were subsequently settled by a scheme embodied in an order of the Chancery Division made in 1939 regulating the method of appointment of trustees. Each trustee was to be paid a sum at such a rate as, after deducting income tax at the standard rate and providing for that part of the surtax payable by him which was attributable to his remuneration, left a clear sum of £1,000 a year. The taxpayer has performed the duties so required of him by the testator ever since. They are onerous duties and involve fortnightly meetings and working for two hours a day in an office, with, no doubt, a good deal of thought and care besides.

By the Finance Act, 1948, provision was made in Part V for a new tax called the "special contribution". By s. 47 (1) the tax was levied by a poundage on individuals whose total income for the year 1947-48 exceeded £2,000 and whose aggregate investment income for the year exceeded £250. By s. 49 (1) it was provided:

" . . . the expression 'investment income' means income from any source other than a source of earned income."

That is a tautologous phrase, which I take to signify any income not being earned income. By s. 68 (2), which is also contained in Part V of the Act, it is provided:

"Save as expressly provided in this Part of this Act, expressions used therein have the same meanings as in the Income Tax Acts."

The case was argued on the footing that there is no express provision as to the expression "earned income" in Part V. The Finance Act, 1920, s. 33, states:

"In this Part of this Act and in any subsequent enactment relating to income tax, except where otherwise expressly provided—The expression 'earned income' means income which is earned income within the meaning of s. 14 of the Income Tax Act, 1918 . . ."

Section 14 (3) of the Act of 1918 provides:

"For the purposes of this section the expression 'earned income' means—(a) any income arising in respect of any remuneration from any office or employment of profit held by the individual . . . (b) any income from any property which is attached to or forms part of the emoluments of any office or employment of profit held by the individual."

A demand was made on the taxpayer to pay special contribution on the footing that this £1,000 a year was part of his investment income. The Special Commissioners decided that it was not earned income. In *Baxendale v. Murphy* (1) and *Hearn v. Morgan. Pritchard v. Harding Lathom-Browne* (2) it was decided that the remuneration of a trustee was not money on which he could be directly assessed for tax, but was money which, under the Income Tax Act, 1918, All Schedules Rules, r. 19, was taxable by deduction in the hands of the payers, viz., his co-trustees, or, as the case may be, the settlor or beneficiaries. It is

said to follow from these two decisions that this taxpayer's remuneration is not earned income because it cannot be held to arise from an "office of profit" within s. 14 (3) (a) of the Act of 1918. The Special Commissioners thought that those two cases obliged them so to hold. Although they mention *A.-G. v. Eyres* (3), which was not cited in *Baxendale v. Murphy* (1) or *Hearn v. Morgan. Pritchard v. Harding Lathom-Browne* (2), they did not feel at liberty to hold that the execution of the duties of a trustee constituted the performance of the duties of an office. In this they were justified because MACNAGHTEN, J., in *Hearn v. Morgan. Pritchard v. Lathom-Browne* (2) so held, but before me it was conceded that this was an oversight and that this is an office. The Special Commissioners then state:

A "... we regard the latter case [*Baxendale v. Murphy* (1)] as deciding that the income was an 'annual payment . . . payable by virtue of a deed or will' chargeable to income tax under r. 1 (a) of case III of sched. D. After consideration of all the authorities cited to us, we are of opinion that, in view of *Baxendale v. Murphy* (1), we ought to hold, and we do hold, that the source of the income in question is the bequest or gift of the annuity by the testator, and the source is not an office of profit held by Sir Henry Dale."

If by that they mean that the remuneration of a paid trustee is, from the testator's point of view and from the point of view, for instance, of death duty, a legacy, then they are right. Every practitioner knows that the remuneration paid to trustees under wills does not rank as a debt if it comes to insolvency. *Re White* (4) and *Re Brown* (5) show that quite clearly.

D The main case which was relied on in this connection was *Re Thorley* (6). That decided that a bequest to a trustee of so much a year on condition that he performed the duties of a trustee was a gift on a condition: see *per* BOWEN, L.J. ([1891] 2 Ch. 626). That I accept, but how that carries the matter any further I am unable to see. If the gift be made on a condition that certain work is done, the money given is clearly remuneration for the work, and the fact that it is also a legacy seems to me to have nothing to do with the point. However that may be, the commissioners thought that the cases to which I have referred bound them to hold that this was not profit from an office. They arrived at that conclusion in this way. Both *Baxendale v. Murphy* (1) and *Hearn v. Morgan. Pritchard v. Harding Lathom-Browne* (2) decided that trustees who receive remuneration, whether under wills, settlements, or orders of court, cannot be directly assessed under sched. E. If that be so, conceding that a trustee holds an "office," the remuneration which he gets is not a "profit." That, however, seems to be contrary to common sense.

F Counsel for the Crown contended that, since s. 14 (3) (a) of the Act of 1918 referred to "remuneration from any office," to be earned income the remuneration must be income arising from an office of profit. Under that Act offices of profit, if they were private offices, were chargeable to tax under sched. D, and case III of sched. D applied to them. Rule 1 of the Rules Applicable to Case III of Sched. D provides:

G "The tax shall extend to—(a) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment . . . by virtue of any . . . will . . ."

H That exactly describes the payments received by the trustees in the present case. This is an annuity or other annual payment payable by virtue of the will, and, therefore, chargeable, as ROWLATT, J., held in *Baxendale v. Murphy* (1), under case III. By s. 18 (1) of the Finance Act, 1922, profits or gains from an office, which under the Income Tax Act, 1918, had been chargeable under sched. D, were transferred to sched. E, and it is said, therefore, that, unless a trustee can be directly assessed under sched. E, he cannot be

taken as holding an office of profit. I cannot see why. *Baxendale v. Murphy* (1) decided that case III of sched. D applied, and case III deals with annuities and directs one to r. 19 of the All Schedules Rules. So, after 1922, the profit remained chargeable under r. 19 which in terms corresponds with the former cases under Rules Applicable to Case III of sched. D. Although this is, according to *Baxendale v. Murphy* (1) and *Hearn v. Morgan. Pritchard v. Harding Lathom-Browne* (2), a remuneration which is not assessable directly to tax under sched. E, but remains under r. 19, nevertheless, I am not going to say that because of that fact it is not an office of profit. There is nothing which drives me to a conclusion so contrary to the dictates of reason. In my judgment, therefore, *Baxendale v. Murphy* (1) and *Hearn v. Morgan. Pritchard v. Harding Lathom-Browne* (2), did not bind the commissioners to reach the conclusion which they did. They wrongly supposed that this trusteeship was not an office, and that has been conceded. They also wrongly supposed this remuneration was not profit. It seems to be that an office which does produce a profit, is an office of profit, and so I allow this appeal.

Counsel for the taxpayer took a further point under s. 14 of the Income Tax Act, 1918, saying that the case also came under s. 14 (3) (b) as being income from any property which is attached to or forms part of the emoluments of an office. In my judgment, though I need not decide it, I am inclined not to accept that proposition because it seems to me that one must construe s. 14 (3) (b) as if the relative "which" governed the word "property" and not the word "income," so that para. (b) only applies to income from *property* attached to or forming part of the emoluments of an office. So, if the decision had been based on sub-s. (3) (b) I should have been against the taxpayer's contention.

Appeal allowed.

Solicitors: *Markby, Stewart & Wadesons* (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

COCKRAM v. TROPICAL PRESERVATION CO., LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Birkett, L.JJ.), July 10, 11, 1951.]

Rates—De-rating—Industrial hereditament—Adapting for sale—"Packaging"—Motor car parts made fit for use abroad—Protection against climatic conditions—Factory and Workshop Act, 1901 (c. 22), s. 149 (1) (c) (iii)—Rating and Valuation (Apportionment) Act, 1928 (c. 44), s. 3 (1).

The ratepayers used their premises to carry out a process known as "packaging," which included certain treatment, of spare parts of motor vehicles manufactured elsewhere and destined for government departments and manufacturers under contract with such departments abroad. The packaging was an elaborate process which differed from the ordinary commercial packing of goods and had to conform to departmental specifications. When received by the ratepayers the spare parts were fit for sale in this country, and the object of the packaging was to make them impervious to excessive humidity, extremes of temperature, or other climatic conditions abroad so that they arrived at their destinations in a fit condition and could be stored and preserved there for a considerable time.

HELD: the operations of the ratepayers were more than a mere prelude to the distribution of the spare parts; they constituted the making of the parts different from what they had been previously; and, therefore, the premises of the ratepayers were premises wherein manual labour was exercised in or incidental to the adapting of an article for sale within the

Factory and Workshop Act, 1901, s. 149 (1) (c) (iii), and an "industrial hereditament" within the Rating and Valuation (Apportionment) Act, 1928, s. 3 (1).

Dictum of VISCOUNT DUNEDIN in Grove (Dudley Revenue Officer) v. Lloyd's British Testing Co., Ltd. ([1931] A.C. 467), and *Richardson & Son v. Middlesbrough Borough Assessment Committee* ([1947] 1 All E.R. 884), applied.

Union Cold Storage Co., Ltd. v. Bancroft (Manchester Revenue Officer) ([1931] A.C. 459), distinguished.

AS TO RATING RELIEF FOR FACTORIES AND WORKSHOPS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 439-459, paras. 876-887; and FOR CASES, see DIGEST Supps.

FOR THE RATING AND VALUATION (APPORTIONMENT) ACT, 1928, s. 3 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 20, p. 176.

Cases referred to:

(1) *Bailey (Stoke-on-Trent Revenue Officer) v. Potteries Electric Traction Co., Ltd.*, [1931] 1 K.B. 385; 100 L.J.K.B. 1; 143 L.T. 650; 94 J.P. 177; *revsd.*, H.L., *sub nom. Potteries Electric Traction Co., Ltd. v. Bailey (Stoke-on-Trent Revenue Officer)*, [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; Digest Supp.

(2) *Sedgwick (Camberwell Revenue Officer) v. Camberwell Assessment Committee & Watney, Combe, Reid & Co.*, [1931] A.C. 447; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

(3) *Grove (Dudley Revenue Officer) v. Lloyd's British Testing Co., Ltd.*, [1931] A.C. 450; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

(4) *Fullers, Ltd. v. Squire*, [1901] 2 K.B. 209; 70 L.J.K.B. 689; 85 L.T. 249; 65 J.P. 660; 24 Digest 903, 38.

(5) *Union Cold Storage Co., Ltd. v. Bancroft (Manchester Revenue Officer)*, [1931] A.C. 459; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

(6) *Wiltshire County Valuation Committee v. London Co-operative Society, Ltd.*, [1950] 1 All E.R. 937; 114 J.P. 266.

(7) *Richardson & Son v. Middlesbrough Borough Assessment Committee*, [1947] 1 All E.R. 884; [1947] K.B. 958; 177 L.T. 103; 111 J.P. 357; 2nd Digest Supp.

CASE STATED by the Lands Tribunal under s. 3 (4) of the Lands Tribunal Act, 1949.

The appellant, the valuation officer for the Northampton Valuation Area, appealed to the Lands Tribunal against the decision of a local valuation court of the Northampton County and Northampton County Borough Local Valuation Panel whereby a hereditament occupied by the ratepayers was transferred to Part II of the valuation list on the ground that it was occupied and used as an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 3 (1). The Lands Tribunal affirmed the decision of the local valuation court and the valuation officer appealed to the Court of Appeal.

Simes, K.C., and *P. R. E. Browne* for the valuation officer.

J. R. Willis for the ratepayers.

SIR RAYMOND EVERSLED, M.R.: The question in this appeal is whether a certain hereditament is a factory or workshop within the meaning of s. 149 (1) (c) (iii) of the Factory and Workshop Act, 1901, as being premises wherein the adapting for sale of articles takes place. The matter arises in relation to the problem of valuation. It was contended, and is contended before us, by the ratepayers that the hereditament in question is an industrial

hereditament as defined by the Rating and Valuation (Apportionment) Act, 1928, the relevant sections of which introduce the meaning of "factory and workshop" to be found in Factory and Workshop Act, 1901. The problem was answered favourably to the ratepayers by the Lands Tribunal on appeal to them, and pursuant to s. 3 (4) of the Lands Tribunal Act, 1949, a Case has been stated by the tribunal for the opinion of this court whether their conclusion was correct.

Problems of this kind frequently turn on extremely narrow distinctions. In one of the many cases cited to us, *Bailey (Stoke-on-Trent Revenue Officer) v. Potteries Electric Traction Co., Ltd.* (1), that wise and experienced judge, SCRUTTON, L.J., made this observation ([1931] 1 K.B. 495) regarding this matter:

"In many cases, it is a question of degree, which is in my view fact and not law, and not properly the subject of a Special Case."

Beyond doubt in this case the tribunal have found that in fact this hereditament was used for adapting articles for sale, but it would not be right to say that that was a pure question of fact on which there was nothing more which a court of appeal could say, for this question whether or no the use is for adaptation for sale involves a question of the construction of the language of the Act. On that matter illumination has been shed by many cases in the books and not the least by a series of cases to which much reference has properly been made which fall under the general heading of *Sedgwick (Camberwell Revenue Officer) v. Camberwell Assessment Committee & Watney, Combe, Reid & Co., Ltd.* (2). I will take the following statement from the speech of VISCOUNT DUNEDIN in one of the cases, *Grove (Dudley Revenue Officer) v. Lloyd's British Testing Co., Ltd.* (3) ([1931] A.C. 467):

"I think 'adapting for sale' points clearly to something being done to the article in question which, in some way, makes it in itself a little different from what it was before."

I respectfully accept that as being the test we must apply in this case, and I think it was the test which was applied by the Lands Tribunal.

The question relates to certain spare parts manufactured, not by the ratepayers, but by other companies or individuals for use in motor vehicles. These spare parts are not for sale or use in this country (for which purpose they would admittedly be finished and complete), but are for despatch to different parts of the world for use there, and, particularly, to be kept in store there against an occasion when they will be required, possibly in the course of active military operations. Putting it briefly, the function of the ratepayers, and, as I follow it, their sole function, is that of what is called "packaging" those articles. At first sight it might appear that the word "packaging" had only the doubtful advantage over the more usual "packing" in that it has an additional syllable, but I am not satisfied that that is quite doing it justice. However that may be, I can accurately state the issue thus. It is said by the valuation officer that, however elaborate be the actual process and whatever the apparent significance of the word "packaging" as contrasted with "packing," what this company does, in truth, is no more than to "pack" the spare parts in question in such a way that they will arrive at their destination and be available to their ultimate user in the same finished condition as that in which they arrived at the ratepayers' premises. The operation, it is said, is, in effect, nothing more than that of the application of brown paper and string writ large, and as the spare part is precisely the same both before and after the packaging or packing operation, therefore, the test which I have read from LORD DUNEDIN'S speech is not satisfied, for the article has not been made in itself any different from what it was before. On the other side it is said that the article has been given a quality which it did not previously possess, namely, the quality of resisting severe climatic and other conditions and of enduring

under such conditions for an appreciable length of time, which quality it did not previously possess. Furthermore, counsel for the ratepayers has pointed out that the operations which the ratepayers conduct are conveniently set out in a Ministry of Supply pamphlet prescribing what are the processes which *must*—and I emphasise that word—be carried out if the article is to be accepted by the customer for whom it is intended. In those circumstances, it is contended, although the actual metal which forms the spare part does not undergo a change in the course of the operations conducted by the ratepayers, nevertheless it has been made “a little different from what it was before.” Put in another way, the contention is that when all the facts are looked at it is not correct to say that the article in question is merely a spare part when it emerges from the ratepayers’ hereditament, but is then a spare part particularly packed.

Having so posed the two conflicting arguments I think the examination we have had of the cases shows that it cannot certainly be asserted that packing an article or articles in a particular way is necessarily no more than something which is a mere “prelude to distribution” (to borrow again the language of LORD DUNEDIN [1931] A.C. 463). An example which was used was that of the boxes of chocolates packed by Messrs. Fullers which formed the subject of *Fullers, Ltd. v. Squire* (4). It is quite true, as counsel for the valuation officer pointed out, that the box of chocolates is distinguished from the spare part in the respect that the former is, so to speak, a bulk article which consists of a number of chocolates and part of the operation, which is concluded when the box is tied with its ribbon and other ornament and goes out to the public, consists in the proper selection and arranging of the chocolates. It cannot be said, I think, that the circumstance of plurality in the contents of the package or box necessarily distinguishes cases of which *Fullers, Ltd. v. Squire* (4) is an example from other cases, so that in the case of a single article packed in a particular case or package it must be said that the operation of packing is not the making of the article in some way a little different from what it was before. In all cases of this kind, as SCRUTTON, L.J., and LORD DUNEDIN observed, it must be a question of degree and *prima facie* it is one of fact.

I, therefore, turn at once to the Special Case and to the decision appended to it to see what are the facts which have been proved, and whether in the light of the general observations I have made the conclusion which the Lands Tribunal arrived at can be and should be sustained. I will read first para. 10 (b) of the Special Case:

“The ratepayers carry out at the hereditament packaging, including ancillary treatment, of spare parts for motor vehicles manufactured elsewhere and destined for government departments. They do this in about equal proportions for government departments and for manufacturers who are under contract to deliver packaged articles to such departments. The packaging done is elaborate and far more complicated than ordinary commercial packaging, and in all cases is carried out as prescribed by departmental specifications. It includes cleaning, drying, preserving, identifying and packing in compliance with the specification and contract terms governing the work, and non-compliance therewith renders the work or any part thereof liable to rejection at any stage.”

Then a reference is made to the pamphlet to which I have already alluded.

The relevant part of the judgment of the tribunal is as follows:

“Whether or not the hereditament should be regarded as having the status of a factory or workshop depends on the answer to the question: Are the operations carried out there a packing or treatment in the ordinary commercial sense as a mere prelude to distribution, or are they a treatment or process with a view to adapting articles for the particular purposes for which the customer requires them? It is true that the ball-bearings, etc., when they reach the factory are in a finished state for sale

and use in England, but the buyer does not require those articles for use in England. He wants them for use in distant parts and in different climates, and the evidence before us was to the effect that they were not in a finished state for that purpose. Something other than mere packing to enable them to be carried away had to be done; a treatment involving manual labour had to be applied. Our opinion, therefore, is that the packaging and special treatment of articles as carried out at the hereditament here in question is within the description of 'making, altering, finishing or adapting for sale or incidental thereto.' Where a manufacturer contracts to supply articles he manufactures packaged and treated in a special way designed to meet the requirements and needs of his customer, our view is that we must regard the packaging of such articles as altering, finishing or adapting them for sale. What the Ministry need and set out to buy from the manufacturer is not merely a spare part for a motor vehicle, but a spare part treated where necessary with a chemical or other preservative and packaged in a way which will ensure that after transit and storage, maybe in extreme climatic conditions, its condition can be relied upon when it is required for use, perhaps in a fighting vehicle engaged in combat—in a word, adapted for the particular purpose for which the customer requires it."

In my judgment, the Lands Tribunal applied a correct test to the problem with which they were faced, and I think they were justified on the special facts of this case in concluding, as they did, that the operations of the ratepayers were, in truth, something more than a mere prelude to distribution and did constitute a making (in some way) of the article a little different from what it was before. I think that result can be achieved either by saying that the article was given additional qualities without which it would not answer the description required by the customer, or, putting it in another way, that the article which was ultimately produced was a specially packed article. These articles were not being despatched, to take another example, like glasses packed in a particular way to ensure that they arrived safely for immediate use by the customer. They were sent in order that they might be stocked and preserved for, perhaps, some considerable time, a thing which could only be done provided that they came not merely as spare parts but as specially packed spare parts.

I am a little unwilling to embellish what I have said by analogy or illustration, because in questions of this kind distinctions are very fine. What may be said as *obiter* in one case may be relied on on some other occasion, but I think the point is assisted by this kind of consideration. It is conceded by the valuation officer that, if, in order to make the articles immune against severe conditions of climate and stocking they were covered with some sort of plating, they would be rendered different because they were plated. If, however, a spare part were plated, it would, presumably, no longer fit the thing into which it was made to go. It may then not be an unfair way of looking at it to say that this special packaging was equivalent to a temporary plating to give the advantages of a plating without altering the dimensions of the article. I think the tribunal were justified and entitled to find from the special facts of this case that the production of this specially packaged article satisfied the test which LORD DUNEDIN laid down.

I add a reference to one other of the cases in the same *fasciculus* of cases to which I have already alluded, namely, that relating to the functions of the Union Cold Storage Company. That case, I think, deserves a little further examination because it is plain from LORD DUNEDIN's speech ([1931] A.C. 492, 493) that arguments were there presented for the company which were in essence at least similar to the argument for the ratepayers here. Before reading the passage in the speech which I think it proper to read I must state this

important fact as found in the course of the case, namely, that in *Union Cold Storage Co., Ltd. v. Bancroft (Manchester Revenue Officer)* (5) (which related to the operations which the name of the company implies) (*ibid.*, 491):

A “14. Approximately twenty-five to thirty per cent. of the produce received by the occupiers is fresh and requiring to be refrigerated before export or sale in distant markets, and the remainder, approximately seventy-five per cent., has been already refrigerated and is kept by the occupiers in that state.”

B The problem in that case was whether the Union Cold Storage Co. were deprived of the advantages of being an industrial hereditament by the proviso to s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, on the ground that
C said (*ibid.*, 492):

D “Your Lordships, however, heard from counsel for the appellants an ingenious argument to support the view that the processes by which goods are frozen, maintained frozen and de-frosted amount to an altering or
E adapting for sale of the goods within s. 149 (1) (c) of the Factory and Workshop Act, 1901. It is pointed out that the freezing of some articles of food alters them by destroying tissue therein, that commercially all
F articles of food are altered by refrigeration in the respect that they cannot afterwards be sold as fresh, and that the several processes of freezing, maintaining frozen and de-frosting are for the most part carried out in
G order that the goods may be preserved for sale at some future time or may be made capable of transport to a distant market, or having been preserved frozen for a future market may by de-frosting be made available at the appropriate time for that market. Upon this it is contended that the processes are really processes by which the goods are adapted for sale, even if not altered in the freezing or de-frosting processes, because without the application to the goods of the appropriate process or processes they could not be sold in the particular market for which they are destined
H by their owners. It may be difficult or impossible to identify the essential quality of the operation described in s. 149 of the Factory and Workshop Act, 1901, ‘as the adapting for sale of any article’, nor in my view is it necessary for the purposes of this case to do so. The phrase was probably introduced to secure somewhat more flexibility than is to be found in the immediately preceding terms—namely, ‘the altering, repairing, ornamenting or finishing of any article’—but it cannot in my judgment be stretched to cover the processes carried on by the appellants in the circumstances set out in the Special Case. Upon the facts of the Special Case storage is beyond question, at any rate as to about three-fourths of the goods handled, the primary purpose for which the hereditament is occupied and used, and, though the processes in question, as applied to such goods, may alter them by affecting their quality, and though without their application the goods might not be available for sale in the markets in which they are in fact ultimately sold, yet it is as incidental to storage and to render storage possible and not otherwise that the processes are applied.”

I think it is clear from that passage that LORD DUNEDIN is not rejecting altogether what he called the “ingenious argument” of counsel, and is certainly not saying that processes which may alter the article’s quality in a way not

dissimilar from the alteration alleged to be made by refrigeration were merely incidental to the purpose of storage which could not amount to an adaptation of the article for sale. What (as I read his speech) the noble Lord is saying is that on the particular facts of that case the process took the case out of the ambit of an industrial hereditament. I do not, therefore, think that there is anything in that speech which constrains me to hold that the argument of counsel for the ratepayers cannot be sustained in the present case. I conclude, therefore, that the decision of the Lands Tribunal is one which we should not disturb. It was in the circumstances founded on proper and justifiable inference from the facts found. I am glad to reach that view, for it seems to me as a matter of common sense a view which should be supported. I find it difficult to say that the operations performed on this hereditament are not, according to common sense, within the contemplation of what is called in this Act a factory or workshop. I think that this matter is so different in essentials from *Wiltshire County Valuation Committee v. London Co-operative Society, Ltd.* (6) that I cannot derive assistance from that case. A B

JENKINS, L.J.: I agree. The question whether a given operation amounts to the adapting of an article for sale within the meaning of s. 149 (1) (c) (iii) of the Factory and Workshop Act, 1901, is very much a question of fact and degree, and, in my view, this court should be slow indeed to reverse the decision of the tribunal on such a question unless it is clear that the finding on the facts of the particular case was due to the application of some erroneous principle of law. As to the principle of law to be applied it is, no doubt, clearly established by the authorities that before it can properly be said that an article has been adapted for sale it must be shown that there is some change or alteration in the article itself. The application of that principle necessarily depends on a question of fact, namely: What is the article with which the particular case is concerned? In the present case it seems to me that there are two possible views. The first is that the relevant article is simply the spare part of machinery or apparatus fit for immediate incorporation into a machine. On this view it could be said that the ratepayers received on their premises spare parts and produced from their premises those same spare parts, not altered or changed at all, but merely packed so as to be available for distribution abroad. It might very well be right to conclude that there had been no adapting for sale, and nothing more than packing incidental to distribution. That was the view counsel for the valuation officer invited us to adopt. The other possible view, which commended itself to the tribunal, is that on the facts and in the circumstances of this particular case the relevant article cannot be regarded as finished or as adapted for sale until it has been subjected to the elaborate processes of preservation and packaging described in the Case and insisted on by the Ministry of Supply. On that view of the facts it is reasonably plain that the articles here in question underwent a change. They had been converted from mere loose parts, fit for immediate assembly, into spare parts so treated and packed as to be in a condition fitting them for use as spare parts and to be transported and stored in all sorts of climatic conditions. That seems to me to be a perfectly tenable view of the facts. It is the view which commended itself to the tribunal, and on that view of the facts, in my judgment, there was no obstacle as a matter of law to the conclusion at which the tribunal arrived, namely, that there was here a finishing or adapting of the parts in question. C D E F G H

The essential point is well illustrated by *Richardson & Son v. Middlesbrough Borough Assessment Committee* (7). In that case eggs were collected from producers, cleaned, sorted, and graded. It was held that what was done was an adapting of the goods for sale although from one point of view what came on to the premises was eggs and what left the premises was eggs. *ATKINSON, J.*, put the point succinctly in saying as he did ([1947] K.B. 963):

"The question is whether the process carried on in this factory was one of the adapting for sale of any article. The article must not be regarded as an egg; what was being dealt with were crates of eggs."

So, too, in the present case the articles being dealt with were, not merely loose parts of machines, but parts which were to be made available as spare parts so treated, packed, and preserved as to be suitable for use as such in any part of the world, and, it may be, after a considerable interval of time. Accordingly, for the reasons given by my Lord and such additional reasons as I have been able to express, in my view, the decision of the tribunal in this case should stand.

BIRKETT, L.J.: I agree. In the course of the argument I could not help feeling that had we not been bound by the authorities I should have found the solution of this problem very much simpler than it is. Apart from the citations which have been made (for example, the passage quoted by the Master of the Rolls from *Sedgwick v. Watney, Combe, Reid & Co.* (2) about the importance of the facts found) I think that all the cases cited, in dealing with different commodities, emphasise the vast importance of the facts of the particular case. In *Sedgwick v. Watney, Combe, Reid & Co.* (2) **LORD DUNEDIN** (after referring to a case which came from the Scottish Valuation Court and which, in his view, had been wrongly decided) said ([1931] A.C. 465):

"**LORD SANDS** seems to have had difficulty, but in view of former cases thought that it was well to lay down a general rule applicable to each class of industry. This remark is a little dangerous. Certain decisions will, it is hoped, prove of very general application, and so be of service to the local rating authority. But, after all, the question is an individual one as to each particular hereditament."

That leads me to say that the important passage on which counsel for the valuation officer relied was from the same case and was (*ibid.*, 467):

"I think 'adapting for sale' points clearly to something being done to the article in question which, in some way, makes it in itself a little different from what it was before."

It is just as well to see how that passage came into being. In *Grove v. Lloyd's British Testing Co., Ltd.* (3) the question was whether the premises in which the testing of cable was carried on was an industrial hereditament. The Divisional Court, by a majority, said it was. **GREER, L.J.**, said (*ibid.*):

"The making of goods fit to be lawfully sold is the immediate purpose for which the hereditament is occupied . . ."

SLESSER, L.J., said (*ibid.*):

"The testing of the cables in this case was, I think, a part of the process of making them fit for the purpose of sale. Indeed, without such a process, their sale would have been prohibited by law. I thus conclude that the phrase 'adapting for sale,' being so generously construed, includes adaptation for selling . . ."

LORD HEWART, C.J., said (*ibid.*):

"... the tester's task is not to adapt the cables for sale, but to see that they have been so adapted."

In the Court of Appeal there was a difference of view, as there had been in the Divisional Court. **SCRUTTON, L.J.**, there said (*ibid.*):

"The cables are not adapted for sale, but tested to see if they are fit for sale."

LORD DUNEDIN said (*ibid.*):

"I think 'adapting for sale' points clearly to something being done to the article in question which, in some way, makes it in itself a little

different from what it was before. Now, testing does not in any way make the article different as an article from what it was before. It only proclaims its character."

While that passage in the judgment must be used in the way that counsel for the appellant used it, it is, I think, interesting and instructive to observe the exact reason for which it came into existence.

In the present case I think that the tribunal certainly took into account the questions of law they had to consider, and they set them out in para. 11 of the Case:

"The questions we asked ourselves were: Can the operations carried out by the ratepayers at the hereditament be properly regarded as being in, or incidental to the making of any article or of part of any article, the altering, repairing, ornamenting or finishing of any article, or the adapting for sale of any article, within the meaning of s. 149 (1) of the Factory and Workshop Act, 1901, so as to confer upon the hereditament the status of a factory or workshop? And is the hereditament, if a factory or workshop, excluded from the description of 'industrial hereditament' as defined by s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, by being primarily occupied and used for any of the purposes mentioned in paras. (a) to (e) of the proviso to that sub-section, or any combination of such purposes, or for any other purposes which are not those of a factory or workshop? For the reasons given in our decision . . . we answered the former question in the affirmative, and the latter question in the negative."

Then in the judgment there appear those reasons which have already been read by the Master of the Rolls. I think for myself that the tribunal considered, not only the questions of law which they must apply, but also the very special facts stated, and that they were entitled to come to the conclusion to which they came.

Appeal dismissed.

Solicitors: *Solicitor, Inland Revenue* (for the valuation officer); *Gregory, Rowcliffe & Co.*, agents for *Wright, Hassall & Co.*, Leamington Spa (for the ratepayers).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re MORRIS'S SETTLEMENT TRUSTS. ADAMS v. NAPIER AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Birkett, L.JJ.), July 9, 10, 16, 1951.]

Power of Appointment—Exercise—Excessive exercise—Delegation—Special power to appoint among children and issue—"In such manner in all respects" as appointor should appoint—Discretionary trusts after forfeiture of life interest under appointment.

By a settlement, dated Aug. 28, 1896, the settlor, after declaring particular trusts for the benefit of his children and their issue, gave the surplus trust fund on trust for all or any of his children or remoter issue "in such shares and in such manner in all respects" as his wife should by deed or will appoint. The settlement then contained a clause imposing, in certain events, forfeiture of the limited interests created by the settlement, with discretionary and other trusts thereafter. By a deed of appointment, dated Dec. 20, 1901, the wife appointed a specified share of the fund to each of the settlor's three surviving sons and a grand-daughter for his or her life with remainder to his or her children at twenty-one, with a provision for

accruer to the other shares in the event of the failure of the trusts declared concerning any of the shares thus settled. She then declared that a person entitled to a life interest under the appointment was to forfeit his interest if (*inter alia*) he attempted to alienate or charge it, and she gave to the trustees an absolute discretion, in the event of a forfeiture, to apply all or any part of the income thus forfeited, in such proportions and manner as they thought fit, for the benefit of the forfeiting beneficiary or his issue during the remainder of the life of the forfeiting beneficiary, and, subject to this discretionary power, she directed them to hold any income not so applied on the trusts on which it would for the time being be held if the forfeiting beneficiary were then dead.

HELD: as the discretion purported to be given to the trustees by the appointment was not analogous to a power of advancement, but was an absolute power to select, within a range of persons specified by the appointor, those who were to enjoy the income during the remainder of the life of the forfeiting beneficiary and the proportions and manner in which they were to enjoy it, and as the specified range included persons in whose favour no appointment had been made (*viz.*, remoter issue of a forfeiting life tenant), the attempted delegation to the trustees of the exercise of the power given to the appointor was not authorised by the words "in such manner in all respects" in the provision in the settlement conferring the special power, and, therefore, the discretionary trusts contained in the appointment were in excess of the powers conferred on the appointor and were of no effect.

Re Boulton's Settlement Trust ([1928] Ch. 703), applied.

Re Mewburn's Settlement ([1934] Ch. 112), distinguished.

AS TO DELEGATION OF POWERS, see HALSBURY, Hailsham Edn., Vol. 25, p. 526, para. 955; and FOR CASES, see DIGEST, Vol. 37, pp. 407-409, Nos. 175-187, and Supplement.

Cases referred to:

- (1) *Re Boulton's Settlement Trust*, [1928] Ch. 703; 97 L.J.Ch. 243; 139 L.T. 288; Digest Supp.
- (2) *Re Mewburn's Settlement*, [1934] Ch. 112; 103 L.J.Ch. 37; 150 L.T. 76; Digest Supp.
- (3) *Re Greenslade*, [1915] 1 Ch. 155; 84 L.J.Ch. 235; 112 L.T. 337; 37 Digest 408, 185.
- (4) *Re Joicey*, [1915] 2 Ch. 115; 84 L.J.Ch. 613; 113 L.T. 437; 37 Digest 408, 186.
- (5) *Re May's Settlement*, [1926] Ch. 136; 95 L.J.Ch. 230; 134 L.T. 696; 37 Digest 409, 187.

APPEAL by the first and second defendants, Lady Napier and Miss Mary Napier, from an order of DANCKWERTS, J., dated Mar. 21, 1951.

By a settlement, made on Aug. 28, 1896, the settlor, John Morris (Lady Napier's grandfather), settled property on trust to pay thereout an annuity to each of his four surviving children and to the widow of a deceased son (Lady Napier's father) and, on the death of any annuitant, there was to be set aside a trust fund (referred to as the "particular fund") sufficient to produce an annual income equal to the annuity of the deceased annuitant. The particular fund to be set aside on the death of the deceased son's widow was then settled on trust for Lady Napier and her issue, and similar trusts were declared in regard to the other particular funds. Subject to these trusts, the settlor gave the settled fund on trust for all or any of his children or remoter issue "in such shares and in such manner in all respects" as his wife, Mrs. Sarah Morris, should by deed or will appoint. The settlement then contained a clause imposing, in certain events, forfeiture of the limited interests created by the settlement

and discretionary trusts after forfeiture. By a deed of appointment, dated Dec. 20, 1901, Mrs. Morris appointed a specified share of the trust fund to each of the three surviving sons of the settlor and to Lady Napier with remainder to his or her children at twenty-one, with a provision for forfeiture if a life tenant affected to alienate or charge his or her interest or any part thereof, and with discretionary trusts for the benefit of the life tenant and his or her issue, during the remainder of the life of the life tenant, in the event of forfeiture. Lady Napier, who was born in 1890, had one child only, the second defendant, Miss Napier (who had attained the age of twenty-one), and they now intended, if they were legally entitled to do so, to divide between themselves part of the share appointed to Lady Napier and her children. The question arose whether, if they attempted to do so, Lady Napier's life interest under the appointment would be determined (a) by the forfeiture clause contained in the settlement, and the discretionary trust contained in the settlement would then take effect during the remainder of her life, or (b) by the forfeiture clause in the appointment and (i) the discretionary trust contained in the appointment would then take effect during the remainder of her life, or (ii) her share would vest in Miss Napier absolutely on the ground that the discretionary trust was void as a delegation of a discretion. DANCKWERTS, J., held that the forfeiture clause and the discretionary trusts contained in the settlement applied to Lady Napier's life interest under the appointment. On an appeal by Lady Napier and Miss Napier, the Court of Appeal (SIR RAYMOND EVERSHED, M.R., JENKINS and BIRKETT, L.JJ.) reversed the decision of the learned judge, and the question then arose whether, in the event of Lady Napier forfeiting her life interest under the forfeiture clause contained in the appointment, the discretionary trust contained in the appointment would take effect during the remainder of her life. The report deals only with the judgment of the Court of Appeal on this point.

Wilfrid Hunt for the first and second defendants (Lady Napier and Miss Napier).

Rink for the trustees.

G. D. Johnston for the third, fourth, fifth, sixth, seventh and eighth defendants (persons claiming to be interested, under the trusts of the settlement, in the income of the share appointed to Lady Napier and her children, during the remainder of Lady Napier's life in the event of a forfeiture by her of her interest in that share).

Cur. adv. vult.

July 16. **SIR RAYMOND EVERSHED, M.R.:** We have already given our reasons for thinking, contrary to the view of DANCKWERTS, J., that the clause in the settlement imposing, in certain events, forfeiture and discretionary trusts after forfeiture do not apply to life interests created by Mrs. Morris under her power of appointment. That conclusion has rendered it necessary for the court to determine, as it was unnecessary for DANCKWERTS, J., to do, a second point, *viz.*, whether the discretionary trusts after forfeiture of the life interest contained in the appointment itself, and therein made applicable to the life interest, *inter alia*, of Lady Napier, are ineffective on the ground that they constitute an unauthorised delegation by Mrs. Morris of the powers conferred on her by the settlement. No question arises as to the provisions imposing forfeiture of themselves.

At the end of the argument I felt great doubt on the matter, not as regards the law, but whether the terms of the power of appointment, in the context in which it appeared in the settlement, were not so wide in import as to be equivalent to an express delegation of the power, at any rate to an extent sufficient to justify the imposition by Mrs. Morris of the discretionary trusts on life interests created by her, for it is not, I conceive, in doubt that the donor of a power of appointment can authorise such a delegation by appropriate

A language. It seemed to me that there was great force in the contention of counsel for the trustees that the words "in such manner in all respects" after the words "in such shares," coupled with the fact that the settlor had himself made liability to forfeiture. and the application of discretionary and other trusts thereafter incidents universally applicable to limited interests of his own creation, should justify the view that the imposition by Mrs. Morris of similar trusts as incidents of a life interest were within the contemplation of the settlor and authorised by him, and not the less so since, subject to the annuities in what are called "the particular trusts," the settlor had left the disposition of the capital and income of the whole settled property entirely to his wife, Mrs. Morris, in the first instance. I, therefore, desired time for further consideration.

B Having now carefully re-considered the matter and having also had the advantage of reading the judgment about to be delivered by JENKINS, L.J., I have felt compelled to the conclusion that, wide as the ambit is of the settlor's words in light of their context, they ought not to be held sufficient to confer on Mrs. Morris the power to delegate to the trustees appointed by her the right and authority to select, on a forfeiture by Lady Napier, the persons to whom the forfeited income should be paid and in what shares and proportions, even though such persons be all within the class to whom Mrs. Morris might herself have appointed. The precise words of the relevant will in *Re Boulton's Settlement Trust* (1) are not set out in the report of the case, but at the beginning of his judgment EVE, J., proceeds on the view that they contained a power of appointment substantially identical with that now under construction. It does not, on reflection, seem to me that a decision in favour of the contention put forward by counsel for the trustees could properly be reconciled in principle with the decision of EVE, J., which I certainly am not prepared to disapprove. *Re Mewburn's Settlement* (2) is, to my mind, essentially different, as the power of advancement there considered had become a common form conveyancing practice and its effect was limited to giving to the trustees power to make payment to the individuals selected and specified by the appointor in advance of their acquiring an absolute right to the subject-matter appointed. On the whole, therefore, I conclude that the discretionary trusts in question were in excess of the powers conferred on Mrs. Morris and must be treated, accordingly, as of no effect.

E JENKINS, L.J., read the following judgment. The power of appointment conferred on Mrs. Morris by the ultimate trust of the settlement was in these terms:

F "Upon trust for all or any to the exclusion of the others or other of the children or remoter issue of the settlor if more than one in such shares and in such manner in all respects as the said Sarah Morris shall by deed or deeds revocable or irrevocable or by will or codicil appoint."

G By the deed of appointment of Dec. 20, 1901, Mrs. Morris in exercise, or purported exercise, of this power appointed to each of the three surviving sons of the settlor and to his grand-daughter, Joan (now Lady Napier), a specified share of the trust fund for his or her life (less, in the case of each son, a sum of £5,000 appointed to him absolutely) with remainder to his or her children at twenty-one or, in the case of daughters, marriage under that age, and, subject as aforesaid, as to one moiety thereof in trust for him or her absolutely and with a provision for accruer to the other shares in the event of the failure of the trusts declared concerning any of the shares thus settled, and she included in the deed a declaration in the following terms:

H "And the appointor doth hereby further declare and appoint that in case any person who shall under the trusts contained in this appointment be or become entitled to a life interest in any part of the portion of the surplus trust funds hereby appointed shall at any time alienate or charge or affect to alienate or charge the income of such part or any part thereof or in case

by reason of his or her bankruptcy or any other event (whether happening before or after such life interest shall come into possession) such life interest or any part thereof would belong to or become vested in some other person or persons then the trust for payment of the said income to such person shall immediately thereupon cease and become void and in such event the trustees may during the remainder of the life of such person or during such shorter period continuous or discontinuous as they shall in their absolute and uncontrolled discretion think fit pay all or any part of such income or apply the same for the maintenance or personal support or benefit of such person or his or her issue if any for the time being in existence in such proportions at such times and in such manner as the trustees shall in their absolute discretion think fit and subject to the discretionary power lastly hereinbefore contained shall during the remainder of the life of such person hold the said income or so much thereof as shall not be applied under such discretionary power upon the trusts and for the purposes upon and for which the said income would for the time being be held if such person were then dead."

The question which now has to be determined is whether the discretionary trust which this declaration purports to attach to the income arising from a settled share during the residue of the life of a life tenant who has forfeited his or her life interest under its provisions is a trust which Mrs. Morris could validly create in exercise of her power of appointment, having regard to the terms in which such power was conferred. Counsel for Lady Napier and her daughter, Mary, concedes that there can be no objection to the declaration above quoted so far as it makes a life interest determinable or forfeitable on alienation, and so forth. He contends, however, that the discretionary trust expressed to arise on such determination or forfeiture is void as being in excess of the power, on the principle that the donee of a special power of appointment cannot delegate its exercise unless the terms of the power are such as to authorise delegation.

The principle is well settled: see *Re Greenslade* (3), *Re Joicey* (4), and *Re Boulton's Settlement Trust* (1). Its application, however, clearly depends on the terms of the particular power, and it has been held not to be infringed by the inclusion in an appointment of an ordinary power of advancement, at all events where the instrument creating the power enables any appointment to be made "in such manner and form in every respect," or "generally in such manner for the benefit of" the objects of the power, as the donee of the power may appoint: see *Re May's Settlement* (5) and *Re Mewburn's Settlement* (2). In the present case the power includes the words "in such manner in all respects," and the question is, in effect, whether these words suffice to authorise such a delegation as the appointor has here attempted. Counsel for the trustees, who very properly assisted us by arguing in support of the discretionary trust on behalf of possible unborn objects of it, invited us to hold the trust in question valid on the authority of *Re Mewburn's Settlement* (2). I find it impossible to accept this argument. A power of advancement is a purely ancillary power, enabling the trustees to anticipate by means of an advance under it the date of actual enjoyment by a beneficiary selected by the appointor of the interest appointed to him or her, and it can only affect the destination of the fund indirectly in the event of the person advanced failing to attain a vested interest. Moreover, I think it may fairly be said that an exception from the general rule has been recognised with respect to ordinary powers of advancement in deference to normal conveyancing practice which made such powers no more than "common form" incidents of interests conferred (for instance) on infants contingently on their attaining full age. Legislative recognition has now been given to the old practice in the form of the statutory power of advancement conferred by s. 32 (1) of the Trustee Act, 1925, so that the question is no longer

likely to arise: see this aspect of the matter discussed by MAUGHAM, J. ([1934] Ch. 119) in *Re Mewburn's Settlement* (2). The discretion here purporting to have been given to the trustees, however, is by no means analogous to a power of advancement. It is an absolute discretion enabling the trustees to pay or apply the income of a share during the remainder of the life of a forfeiting beneficiary to or for the benefit of the forfeiting beneficiary and his or her issue for the time being in existence in such proportions and manner as the trustees think fit. The trustees are thus given absolute power to select, within this range of persons, those who are to enjoy the income in question and the proportions and manner in which they are to enjoy it. Moreover, the range of persons to whom the trustees' discretion is made to extend includes persons (*viz.*, remoter issue of the forfeiting life tenant) in whose favour no appointment at all has been made by the appointor. I cannot regard the words "in such manner in all respects," in the provision conferring the power, as authorising such a delegation as this. Similar words appear to have been present in the provisions conferring the powers in *Re Joicey* (4) and *Re Greenslade* (3), but were not regarded as sufficient to authorise the attempted delegation. Counsel for the trustees suggested that in this particular case the settlor's own use of what are now commonly called "protective trusts" in the settlement itself might justify the court in construing the power as intended to enable his wife, Mrs. Morris, to impose similar trusts in any appointment made by her. I cannot accept that argument. Nor can I accept a further submission he made to the effect that the "protective trusts" should be regarded merely as a device to enable a forfeiting life tenant to enjoy the income notwithstanding purported alienation and so forth or the event of his or her bankruptcy, and that the discretionary trust should be regarded merely as machinery to that end, and not as really designed to confer any beneficial interest on the issue nominally included in it. The validity or otherwise of the discretionary trust declared in the event of forfeiture must, in my view, be determined by reference to what the trustees are empowered to do under such trust, and not by reference to what they would in fact be likely to do, or be expected to do, under it. For these reasons I think that the discretionary trust in question should be held invalid.

BIRKETT, L.J.: I agree with the judgment of JENKINS, L.J., and with the reasons there given and with the conclusions already announced by SIR RAYMOND EVERSHEDE, M.R.

Appeal allowed.

Solicitors: *Markby, Stewart & Wadesons* (for the first and second defendants); *Ashurst, Morris Crisp & Co.* (for the trustees and the remaining defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Re DUFF'S SETTLEMENTS TRUSTS. NATIONAL PROVINCIAL BANK, LTD. *v.* GREGSON AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Birkett, L.J.J.), July 4, 5, 16, 1951.]

Company—Share premium account—Distribution to shareholders—Whether capital or income in hands of payee—Companies Act, 1948 (c. 38), s. 56 (1), (2), (3). A
Settlement—Capital or income—Shares in limited company—Payments to shareholders out of share premium account—Companies Act, 1948 (c. 38), s. 56 (1), (2), (3).

The trustee of certain settlements held as part of the funds subject thereto 33,947 £1 shares in H., Ltd. From time to time H., Ltd., had allotted certain of its shares at a premium, and the aggregate amount of the premiums so received was, in conformity with the Companies Act, 1948, s. 56 (1), paid to its share premium account. In 1950 the company resolved to pay to the holders of the company's shares 2s. 6d. per share out of the share premium account, and on Mar. 27, 1950, the reduction of the account was sanctioned by the court. The trustee now raised the question whether the moneys so received in respect of the shares held by him constituted capital or income of the various trust funds. B

HELD: section 56 took the share premium account out of the category of divisible profit and prevented its distribution by way of dividend, and where (as here) the share premium account or part thereof was distributed among shareholders, the transaction was to be treated as if the company were reducing its capital by paying off paid-up share capital, and, therefore, the moneys received by the trustee were capital assets. C

Decision of HARMAN, J., ([1951] 1 All E.R. 869), affirmed. D

AS TO THE COMPANIES ACT, 1948, s. 56, see HALSBURY, 1949 Edn., Vol. 5, p. 163, para. 289; and see HALSBURY'S STATUTES, Second Edn., Vol. 3, p. 508.

Cases referred to: E

- (1) *Re Bates*, [1928] Ch. 682; 97 L.J.Ch. 240; 139 L.T. 162; Digest Supp.
- (2) *Hill (R. A.) v. Permanent Trustee Co. of New South Wales, Ltd.*, [1930] A.C. 720; 144 L.T. 65; *sub nom. Re Hill (Richard)*, 99 L.J.P.C. 191; Digest Supp.
- (3) *Re Doughty*, [1947] 1 All E.R. 207; [1947] Ch. 263; 176 L.T. 173; 2nd Digest Supp. F
- (4) *Re Sechiari*, [1950] 1 All E.R. 417.
- (5) *Drown v. Gaumont-British Picture Corp., Ltd.*, [1937] 2 All E.R. 609; [1937] Ch. 402; 106 L.J.Ch. 241; 157 L.T. 543; Digest Supp.
- (6) *Inland Revenue Comrs. v. Reid's Trustees*, [1949] 1 All E.R. 354; [1949] A.C. 361; [1949] L.J.R. 701; 30 Tax Cas. 431; 2nd Digest Supp. G

APPEAL by persons interested in income under certain settlements against an order of HARMAN, J., dated Mar. 21, 1951, and reported [1951] 1 All E.R. 869, made on an originating summons issued by the trustee of the settlements to determine whether, having regard to the Companies Act, 1948, s. 56, moneys distributed by a company to its shareholders out of the company's share premium account constituted capital assets or income in the hands of the trustee. HARMAN, J., held that the distributed moneys constituted capital assets. H

Raymond Walton for the first three defendants, interested in income.

J. V. Nesbitt for the plaintiff, the trustee of the settlements.

Harold Lightman for the remaining defendants, interested in capital.

Cur. adv. vult.

July 16. JENKINS, L.J., read the following judgment of the court. The appellants are entitled to life interests in the income arising under four

settlements of funds now including an aggregate holding of 33,947 fully paid £1 shares of a company called Highfields (Ceylon), Ltd. The respondents are the trustee of the settlements and the persons interested in remainder under the trusts of capital. The appeal is from a judgment of HARMAN, J., dated Mar. 21, 1951, to the effect that an aggregate sum of £4,243 7s. 6d. received by the trustee from the company in respect of the above-mentioned shares, on a reduction by the company of its share premium account pursuant to the provisions of the Companies Act, 1948, s. 56, ought to be treated as capital to be added to the corpus of the settled funds, and not as income distributable among the life tenants.

The Companies Act, 1948, s. 56, provides:

"(1) Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account, to be called 'the share premium account,' and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the share premium account were paid-up share capital of the company. (2) The share premium account may, notwithstanding anything in the foregoing sub-section, be applied by the company in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares, in writing off—(a) the preliminary expenses of the company; or (b) the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company; or in providing for the premium payable on redemption of any redeemable preference shares or of any debentures of the company. (3) Where a company has before the commencement of this Act issued any shares at a premium, this section shall apply as if the shares had been issued after the commencement of this Act . . ."

In compliance with the provisions of this section the company, which had from time to time issued shares at substantial premiums, transferred to a "share premium account" a sum equal to the aggregate amount of those premiums. At the date of the next mentioned special resolution its authorised capital was £450,000 divided into 450,000 ordinary shares of £1 each, of which 407,433 had been issued and were credited as fully paid up, and the amount standing to the credit of its "share premium account" was £254,645 12s. 6d. which, when compared with the issued share capital, will be seen to amount to 12s. 6d. for each issued and fully paid £1 share. By a special resolution of the company duly passed on Mar. 3, 1950, it was resolved:

"That the sum of £254,645 12s. 6d. standing to the credit of the share premium account in the books of the company be reduced by the sum of £50,929 2s. 6d. to the sum of £203,716 10s. by applying such sum of £50,929 2s. 6d. by which such credit is so reduced in paying to the holders of each of the 407,433 fully paid shares of the company the sum of 2s. 6d. per share."

By an order of the Chancery Division made by HARMAN, J., on Mar. 27, 1950, the reduction of the share premium account of the company resolved on and effected by this special resolution was duly confirmed in accordance with the provisions of the Companies Act, 1948. Pursuant to such special resolution and confirmatory order, the company duly paid to the trustee the sum of £4,243 7s. 6d. to which the present appeal relates, representing 2s. 6d. per share in respect of the aggregate trust holding of 33,947 ordinary shares of the company.

There appears to be little doubt that if before s. 56 of the Companies Act, 1948, came into operation the company had distributed among its shareholders in cash a sum representing premiums received on the issue of shares, the proportion of such distribution attributable to any trust holding of shares would have

been income and not capital as between persons successively interested under the trust. This result would, we think, clearly have followed from the principles enunciated and applied in such cases as *Re Bates* (1); *Hill (R. A.) v. Permanent Trustee Co. of New South Wales, Ltd.* (2); *Re Doughty* (3); and *Re Sechiari* (4). The share premiums would have been profits available for dividend: see *Drown v. Gaumont-British Picture Corp., Ltd.* (5); and if any part of them had been distributed by the company otherwise than in liquidation the amount received by trustees in respect of a trust holding would necessarily have been income in their hands, because it was neither a payment in reduction of paid-up share capital nor an addition to the shareholders' capital investment in the company, but simply a cash distribution which, no matter how described and notwithstanding that in the hands of the company it bore the character of a capital, not an income, profit, could not in law be anything else in the hands of the recipients than income derived from their shareholdings.

The question in this appeal is whether the same result must be taken to have ensued in the case of the present distribution, notwithstanding the provisions of s. 56. Counsel for those interested in income argued with force that s. 56 contained nothing which could properly be regarded as affecting the result. He pointed out that the section does not say that the share premium account is to constitute paid-up share capital of the company, or is to be deemed for all purposes to be paid-up share capital of the company, but merely that the provisions of the Act relating to the reduction of share capital are, except as provided in the section, to apply *as if* the share premium account were paid-up share capital of the company. In other words (counsel argued) the share premium account is not converted into paid-up share capital. Not being paid-up share capital, it is only to be treated for certain limited purposes as if it was. He placed some reliance on the excepted purposes for which a company is left free by sub-s. (2) to apply its share premium account notwithstanding the terms of sub-s. (1), and, in particular, the paying up of unissued shares for issue as fully paid bonus shares, as demonstrating that the share premium account still retained the character of profit though treated for certain purposes as if it was paid-up share capital. He contended that the section could not be regarded as having the effect of adding the amount of the share premium account to the paid-up share capital, because it could not be said to be capital paid up on any particular shares or to any specific part of which any particular shares conferred any right, for shares can only be paid up to the extent of their full nominal amounts, and it cannot be said that the issue of a share at a premium of itself attaches to that share any special interest in the sum representing that premium by way of additional capital rights. This point he illustrated by the hypothetical case of a company with one class of fully paid ordinary shares, some issued at a premium and others at par, in which all the shareholders, whether their shares were originally issued at par or at a premium, would have equal interests in any assets representing the premiums received. He submitted, moreover, that the trustee had precisely the same capital investment in the company before and after the distribution, namely, 33,947 fully paid ordinary shares of £1 each, neither increased by any capital accretion such as bonus shares nor reduced by any reduction in nominal amount or in capital paid up, and asked how in these circumstances the £4,243 7s. 6d. received on the distribution could be anything else than income? In this connection he referred to *Inland Revenue Comrs. v. Reid's Trustees* (6). He called in aid arts. 128 and 129 as to capitalisation of profits contained in Table "A" in sched. I to the Companies Act, 1948, which appear to treat a share premium account as equivalent for that purpose to a free reserve or balance standing to the credit of profit and loss account. Taking all these considerations together, counsel invited us to hold that s. 56 merely imposes (for the protection of creditors) restrictions on the distribution or other application of the share premium account, without depriving a distribution, made in conformity with those restrictions, of sums

representing share premiums of its essential character as a distribution of income and not of capital.

A We do not think the effect of s. 56 ought to be so limited. It is true that the section does not in terms convert the share premium account into paid-up share capital, but merely makes the provisions of the Act relating to the reduction of share capital apply as if the share premium account was paid-up share capital. But the provisions thus made applicable are the essential provisions on which the distinction between share capital and divisible profit depends, and on which the implied prohibition against the distribution of paid-up share capital otherwise than in pursuance of a duly authorised reduction of capital is based. It is thus clear at all events that s. 56 does take the share premium account out of the category of divisible profit and prevents it from being distributed by way of dividend. This seems to us in itself to render the *ratio decidendi* of such cases as *Re Bates* (1); *Hill (R. A.) v. Permanent Trustee Co. of New South Wales, Ltd.* (2); *Re Doughty* (3); and *Re Sechiari* (4) inapplicable. Moreover, the terms of the section seem to us to show that where (as in the present case) the transaction in question is a distribution among shareholders of the share premium account, or part thereof, that transaction is to be treated as if the company was reducing its capital by paying off paid-up share capital. If it is asked on what shares this notionally paid-up share capital is to be considered as paid-up, our answer is that it is to be considered as paid-up on the shares participating in the distribution, that is, assuming the distribution is made in accordance with legal rights, on those shares which would be entitled to participate in the share premium account in a winding-up, or, indeed, in an issue of bonus shares effecting an actual capitalisation of the share premium account, as expressly contemplated and permitted by s. 56 itself. Applying that view to the present case, we think the section means that the company is to be considered as having paid off (with the sanction of the court) 2s. 6d. per share of the capital paid-up on each of its issued shares by way of reduction of capital. If it is asked how this can be, inasmuch as the shares remained before and after the distribution fully paid shares of £1 each, our answer is that for the purpose of applying the reduction provisions of the Act to a transaction such as this, the section requires that each fully paid £1 share should be treated as if it was a fully paid share of 32s. 6d. reduced by a return of capital to a fully paid share of 30s. We do not see how else the provisions of the section can be given intelligible effect. The company being thus by force of the section deemed to have paid off notionally paid-up capital, the sum distributed must, we think, clearly be deemed to have left the company as paid-up share capital returned to the members and not as distributable profit divided among the members by way of dividend.

G What reason is there for holding that the capital character with which the trustee's proportion of the amount was thus impressed when it left the company was effaced and replaced by an income character when it reached the hands of the trustee? For our part we can see none. We think the hypothesis enjoined by the section must follow the amount received by the trustee and determine its character and destination in the trustee's hands also. The cases to which we have referred show that the character, as a matter of company law, of any given distribution as it leaves a company determines its character in the hands of the recipient. The relevant company law in the present case seems to us to require that the distribution here in question should be treated from the point of view of the payer, that is, the company, as a distribution by way of return of capital. It follows, to our minds, that the trustee's proportion of the distribution should similarly be treated in their hands as paid-up capital returned by the company. We think the argument based on *Inland Revenue Comrs. v. Reid's Trustees* (6) is met by the consideration that for the purposes of a distribution such as this the shares participating in it must by virtue of s. 56 be treated as if their nominal amount and the amounts paid-up on them

included the proportions attributable to them respectively of the share premium account. The provision in s. 56 (2) permitting the application of a share premium account in paying up bonus shares does not, in our view, assist the life tenants. This merely enables a company to substitute actual capitalisation for the notional capitalisation produced by the section itself. The section, as we read it, produces the same result on a direct distribution of a share premium account as if the company had first gone through the formality of actual capitalisation by bonus shares, and then paid off the bonus shares by way of reduction of capital. Nor can we regard arts. 128 and 129 of the 1948 Table "A" as of any substantial assistance to the life tenant's argument. For the purposes of those articles the distinction between a share premium account and free reserves or accumulated profits is irrelevant, inasmuch as all are equally available for the purposes of capitalisation, save that a share premium account can only be applied in paying up unissued shares to be issued as fully paid bonus shares, a restriction duly recognised in the proviso to art. 128. If the terms of s. 56 are concerned, as counsel submitted, with the "mechanics" of the distribution of premiums received on the issue of shares, still the "mechanics" are, in our judgment, an essential factor in determining the character as between capital and income of the sum distributed. A company, having an artificial person, can (as it has been laid down) make a distribution among its members (otherwise than in a winding-up) in one of two ways—but only in one of two ways—by a distribution of divisible profit, that is, by way of dividend, and by way of a return of capital pursuant to an order of the court on a petition for reduction of capital in accordance with the Act. The question whether a given distribution lawfully made by a company is of the former or of the latter description may thus justly be determined by reference to the method or mechanics of distribution permitted or enjoined by the Act, which the company has adopted in regard to it and the answer to that question must *prima facie* also determine the question whether the distribution is capital or income as between tenant for life and remainderman of a settled shareholding: see *per* LORD RUSSELL OF KILLOWEN in *Hill (R. A.) v. Permanent Trustee Co. of New South Wales, Ltd.* (2).

We were referred in argument to the provisions in the Companies Act, 1948, s. 58, as to the creation of a capital redemption reserve fund on the redemption of redeemable preference shares, which closely resemble those of s. 56 in so far as it is provided (by s. 58 (1) (d)) that the provisions of the Act relating to the reduction of the share capital of a company shall, except as provided in s. 58, apply as if the capital redemption reserve fund were paid-up share capital of the company with an exception (in sub-s. (5)) similar to the one in s. 56 (2) with respect to the share premium account, enabling the capital redemption reserve fund to be applied in paying up unissued shares of the company to be issued as fully paid bonus shares.

There appears to have been no case, at all events none was cited to us, in which the destination as between tenant for life and remainderman of a sum received in respect of settled shares on a cash distribution of a capital redemption reserve fund has been considered, although s. 58 reproduces s. 46 of the Companies Act, 1929, and has thus, in effect, been in force for a matter of twenty-two years. The similarity between s. 58 and s. 56 in the respects here relevant can, therefore, throw no light on the present problem. At all events we do not see how it can be said that an application of the conclusion reached by the learned judge and ourselves with respect to the distribution of a share premium account under s. 56 to the distribution of a capital redemption reserve fund under s. 58 would involve any impossibility or absurdity. Moreover, if any distinction is for this purpose to be drawn between a share premium account and a capital redemption reserve fund (a question which must be determined when it arises) it seems to us that, if anything, the share premium account provides the stronger case in favour of capital in any contest between tenant for life and remainderman. For, whereas a capital redemption reserve fund

may have been provided out of an accumulation of ordinary income profits, a share premium account represents from first to last what is essentially a capital profit and not income in any ordinary sense of that expression, and where trustees have acquired shares for their trust at a premium, they will on their side have provided the amount of the premium out of capital moneys. A fund representing share premiums received by a company, if distributed in cash before s. 56 came into operation, would, as we have said, have been income in the hands of the recipient shareholders, notwithstanding its capital character when considered as a receipt of the company. But that was because as the law then stood such a fund constituted a profit available for distribution as dividend, and, except in liquidation, only capable of distribution on the ground that it was a profit so available. The rights of tenant for life and remainderman would thus have been determined in favour of the former by reference to the character of the distribution, the origin of the fund distributed being irrelevant. The effect of s. 56, however, is to make such a distribution equivalent in law to an actual return of paid-up share capital and capable of being validly effected only through the medium of precisely similar reduction proceedings. It may, therefore, be said that s. 56 recognises the essentially capital character of premiums received on the issue of shares, and gives effect to it by investing any distribution of the share premium account with the character of a capital distribution carried out by means of a notional reduction of paid-up share capital. Thus, whether the origin of the share premium account or the mode and character of its distribution be looked at, it seems to us that as between successive interests in settled shares the claims of capital are unanswerable. For these reasons we are of opinion that the learned judge came to a right conclusion in this case, and that the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Slaughter & May* (for the first three defendants and the plaintiff); *Peake & Co.* (for the remaining defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

WILLIAMS v. PORTMAN.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Birkett, L.JJ.), July 12, 1951].

Landlord and Tenant—Compensation for goodwill—Carrying on business for five years—"Predecessor in title"—Similar business carried on for part of period by sub-tenant under sub-lease—Landlord and Tenant Act, 1927 (c. 36), s. 4 (1), s. 25 (1).

On Mar. 25, 1945, a lease of shop premises was granted to a tenant for a term of six years. The tenant prepared the premises for his business of a watchmaker and jeweller, but he was then taken ill, and on Apr. 17, 1945, he granted a sub-lease to one, F., for one year with the option to renew for a further year for the purpose of carrying on a similar business. F. exercised the option, but on July 10, 1946, on the payment to him by the tenant of £650, he surrendered the sub-tenancy to the tenant who then entered into possession and carried on his original business, which was in all ways completely distinct from that of F. On a claim by the tenant under s. 4 (1) of the Landlord and Tenant Act, 1927, at the termination of the tenancy of Mar. 25, 1945, for compensation for goodwill or a new lease,

HELD: the tenant, on resuming possession, did so exclusively by virtue of his rights under the lease of Mar. 25, 1945, and not in consequence of the sub-tenancy, and, therefore, F. was not the tenant's predecessor in title within the meaning of s. 4 (1) of the Landlord and Tenant Act, 1927, and the tenant could not prove that, "by reason of the carrying on by him

or his predecessors in title at the premises of a trade or business for a period of not less than five years, goodwill had become attached to the premises," and so was not entitled at the termination of the tenancy to compensation or a new lease.

Lawrence v. Sinclair ([1949] 1 All E.R. 418) and *Butlins, Ltd. v. Fytche* ([1948] 1 All E.R. 737), distinguished.

FOR THE LANDLORD AND TENANT ACT, 1927, s. 4 (1) and s. 25 (1), see A
HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 889 and 910.

Cases referred to:

- (1) *Lawrence v. Sinclair*, [1949] 1 All E.R. 418; [1949] 2 K.B. 77; [1949] L.J.R. 1003; 2nd Digest Supp.
- (2) *Butlins, Ltd. v. Fytche*, [1948] 1 All E.R. 737; 2nd Digest Supp.

APPEAL by the tenant from an order of His Honour JUDGE BENSLEY WELLS, B
made at Marylebone County Court on Apr. 5, 1951, refusing the tenant's claim for compensation for goodwill or the grant of a new lease of certain business premises on the ground that a sub-lessee of the tenant, who occupied the premises for part of the period of the lease, was not the tenant's predecessor in title within the meaning of s. 4 (1) of the Landlord and Tenant Act, 1927, so as to satisfy the five-years period stipulated by the Act. C

Vester for the tenant.

L. A. Blundell for the landlord.

SIR RAYMOND EVERSHED, M.R.: This appeal raises a short point which may be accurately stated thus: Does the formula in s. 4 (1) of the Landlord and Tenant Act, 1927 "or his predecessors in title" apply to assist a D
tenant who for a time sub-lets the premises in question to a sub-tenant and then, by arrangement with the sub-tenant and before the end of the sub-tenancy, resumes possession of the premises?

On Mar. 25, 1945, a lease was granted to the tenant of 106 Edgware Road, London, for the term of six years therefrom. The tenant wished to carry on at the premises business as a watchmaker and jeweller. Previously, the business carried on had been that of the selling of cats' meat. The tenant began to prepare the premises for the reception of his jewellery business, but he was taken ill, and on Apr. 17, 1945, he granted a sub-tenancy of the premises furnished (i.e., equipped for carrying on a jeweller's business) to a Mr. Freedman for the term of one year. There is no question of Mr. Freedman having taken over the tenant's stock or having acquired his goodwill. Conversely, there is no F
question at a later date of the tenant having acquired Mr. Freedman's stock or his goodwill. Mr. Freedman's business, though it was of the same character as the tenant's, namely, that of a jeweller and watchmaker, was a distinct business. Mr. Freedman was given an option, which he exercised, to continue the sub-tenancy for a further year. In the meantime the tenant's health began to improve and he assisted Mr. Freedman in conducting the business to an increasing extent, and on July 10, 1946, it was agreed between Mr. Freedman and the tenant that, notwithstanding the exercise by Mr. Freedman of the option, Mr. Freedman should then and there go out, taking with him his stock and all the paraphernalia of his business, and that the tenant should carry on his own watchmaking and jeweller's business. As compensation to Mr. Freedman for having to vacate the premises at so short a notice the tenant H
paid him £650. There is no doubt that the legal effect of that transaction was that Mr. Freedman surrendered to the tenant all his interest and rights of possession to the premises. There is no finding that Mr. Freedman assigned to the tenant the unexpired period of the term. The tenant entered into possession under the lease of Mar. 25, 1945. He carried on his business, and when the expiry of the lease became imminent, he took the necessary steps to obtain compensation, or, alternatively, the grant of a new lease. The only question

is: Can the tenant assert that for some part of the period of time which elapsed since the grant of the lease he "derived his title" from Mr. Freedman? Unless he can, he is not in a position to say that he has carried on, or that any predecessor in title of his has carried on, the jeweller's and watchmaker's business for the period of five years stipulated by the Act.

Section 4 (1) of the Act of 1927 provides:

- A "The tenant of a holding to which this Part of this Act applies shall, if a claim for the purpose is made in the prescribed manner . . . be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than
B five years goodwill has become attached to the premises . . ."

Section 25 (1) of the Act contains definitions as follows:

- "For the purposes of this Act, unless the context otherwise requires—
The expression 'tenant' means any person entitled in possession to the holding under any contract of tenancy, whether the interest of such tenant was acquired by original contract, assignment, operation of law or otherwise . . . the expression 'predecessor in title' in relation to a tenant or
C landlord means any person through whom the tenant or landlord has derived title, whether by assignment, by will, by intestacy, or by operation of law."

- Put as a simple question, and without for the moment considering extraneous circumstances or references to other legislation, one would not be inclined to
D say that a tenant who has granted a sub-tenancy and then resumed possession as the result of an arrangement for determining the sub-tenancy could be said to have derived his title at any time for any purpose or in any respect from his own sub-tenant. Counsel for the tenant has, however, emphasised the last few words of the definition "or by operation of law." He says that that is a term of art which is hallowed by usage in reference to real property, and
E has a particular significance when considering surrender, for surrender may take place by deed or by operation of law.

- The simplest example of a surrender by operation of law is where a tenant has gone out of possession in circumstances from which the obvious inference is that the relation of tenant and landlord is to be regarded as terminated. From that, counsel for the tenant seeks to infer that the reference to "operation
F of law" must comprehend, at any rate, a case where a tenant has resumed a right to possession (with which he had formerly parted consequent on a sub-lease) as a result of a surrender by operation of law. The argument is ingenious, but, in my judgment, it cannot be supported. It may be a criticism that content can only be given to the phrase "or by operation of law" by considering bankruptcy, and that is said to be an unlikely conception as regards the tenant
G in circumstance such as these, but I am not satisfied that it is so unlikely. As counsel for the landlord pointed out, a trustee in bankruptcy might be very concerned to get the benefit of any compensation to which the Act of 1927 entitled him, and it must not be forgotten that the expression "predecessor in title" is to be found in relation, not merely to a tenant, but also to a landlord. However that may be, I think the matter is concluded when one reads together
H the definition of "tenant" and of "predecessor in title." I will read the latter, substituting for the word "tenant" the definition which has already been given thus: "The expression 'predecessor in title' in relation to a person entitled to possession under a contract of tenancy means any person through whom that individual has derived title", etc. When the definition is so read it becomes plain that, so far as the present case is concerned, the tenant cannot qualify for the compensation because he cannot say that Mr. Freedman was his predecessor in title. No doubt, where third parties are concerned, a surrender

may not for all purposes wholly extinguish the term surrendered, but in the present case it is inevitable that the result of what occurred in July, 1946, was wholly to put an end for all purpose to the sub-term which subsisted between the tenant and Mr. Freedman so that when the tenant resumed his possession of the premises he did so by virtue exclusively of his right to possession under the lease of Mar. 25, 1945. He did not derive his right to possession through or in consequence on Mr. Freedman's sub-tenancy. If that is so, it is impossible to say that Mr. Freedman was, within the meaning of s. 4 (1), the predecessor in title of the tenant. A

What I have said in no way runs counter to anything said in *Lawrence v. Sinclair* (1). If it could have been shown that Mr. Freedman was the predecessor in title there is no doubt that the tenant could aggregate any rights of possession directly under his own lease with any rights of possession he derived from Mr. Freedman. Unless Mr. Freedman was a predecessor, however, and unless the tenant's own rights to possession were partly constituted by the right directly derived from his own contract and partly out of Mr. Freedman's contract, no question such as that which arose in *Lawrence v. Sinclair* (1) could arise for determination here. B

In *Butlins, Ltd. v. Fytche* (2) no question of "predecessor in title" arose. That was a case in which a claim was made by Butlins, Ltd., a company carrying on the business of amusement parks. It appears from the report that as to some part of the amusement park another party, Sussex Amusements, Ltd., a wholly owned subsidiary of Butlins, was given the right to run the side-shows either as licensees or as sub-lessees of Butlins. As was observed in the judgment of this court, the business all along was that of Butlins. Theirs was the controlling genius, so to say; theirs the lay-out and scheme of the premises; and the part played by the licensees or sub-lessees, whichever they were, was subsidiary both in responsibility and content. In those circumstances it was said that the business was that of Butlins. They had carried it on and they had been the lessees of the whole premises for the requisite time. If it could have been said in the present case that Mr. Freedman during his short period of sub-tenancy was carrying on the tenant's business on the tenant's behalf, it may well be that the tenant would not be deprived of his right because, as part of the mechanics of the arrangement, a sub-tenancy had been granted. That, however, does not arise since the business of Mr. Freedman was wholly distinct from that of the tenant. Mr. Freedman was not in any sense carrying on the business as an agent. In those circumstances the case of *Butlins, Ltd. v. Fytche* (2) is of no avail to the tenant. For these reasons I conclude that the decision of the learned county court judge was right, and that, accordingly, this appeal fails and should be dismissed. C D E F

JENKINS, L.J.: I agree.

BIRKETT, L.J.: I agree. The short answer is that the moment that the year and three months of Mr. Freedman's occupancy came to an end pursuant to the arrangement made between the tenant and Mr. Freedman and the tenant resumed his occupation of the premises, he did so, not because Mr. Freedman had been his predecessor in title, but because of the subsisting lease of Mar. 25, 1945. G

Solicitors: *Bulcraig & Davis* (for the tenant); *Wilde, Sapte & Co.* (for the landlord). H

Appeal dismissed.

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re D'AVIGDOR-GOLDSMID'S LIFE POLICY. D'AVIGDOR-GOLDSMID v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Birkett, L.J.J.), June 11, 12, 13, 14, July 16, 1951.]

Estate Duty—Passing—Property deemed to pass—Money received under a policy of assurance—Policy kept up for donee—"Donee"—Child taking interest under ante-nuptial settlement of parents—Interest accruing or arising—Accruing or arising on death of assured—Contemporaneous assignment of policy and other property—Subsequent premiums paid by assignee—Whether policy indirectly purchased or provided by assignor—Finance Act, 1894 (c. 30), s. 2 (1) (c), (d)—Finance Act, 1939 (c. 41), s. 30 (1).

In 1904 the deceased took out a policy of assurance on his own life and for his own benefit for £30,000 with profits. On Oct. 22, 1907, on his marriage, the deceased made an ante-nuptial settlement whereby he settled certain freehold estates, certain investments, and the policy, and directed that the trustees should receive the moneys payable under the policy at maturity and invest them in freehold land to be held on the same trusts as might then be subsisting in relation to the freehold estates thereby settled. Under the settlement the deceased took a protected life interest in the freehold estates, which after his death were directed to be held in tail male for the first and other sons of the marriage, subject to a jointure rentcharge. The deceased covenanted in the settlement to pay the premiums on the policy. In 1930, by virtue of powers conferred by a private Act of Parliament, the existing trusts were brought to an end, and by a deed of re-settlement, dated June 10, 1930, the freehold estates were settled on such trusts as the deceased and the plaintiff (the deceased's eldest son) should by deed jointly appoint (provided that this power should not be capable of being exercised so as to benefit the deceased directly or indirectly), and in default of and until and subject to any appointment (as regards part thereof) on trusts under which there was a discretionary trust of which the plaintiff was the principal object and (as regards the remainder) on trusts under which the deceased took a determinable protected life interest in restoration of his former life interest under the settlement. The deceased covenanted in the re-settlement to pay the premiums on the policy, and it was provided that the proceeds of the policy should become subject to the same trusts as that part of realty in which the deceased had a protected life interest. On Nov. 10, 1934, the deceased and the plaintiff appointed that the policy (and also certain real property (the "Wood Street property")) should be held in trust for the plaintiff absolutely, and the deceased was released from his covenant to pay the premiums. The deceased paid all the premiums falling due prior to Nov. 10, 1934, but thereafter until the maturity of the policy the premiums were paid by the plaintiff. On Apr. 14, 1940, the deceased died, and the Crown claimed estate duty under the Finance Act, 1894, s. 2 (1) (c) or s. 2 (1) (d) in respect of the proceeds (or part thereof). Of the thirty-seven premiums which had been paid, the deceased had paid four prior to the date of the original settlement, and a further twenty-three prior to the disentailment in 1930. He paid a further four before the appointment of 1934, and the plaintiff paid the last six premiums.

Held: (i) the word "donee" in s. 11 (1) of the Customs and Inland Revenue Act, 1889, as applied by s. 2 (1) (c) of the Act of 1894, was not apt to include the child of a marriage taking under his parents' marriage settlement since he was within the marriage consideration and not a volunteer; on the assumption (which was not contested by the Crown) that the plaintiff derived his title to the policy moneys under the marriage settlement of 1907, and not under the appointment of 1934, he was not a donee; and the claim to estate duty under s. 2 (1) (c) failed.

A.-G. v. Smyth ([1905] 2 I.R. 553), considered.

(ii) although the benefit of the contract of insurance had passed to the plaintiff in 1934, the right to immediate payment of the policy moneys which by the terms of the policy arose on the death of the deceased, in the sense that it then became for the first time immediately exercisable, was a beneficial interest accruing or arising on such death within the meaning of s. 2 (1) (d) of the Act of 1894, and as it was not disputed that, having regard to the appointment of the Wood Street property to the plaintiff, the deceased must, by virtue of the Finance Act, 1939, s. 30 (1), be treated for duty purposes as having provided the policy to the extent that that property, so far as it was derived from the deceased, was "sufficient" so to provide it, the claim under s. 2 (1) (d) was well founded.

A.-G. v. Dobree ([1900] 1 Q.B. 442) and *A.-G. v. Robinson* ([1901] 2 I.R. 67), applied.

Lord Advocate v. Hamilton's Trustees (1942 S.C. 426), not applied.

Decision of VAISEY, J. ([1951] 1 All E.R. 240), reversed in part.

AS TO POLICIES KEPT UP FOR A DONEE, see HALSBURY, Hailsham Edn., Vol. 13, p. 241, para. 232; and FOR CASES, see DIGEST Supp.

Cases referred to:

- (1) *Lord Advocate v. Hamilton's Trustees*, 1942 S.C. 426; 2nd Digest Supp.
- (2) *Parr v. A.-G.*, [1926] A.C. 239; 95 L.J.K.B. 417; 134 L.T. 321; Digest Supp.
- (3) *Lord Advocate v. Fleming*, [1897] A.C. 145; 66 L.J.P.C. 41; 61 J.P. 692; *sub nom. Lord Advocate v. Robertson*, 76 L.T. 125; 21 Digest 87, 632.
- (4) *A.-G. v. Barclays Bank, Ltd.*, [1943] 1 All E.R. 181; *affd.* C.A. [1943] 2 All E.R. 123; [1943] K.B. 721; 112 L.J.K.B. 585; 169 L.T. 149; *reversd.* H.L. *Barclays Bank, Ltd. v. A.-G.*, [1944] 2 All E.R. 208; [1944] A.C. 372; 113 L.J.K.B. 465; 171 L.T. 366; 2nd Digest Supp.
- (5) *A.-G. v. Jacobs-Smith*, [1895] 2 Q.B. 341; 64 L.J.Q.B. 605; 72 L.T. 714; 59 J.P. 468; 21 Digest 10, 47.
- (6) *A.-G. v. Smyth*, [1905] 2 I.R. 553; 21 Digest 10h.
- (7) *A.-G. for Ontario v. Perry*, [1934] A.C. 477; 153 L.J.P.C. 145; 151 L.T. 405; Digest Supp.
- (8) *Re Earl Fitzwilliam's Agreement*, [1950] 1 All E.R. 191; [1950] Ch. 448.
- (9) *A.-G. v. Murray*, [1904] 1 K.B. 165; 73 L.J.K.B. 66; 89 L.T. 710; 68 J.P. 89; 21 Digest 16, 79.
- (10) *A.-G. v. Dobree*, [1900] 1 Q.B. 442; 69 L.J.Q.B. 223; 81 L.T. 607; 64 J.P. 24; 21 Digest 17, 97.
- (11) *A.-G. v. Robinson*, [1901] 2 I.R. 67; 21 Digest 15, 73 q.
- (12) *Inland Revenue Comrs. v. Scott's Trustees*, 1918 S.C. 720; 55 S.L.R. 654; [1918] 2 S.L.T. 97; 21 Digest 15, 73 i.
- (13) *A.-G. v. Pearson*, [1924] 2 K.B. 375; 21 Digest 15, 75.
- (14) *Tennant v. Lord Advocate*, [1939] 1 All E.R. 672; [1939] A.C. 207; 108 L.J.P.C. 65; 160 L.T. 441; Digest Supp.
- (15) *Westminster Bank, Ltd. v. A.-G.*, [1939] 2 All E.R. 72; [1939] Ch. 610; 108 L.J.Ch. 294; 160 L.T. 432; Digest Supp.

APPEAL by the Crown from an order of VAISEY, J., dated Dec. 20, 1950, and reported [1951] 1 All E.R. 240, dismissing the Crown's claim for estate duty made under the Finance Act, 1894, s. 2 (1) (c), or, alternatively, under s. 2 (1) (d), as extended by the Finance Act, 1939, s. 30 (1), in respect of moneys payable under a policy of assurance on the deceased's life.

The plaintiff, the son of the deceased who was beneficially entitled to the policy moneys, contended that either no duty was payable or duty was payable only on twenty-seven thirty-thirds of the said moneys (being a proportion equivalent to the proportion of premiums paid by the deceased after the policy

was first settled), or on two-fifths thereof (equivalent to the proportion of premiums paid by the deceased after the policy was re-settled).

Upjohn, K.C., and J. H. Stamp for the Crown.

Millard Tucker, K.C., Cyril King, K.C., and Wilfrid Hunt for the plaintiff.

Cur. adv. vult.

- July 16. **SIR RAYMOND EVERSHERD, M.R.**, read the following judgment of the court. This is an appeal from an order made by VAISEY, J., on Dec. 20, 1950. The respondent to this appeal, who was the plaintiff in the court below, took out an originating summons in order to determine certain questions which had arisen between him and the Inland Revenue Commissioners, the appellants in this appeal, who were the defendants in the court below. The questions to be determined concern the construction of the Finance Act, 1894, s. 2, *viz.*, whether estate duty became payable on the death of the plaintiff's father on Apr. 14, 1940, on a policy of assurance on the life of his father in the special circumstances of the case, and, if duty was chargeable, what was the amount of duty to be paid. The claim of the Crown was made under the Finance Act, 1894, s. 2 (1) (c), and, alternatively, under s. 2 (1) (d). The consideration of these provisions necessitated a consideration also of the Customs and Inland Revenue Act, 1881, s. 38, of the Customs and Inland Revenue Act, 1889, s. 11, and of the Finance Act, 1939, s. 30.

- The plaintiff's father, Sir Osmond Elim d'Avigdor-Goldsmid (the deceased), took out the life policy for £30,000 with profits on May 3, 1904, and the annual premium was £695. On Oct. 23, 1907, the deceased married, and the plaintiff, his eldest son, was born on June 10, 1909. On the day before his marriage in 1907, the deceased made a settlement of certain property including the policy. Under that settlement the deceased took a protected life interest in the settled freeholds, out of which, after his death, a jointure rentcharge was limited to his wife with power to him to apportion it among the various settled freehold properties, and, subject to this, there was a limitation to the first and other sons of the marriage in tail male of the estates which were set out in the first two parts of the first schedule to the settlement. The policy, with which we are concerned, was assigned to the trustees on trust to receive the moneys which would be paid on the maturity of the policy, and to invest the same in the purchase of freehold hereditaments to be settled on the trust above referred to as directed in the deed of settlement. The deceased covenanted to pay the premiums on the policy. A private Act of Parliament entitled the Goldsmid Estate Act, 1928, was passed on Aug. 3, 1928. By this Act the deceased was empowered by deed effectually to assure his life interest in all or any parts of the settled property to the person who at the date of the assurance was next entitled in remainder or reversion expectant on his death to the property to which the assurance related; and it was also provided that this should extend to a disentailing deed affecting the property or any part thereof whereby the property was assured to a grantee on trusts conferring a general power of appointment having priority over the life interest. It was further provided that any assurance thereby authorised should operate as if the settlement had not contained any provision to determine the deceased's life interest, and as if, in place thereof, an absolute life interest had been limited to him, and any assurance of part of the settled property should not operate to effect a determination of the said life interest as respects any other part of the settled property. But the Act also provided that the plaintiff's father could not, by any deed made pursuant to the Act or by virtue of the exercise of any such power of appointment as above mentioned, create or obtain for himself any greater interest than the protected life interest to which he was entitled under the settlement. By a deed of appointment dated June 10, 1930, the deceased, under a power of appointment conferred on him by the settlement over certain properties and funds settled for the benefit of his younger children, appointed that they should

be held in trust for the plaintiff in tail male, subject to the prior limitations and powers referred to in the appointment. By a disentailing deed of the same date, the plaintiff, with the consent of the deceased as the protector of the settlement, assured, and the deceased, exercising the powers conferred on him by the Act of Parliament as to his life interest in the property, assured, released and confirmed to the trustees all the hereditaments of which the plaintiff was then tenant in tail under the settlement or the appointment, to hold the same in fee simple or absolutely freed from the life estate or interest of the deceased and from the plaintiff's interest in tail male and all subsequent estates or interests on such trusts and in such manner generally as the deceased and the plaintiff should by deed jointly appoint and in default of and until and subject to any such appointment on the precedent subsisting trusts and so as to restore the same. By the provisions of the disentailing deed a similar assurance was made of the life policy on and subject to similar trusts and powers. A

On the same date, June 10, 1930, and immediately after the two deeds last mentioned, a re-settlement was made by the deceased and the plaintiff under their joint powers of appointment of property including the policy. Clause 3 of the re-settlement provided that some of the family real estate was settled on such trusts as the deceased and the plaintiff should by deed jointly appoint, provided that this power should not be capable of being exercised so as to benefit the deceased directly or indirectly, and in default of and until and subject to any appointment on trusts under which there was a discretionary trust of which the plaintiff was the principal object. Clause 4 of the re-settlement settled other parts of the family real estate on trusts under which the deceased and the plaintiff had a joint power of appointment corresponding to the power in cl. 3, and, subject thereto and to certain charges, the deceased took a determinable protected life interest. By cl. 10 the deceased covenanted with the trustees that he would pay the premiums and keep the policy alive so long as the policy should remain subject to the trusts. By cl. 22, in exercise of the power conferred by the disentailing deed, the deceased and the plaintiff appointed the policy to be held on trust to get in all moneys payable thereunder, and to stand possessed of the net money received on the trusts and subject to the powers and provisions on and subject to which capital money arising under the Settled Land Act, 1925, from the estates settled by cl. 4 or investments representing the same would be held, and as to the money and investments in the second schedule on the trusts and subject to the powers and provisions subject to which capital money arising under the said Act from the estate settled by cl. 3 would be held. B C D E F

Before the appointment of Nov. 10, 1934, next mentioned, freehold property at 27, Wood Street, in the city of London, had been acquired out of money representing part of the estates settled by cl. 4. By deed of appointment, dated Nov. 10, 1934, the deceased and the plaintiff appointed that, first, the policy, and secondly, the premises at No. 27, Wood Street, should be thenceforth held by the trustees and the deceased respectively in trust for the plaintiff absolutely and in fee simple for the plaintiff's own use and benefit discharged from the trusts declared by the re-settlement, and the plaintiff thereby released and discharged the deceased from all his covenants contained in the re-settlement for the payment of premiums on the policy, and that a term of ninety-nine years limited by the re-settlement should, as regards the premises affected by such appointment, cease and be extinguished. G H

On the death of the plaintiff's father in 1940, the sum due under the policy was the original sum of £30,000 and the bonuses which together amounted to £48,765. Thirty-seven premiums had been paid in all. The deceased had paid thirty-one premiums and the plaintiff had paid six. The deceased paid the first premium in 1904, and one each in 1905, 1906, and 1907. After the settlement in 1907, the deceased paid twenty-three further premiums until 1930. After the re-settlement in 1930, the deceased paid four premiums down to 1934.

The plaintiff paid six premiums from 1935 to 1940 following the deed of appointment of 1934. Since the date of the settlement of 1907 the deceased had, therefore, paid twenty-seven out of the thirty-three premiums which had been paid.

A VAISEY, J., held that the claim of the Crown under s. 2 (1) (c) of the Act of 1894 failed. He held that the word "donee" in s. 11 of the Act of 1889 meant the ultimate donee; that the reference to donee is not properly applicable to a series of donees; and that the word only properly signifies the final beneficiary and the owner of the policy in question. He further held that the deceased could not be considered on the facts of this case as having kept up the policy for the benefit of the plaintiff as donee. It was kept up by the deceased until Nov. 10, 1934, but it was not kept up for the benefit of the plaintiff. The learned judge also held that the claim of the Crown under s. 2 (1) (d) failed. B He held that the plaintiff was the sole and absolute owner of the assigned property at the death of the deceased in 1940, and, having been so for more than five years from the date of the assignment to the death of his father, no duty could attach to it. He held that no beneficial interest accrued or arose on the death of the plaintiff's father, and that the decision of the Inner House of the Court of Session in Scotland in *Lord Advocate v. Hamilton's Trustees* (1) concluded the matter in the plaintiff's favour. C He decided that no estate duty was payable at the deceased's death on the policy, or on the value of it, or on any part of such value, or on the sum of £48,765 which became payable under the policy, or on any part of such sum. From this decision of the learned judge the Crown appeal.

D The Crown have (as above stated) claimed to be entitled to charge duty alternatively under para. (c) and para. (d) of s. 2 (1) of the Finance Act, 1894. It was said before VAISEY, J., on the plaintiff's behalf that the claim under para. (d) should logically be first considered, but the learned judge dealt first in his judgment with the claim under para. (c), and the appeal was argued in that order before us. We adhere to it in this judgment. The Crown's claim under s. 2 (1) (c) admittedly rests exclusively on the paragraph added to s. 38 of the Customs and Inland Revenue Act, 1881, by s. 11 (1) of the Customs and Inland Revenue Act, 1889: E

"The charge under the said section shall extend to money received under a policy of insurance effected by any person dying on or after June 1, 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion F to the premiums paid by him, where the policy is partially kept up by him for such benefit."

It was and is the contention of the Inland Revenue Commissioners that the plaintiff, when he received on his father's death and as a result of the various deeds to which we have referred, the sum of £48,765 policy moneys was a "donee" thereof within the meaning of the paragraph quoted, the relevant G donation being the original settlement of 1907; and, inasmuch as the deceased had provided twenty-seven out of the total of thirty-three premiums paid since the date of that settlement, that the charge extended accordingly to nine-elevenths of the policy moneys. To this contention the first answer presented by counsel for the plaintiff before VAISEY, J., and maintained before us was that in the light of the facts of this case it was an abuse of language to say that H the plaintiff was such a "donee." The relevant question (according to his argument) was this: Did the deceased keep up the policy to the extent of the twenty-seven premiums paid by him for the benefit of the plaintiff? To which question, since the plaintiff's title to the policy moneys arose from the appointment in 1934 (from the date of which the deceased ceased to pay any further premiums) the answer must be in the negative. Alternatively, counsel contended before the learned judge that, if there had been a "donation" within the meaning of the charging paragraph by virtue of the settlement of 1907, that

donation was superseded by the disentailing deed and the re-settlement of 1930 from which alone was derived the power of appointment exercised in the plaintiff's favour in 1934, and on that basis, if in other respects the claim of the Crown was well founded, the proportion of the policy moneys in respect of which duty was exigible was reduced to two-fifths. To this argument counsel also adhered in this court, but in the circumstances later mentioned its importance somewhat receded, and it appeared indeed at one time that it might even change sides. A

VAISEY, J., accepted, as we read his judgment, the validity of both these contentions. He said ([1951] 1 All E.R. 245):

"... it is quite clear that in 1930 the original settlement was destroyed, and a new settlement came into operation under which a class of beneficiaries different from the class interested under the original settlement came into existence" B

Again, later (*ibid.*, 246):

"I do not think that the deceased can be considered for the present purpose as having kept up the policy for the benefit of the plaintiff as donee. He could never, prior to 1934, have been understood to be doing so, except prophetically. The only person who kept up the policy for the benefit of the plaintiff was the plaintiff himself. I reject the argument that the fact that the plaintiff was one of a number of beneficiaries under the previous settlements has any bearing on the present question." C

As regards the "destruction" of the original settlement by the deeds of 1930, the learned judge derived assistance from *Parr v. A.-G.* (2). With all respect to the learned judge, we think that there are, on the facts of the case, formidable difficulties in the way of regarding the original settlement as having lost all significance for present purposes. The deceased was enabled to join with the plaintiff in executing the disentailing assurance and the re-settlement by the special Act of 1928, but subject to the substantial restrictions which that Act imposed on him. The question in *Parr v. A.-G.* (2) was (as the learned judge observed) different from that with which we are concerned. In that case there had been a settlement in usual form followed in due course by a disentail and re-settlement also in usual form. The question there posed was whether on the death of the original life tenant the trust property passed "under" the original settlement or the re-settlement, and the answer was "under" the latter, for the succession which then occurred was in accordance with the limitations of the re-settlement. But three out of five of the noble Lords were also of opinion that the life interest of the deceased under the original settlement still persisted—not, as LORD BLANESBURGH observed, as the magical result of the incantations of the conveyancers, but because such was manifested to be the intention of those concerned, the original life interest being "restored" and "confirmed" by the terms of the re-settlement. In the present case the relevant words in the re-settlement are "restoration" and "continuation"; and particularly when regard is had to the terms and effect of the Act of 1928 it seems to us difficult indeed to say that during the rest of his life the deceased's original protected life interest under the settlement of 1907 did not for some purposes at least remain in being, and, if this is so, impossible to treat that settlement as "destroyed." D E F G

As regards the plaintiff's main point in the court below, there are, as it seems to us, formidable difficulties also. We agree with the learned judge that there is a certain unreality in speaking of the plaintiff, at the date of his father's death, as his father's "donee" under the settlement of 1907. But a certain artificiality is inescapable under taxing statutes. Moreover, if the question posed by counsel for the plaintiff is the correct question, still the negative answer which he demanded cannot, we think, be regarded as self-evident. In a sense, no doubt, H

the plaintiff is not appropriately described as having been since 1907 (and before he was born) his father's "donee" of the policy moneys for whose benefit his father had kept the policy up until 1934; and when he himself and his father joined in 1934 in making an absolute appointment to him, it is not to be forgotten that they could have so appointed to anyone in the world, *e.g.*, to an individual who was not and never had been in any way interested under the trusts of the settlement of 1907 or of the re-settlement of 1930 in default of appointment, and that, so far as the plaintiff was concerned, his power of appointment (that is, of disposition) arose out of his interest under the settlements of 1907 and 1930. On the other hand, if the deceased is not to be treated as having kept up the policy from 1907 to 1934 for the benefit of the plaintiff, for whose benefit did he so keep it up? Not, certainly, for his own. By the terms of the Act of 1928, he was disabled from recalling at all in his own favour the disposition of the policy he had made in 1907. As counsel for the Crown observed, he had then, so far as his own interest was concerned, parted altogether and irrevocably with the policy and all benefits to be received in respect thereof. For so long, then, as, pursuant to his covenants in the settlements of 1907 and 1930, he in fact kept up the policy he must be taken to have so done for the benefit of the person or persons who ultimately should become entitled to receive the policy moneys under the limitations of the settlement of 1907 or under limitations which might fairly be regarded or contemplated as derivable therefrom. In this respect we find ourselves unable to share the view of VAISEY, J., that on its facts the present case is on all fours with that of *Lord Advocate v. Fleming* (3). In that case, a father, having taken out a policy on his own life and paid a certain number of premiums, then assigned the policy absolutely to his daughter who, from the date of the assignment, paid out of her own resources all subsequent premiums, and it was held not legitimate to regard the premiums paid before the assignment as constituting a keeping up of the policy for the daughter's benefit, for during that period the father had no thought of any interest but his own—no thought not only of the daughter as a donee but of any donee at all: see *per* LORD HERSCHELL [1897] A.C. 154. The principle of *Lord Advocate v. Fleming* (3) applies to exclude from consideration premiums paid from the date of the policy to the date of the marriage settlement—from 1904 to 1907, but is thereafter, in our view, inapplicable, for, as we have already observed, from 1907 onwards the deceased must have been keeping up the policy for the benefit of some donee in the sense of some person who would ultimately become entitled to the moneys as a result of his having parted irrevocably with all interest in the policy as part of the settlement of 1907. As at present advised, we agree with the view expressed by WROTTESELEY, J., in *A.-G. v. Barclays Bank, Ltd.* (4) (a case not noticed by VAISEY, J., in his judgment) that the word "donee" is apt to comprehend a number of persons entitled to successive interests and ought not to be restricted to one or more specified person or persons designated as the donee or donees from the date of the donation. Thus, in the simple case of a voluntary settlement in favour of such one of a class as the donor or some other might appoint and in default of appointment over, the individual ultimately entitled to take would none the less be a "donee" for whose benefit the policy had been kept up from the date of the settlement although the appointment in his favour was only made very shortly before the policy matured. Were it otherwise, surprising and capricious results would appear to follow.

It is, however, unnecessary for us to express a concluded opinion on either of the matters so far considered. For in this court counsel for the plaintiff sought to sustain the judgment of VAISEY, J., on this part of the case by taking a point not taken in the court below, *viz.*, that, assuming in favour of the Crown that the plaintiff's right to the policy moneys was referable to the settlement of 1907, nevertheless he was not a "donee" within the relevant paragraph of

the section, since the settlement was made on the marriage of the deceased and the plaintiff as a child of such marriage was within the marriage consideration; and this point became the main issue on the claim to charge under s. 2 (1) (c). As we have stated, it appeared possible that the argument for the view that the settlement of 1907 had been superseded by the re-settlement of 1930 might be adopted by counsel for the Crown as an alternative to his main submission, since on that hypothesis he could say that the relevant disposition, being post-nuptial, was without consideration. But counsel expressly disclaimed the argument and was content that his claim under s. 2 (1) (c) should stand or fall on the basis that the plaintiff's right to the policy moneys was referable to the settlement of 1907. The issue being so defined, we have come to the conclusion, for the reasons which we now proceed to state, that the new argument of counsel for the plaintiff is well founded and should defeat the claim to charge under s. 2 (1) (c).

Marriage settlements, no less than marriage articles, have always been treated as made for good consideration so that not only the spouses but also the issue of the marriage (as being "within the marriage consideration") can enforce them: see, for example, *per* KAY, L.J., in *A.-G. v. Jacobs-Smith* (5) ([1895] 2 Q.B. 354). If some of the grounds for this view to be found in the books seem a little out of keeping with modern social philosophy, we have no doubt that the law as we have stated it is well settled. Counsel for the Crown virtually admitted as much, and conceded, therefore, that, if the word "donee" in the relevant paragraph of s. 11 of the Act of 1889 bears its ordinary and natural signification, the plaintiff could not (on the assumption on which the argument proceeds) be regarded as a "donee." It is, however, said that the effect of s. 2 (1) (c) of the Finance Act, 1894, is such as to compel a construction of the word "donee" as equivalent to grantee, or at least as comprehending spouses or issue of a marriage.

It becomes, therefore, necessary to examine closely the language of s. 38 of the Act of 1881 as amended by s. 11 of the Act of 1889 and the effect thereon of the impact of s. 2 (1) (c) of the Finance Act, 1894. It will be convenient to set out fully the original s. 38, which is as follows:

"(1) Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof. (2) The personal or moveable property to be included in an account shall be property of the following descriptions, *viz*:—(a) Any property taken as a *donatio mortis causa* made by any person dying on or after June 1, 1881, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bona fide* made three months before the death of the deceased. (b) Any property which a person dying on or after such day having been absolutely entitled thereto, has voluntarily caused or may voluntarily cause to be transferred to or vested in himself and any other person jointly whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person. (c) Any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property."

To this provision s. 11 of the Act of 1889 made additions and alterations. Those made to para. (b) and para. (c) of the original section need not be noticed here. As regards para. (a) the Act of 1889 provided by s. 11 (1) that:

A "The description of property marked (a) shall be read as if the word 'twelve' were substituted for the word 'three' therein, and the said description of property shall include property taken under any gift, whenever made, of which property *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

Finally there was added the new paragraph which we have already set out and on which alone the claim of the Crown rests.

B On the amendment made to para. (a) the argument of the Crown is concentrated. By that amendment there was introduced into para. (a) references to "donor" and "donee" and it is claimed by counsel for the Crown that the significance to be given to the word "donee" in para. (a) after the further amendment required by the Act of 1894 must also be given to the same word in the relevant new paragraph added by the Act of 1889 to that of 1881, C though the amendments specified in the Act of 1894 do not in terms apply to such last-mentioned paragraph. Having regard to its vital significance, we may be forgiven for setting out in full the material words of para. (a) as amended by the Act of 1889. They will run as follows:

D "Any property taken as a *donatio mortis causa* . . . or taken under a voluntary disposition . . . purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bona fide* made twelve months before the death of the deceased, and property taken under any gift, whenever made, of which property *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by E contract or otherwise."

Then comes, finally, s. 2 (1) (c) of the Finance Act, 1894, whereby the amended s. 38 of the Act of 1881 is re-enacted as if it extended to real property as well as personal property, and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom. The Finance Act, 1894, F further, by s. 3 exempted from estate duty property passing on the death of the deceased by reason only of a *bona fide* purchase for full consideration in money or money's worth.

The question then is: What is the effect and extent of the omission from the original section as amended of the words "voluntary", etc.? As regards para. (b) and para. (c) of the original section (so amended), there appears to be no difficulty, for the omissions seem plainly to have the effect that those paragraphs thence- G forward cover equally transactions of the character named whether voluntary or made for a full consideration. The difficulty arises under para. (a) which continues to retain the references to gifts and donors and donees. We fully accept the argument that in construing this paragraph it is not legitimate to read it as though the word "voluntary" had never been inserted therein—so much was laid down by PALLES, C.B., in *A.-G. v. Smyth* (6), which LORD H BLANESBURGH, in delivering the judgment of the Privy Council in *A.-G. for Ontario v. Perry* (7), regarded as the leading authority on the subject—a judgment to which we must refer more fully hereafter. So to read the paragraph would, indeed, appear to produce substantially if not entirely the same result as it had before the amendment of 1894 was made, and would, therefore, defeat the intention of Parliament. But the construction for which the Crown now contend seems to have hardly less remarkable results since it requires no significance whatever to be given to the use of the words "gift," "donor" and "donee."

In the case just cited, *A.-G. for Ontario v. Perry* (7), the question related to liability for duty under the Ontario Succession Duty Act in respect of property settled on his marriage by a deceased husband. LORD BLANESBURGH said ([1934] A.C. 482):

" . . . the judicial task is to ascertain how far a transfer not purely voluntary may still be a 'gift' . . . "

In the course of discharging that task the noble Lord referred to s. 2 (1) (c) of the Finance Act, 1894, and drew a distinction between a marriage settlement made by a party to the relevant marriage which, if it might purport to operate as an immediate gift, was in truth not voluntary but made for good consideration, and a settlement made, say, by a father on his son's marriage which, purporting to operate as an immediate gift, was also purely voluntary. And other instances were cited in the argument before us of dispositions which, though operating as gifts to the persons benefiting thereby, yet were not purely voluntary—for example, where A and B mutually agree to make gifts in favour of C. While giving effect, therefore, to the principle of construction stated by PALLES, C.B., we think it would be perfectly possible so to interpret para. (a) of the Act of 1881 in its finally amended form so as not to comprehend property taken under an ante-nuptial marriage settlement by a person within the marriage consideration. Counsel for the Crown, however, challenged the validity of the distinction made by LORD BLANESBURGH, and, citing in his support the whole judgment of PALLES, C.B., in *A.-G. v. Smyth* (6), contended, first, that in the circumstances the words "donor" and "donee" in para. (a) of s. 38 of the Act of 1881 (as amended) must be regarded as equivalent to "grantor" and "grantee", and, secondly and consequentially, that the word "donee" in the new paragraph added to s. 38 by the Act of 1889 (being the relevant paragraph in the present case) must have a like significance. And counsel argued that this view of the construction of para. (a) must have been that adopted by Parliament when the Finance (1909-10) Act, 1910, s. 59, was enacted, which, as regards "gifts *inter vivos*," provided (by sub-s. (2)) that so much of s. 2 (1) (c) of the Act of 1894 as made gifts *inter vivos* property deemed to pass on the death of the deceased should not apply to gifts made in consideration of marriage.

Assuming, however, in the Crown's favour (but without deciding) that in para. (a) of s. 38 of the Act of 1881 (as amended) the words "donor" and "donee" must be construed as "grantor" and "grantee," and that it is legitimate in support of that view to have regard to the later Act of 1910, still, in our view, it does not follow that a like unnatural construction must be given to the word "donee" in the added paragraph. To construe the word "donee" as including a grantee for valuable consideration is to give to the word a meaning so foreign to its ordinary and proper signification that it can only be justified by the sheer compulsion of the context in which it is found. If the amendment to para. (a) of s. 38 of the Act of 1881 introduced by s. 2 (1) (c) of the Act of 1894 provides in that paragraph such a compelling context, there was no amendment introduced by the latter section into the new and independent paragraph added to the former by s. 11 of the Act of 1889. It is true that the original section with all its amendments was re-enacted by the Act of 1894, and that s. 3 of that Act made express exemption of dispositions for consideration in money and money's worth. And it is also true that *prima facie* a word used with a particular meaning in one part of a section in an Act of Parliament should have the same meaning in another part of the same section. But the rule is not immutable, and every case must be judged on its own facts. In our judgment, if the word "donee" in para. (a) has the sense of "grantee," it has it only by the peculiar force of its particular context. That context is absent from the final paragraph. There the word appears in a different context—

"where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee"

—words pointing, in our view, towards the natural and proper sense of the term.

In our view, therefore, the paragraph in question does not apply to the plaintiff since he, deriving his title (on the assumption made in this argument) from his father's marriage settlement of 1907, is within the marriage consideration and cannot be aptly described as a donee within the meaning of the paragraph. The view we have expressed may be said not to be in accordance with the opinion expressed by PALLES, C.B., in *A.-G. v. Smyth* (6) already referred to, and out of respect for that very learned and experienced judge we must make some further reference to that case. The question in the case was whether certain property which had been made the subject of a settlement by a father on the marriage of his son was liable for duty under s. 2 (1) (c) of the Act of 1894, the father having died within twelve months of the settlement. The case was, therefore, one arising under para. (a) of s. 38 of the Act of 1881 (as amended), and it was also a case where the settlor was not himself a party to the marriage. It was argued, nevertheless, that since the settlement was made on the son's marriage, it could not properly be described as a disposition purporting to operate as a gift; and that was the sole question which fell to be determined. PALLES, C.B., in his judgment, rejecting the argument of the taxpayer, considered at length the history of the legislation and the effect of the amending provisions of s. 2 (1) (c) of the Act of 1894 on para. (a) of s. 38 of the Act of 1881; and he concluded that the word "gift" in that paragraph must now comprehend a grant for value. His judgment towards the end contained the following paragraph ([1905] 2 I.R. 570):

"Referring back to the general words of the description, it will be found that it contains four, and only four, words indicative of bounty. Taking them in the order of time, they are—(1) voluntary; (2) gift; (3) donee; (4) donor. The two latter aptly describe the persons to whom and from whom the property moves under the gift, and do no more than reiterate the character they acquire from the nature of the disposition or gift. They add no additional force to it, and are referable to it. 'Gift,' as I have already shown, is referable to the character the disposition had already acquired from being voluntary. Thus, the word 'voluntary' permeates the entire description. It is by reason of that that the disposition is described as a 'gift' and that the parties to it are designated as 'donor' and 'donee.' When that element is extinguished, those things which, by reason of it, acquired particular designations, cease to answer those descriptions. The disposition itself ceased to be a 'gift,' and must be read 'disposition.' The parties to it no longer answer the descriptions of donor and donee; they become 'grantor' and 'grantee'."

The learned judge nowhere in his judgment considered the paragraph in the re-enacted section on which the present case depends, for such paragraph was irrelevant to the matter before him. We cannot, therefore, treat the judgment as a pronouncement on, or the argument as directly pertinent to, the matter which we have to decide. We observe, however, that in the recent case of *Re Earl Fitzwilliam's Agreement* (8), DANCKWERTS, J., had to consider whether a disposition for a consideration in money or money's worth which was taken out of the exemption in s. 3 of the Act of 1894 by the Finance Act, 1940, s. 44, was within the scope of s. 2 (1) (c) of the former Act; and he answered the question negatively, declining to follow the judgment of PALLES, C.B., in *A.-G. v. Smyth* (6). In the circumstances, it is unnecessary for us to express any opinion on the judgment of DANCKWERTS, J., or (save to the extent already stated) on that of PALLES, C.B.

In our view, the appeal of the Crown on s. 2 (1) (c) of the Act of 1894 fails. It remains to consider the claim under s. 2 (1) (d) of the Finance Act, 1894, whereby property passing on the death of the deceased is to be deemed to include:

"Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

Two exemptions from this provision are worth notice as throwing some light on its intended scope. These are contained in s. 15 of the Act of 1894, which exempts by sub-s. (1)

"... a single annuity not exceeding £25 purchased or provided by the deceased ... for the life of himself and of some other person and the survivor of them, or to arise on his own death in favour of some other person ...",

and by sub-s. (3)

"... any pension or annuity payable by the government of British India to the widow or child of any deceased officer of such government, notwithstanding that the deceased contributed during his lifetime to any fund out of which such pension or annuity is paid."

Reference should also be made to the Finance Act, 1939, s. 30 (1), which (so far as material for the present purpose) provides:

"Paragraph (d) of sub-s. (1) of s. 2 of the Finance Act, 1894 (which provides that property passing on the death of a deceased person shall be deemed to include any annuity or other interest purchased or provided by the deceased) shall have effect in relation to an annuity or other interest that was purchased or provided wholly or in part by any person who was at any time entitled to, or amongst whose resources there was at any time included, any property derived from the deceased, as if that annuity or other interest had been provided by the deceased, or, if it is proved to the satisfaction of the commissioners that the application of all the property derived from the deceased would have been insufficient to provide the whole of that annuity or other interest, as if a similar annuity or interest of an amount reduced to an extent proportionate to the insufficiency proved had been provided by the deceased."

It will be seen that there are three conditions which must be satisfied in order to give rise to a claim for duty under s. 2 (1) (d), viz.: (i) There must be an annuity "or other interest"; (ii) it must have been purchased or provided by the deceased either by himself alone or in concert or by arrangement with some other person; and (iii) a beneficial interest must accrue or arise by survivorship or otherwise on the death of the deceased. If these three conditions are satisfied, then the annuity or other interest is deemed to pass on the death to the extent of the beneficial interest so accruing or arising, and accordingly to that extent attracts duty. As regards condition (i), counsel for the plaintiff, while formally submitting the contrary, conceded that the judgment of this court in *A.-G. v. Murray* (9) ([1904] 1 K.B. 172) precluded him from maintaining before us that the policy here in question was not an "interest" within the meaning of the words "or other interest" in s. 2 (1) (d). As regards condition (ii), it was not disputed that, having regard to the Finance Act, 1939, s. 30 (1), and the appointment to the plaintiff of the Wood Street property in addition to the policy by the deed of Nov. 10, 1934, the deceased must be treated as having provided the policy for the purposes of s. 2 (1) (d), though it was contended by counsel that, in the event of condition (iii) being held to be satisfied, the policy must, under s. 30 (1) of the Act of 1939, be treated for duty purposes as a policy for a reduced amount bearing the same proportion to the full sum actually paid under it as the rents of the Wood Street property during the period from Nov. 10, 1934, down to the death of the deceased bore to the premiums paid by the plaintiff during the same period.

The real contest centred on condition (iii). Did any beneficial interest accrue or arise to the plaintiff from the policy on the death of the deceased? The argument for the plaintiff, which was accepted by VAISEY, J., is to the effect that on the footing that the interest provided by the deceased should be taken to be the policy, *i.e.*, the benefit of the contract of life assurance constituted by the policy, the plaintiff became the absolute beneficial owner of the policy and of all rights arising under or conferred by it on Nov. 10, 1934, the date of the absolute appointment thereof to him; that at any time thereafter he could have surrendered the policy to the insurance company concerned for its appropriate surrender value or could have sold it for whatever its current value in the market might be; and that, although he in fact elected to hold it until the death of the deceased and receive the full sum which became payable on the happening of that event, no beneficial interest which he did not possess before accrued or arose to him on the death of the deceased, all that happened being that the property, in the shape of the policy, of which he had been absolute beneficial owner ever since Nov. 10, 1934, became more valuable from day to day as it approached maturity, and finally reached its full value on the deceased's death. This argument is supported by the recent decision of the Inner House of the Court of Session in *Lord Advocate v. Hamilton's Trustees* (1), which the learned judge thought it his duty to follow.

An alternative argument for the plaintiff was to the effect that, if the interest provided by the deceased should be taken to be the policy moneys, then the exemption afforded by the Finance Act, 1894, s. 3 (1), in respect of property passing on the death of the deceased by reason only of a *bona fide* purchase from the person under whose disposition the property passes (said in this case to be the insurance company from whom the policy moneys were purchased by means of the premiums paid) is applicable. We think this argument can be shortly disposed of. It is true that in some of the cases expressions have been used which suggest that the interest provided consists of the policy moneys rather than the policy. But this seems to us to be largely a matter of words. To be strictly accurate, we think the interest provided by the deceased should, as assumed in the argument above summarised, be taken to be the benefit of the policy. By virtue of that interest the plaintiff became entitled on the death of the deceased to immediate payment of the sum assured with the appropriate profits. It may, therefore, be said that the interest provided by the deceased, as ultimately realised by the plaintiff, consisted of the sum assured, with profits, received by him from the insurance company on the death of the deceased. The question in the case is whether the conversion on the death of the deceased of the prospective right to payment of the policy moneys which had passed to the plaintiff under the appointment of Nov. 10, 1934, into an immediate right to such payment amounted to the accruing or arising of a beneficial interest within the meaning of s. 2 (1) (d). If it did, then there was a notional passing on the death of the deceased of the benefit of the policy, which then assumed the form of a debt immediately payable in the shape of the policy moneys, to the extent of the beneficial interest accruing or arising, which interest was represented (subject to the question of adjustment under s. 30 (1) of the Act of 1939 raised by counsel for the plaintiff) by the amount of the policy moneys. But this notional passing could not, in our view, be said to have taken place by reason only of a purchase from the insurance company by means of the premiums paid; it would have taken place by reason of such purchase coupled with the provision of the policy by the deceased for the benefit of the plaintiff. Moreover, such notional passing would have taken place under the disposition of the deceased, not that of the insurance company. We, therefore, fail to see how the Finance Act, 1894, s. 3 (1), can assist the plaintiff. Indeed, the use counsel seeks to make of it seems wholly inconsistent with the reference in s. 2 (1) (d) itself to the "purchase" of any annuity or other interest. A similar argument was advanced,

and, in our view, rightly rejected by the Divisional Court, in *A.-G. v. Dobree* (10).

The argument for the Crown on the main point was to the effect that on the death of the deceased there arose to the plaintiff for the first time an immediate right to receive the sum assured with profits in accordance with the terms of the policy which in the lifetime of the deceased had existed only as a future or prospective right which would arise on the death of the deceased, and moreover as a right not merely future or prospective but conditional on the premiums being in the meantime duly paid. It was claimed that the arising of this immediate right did amount to the arising or accruing of a beneficial interest within the meaning of s. 2 (1) (d), the extent of such beneficial interest being the amount of the policy moneys, the circumstance that the plaintiff might have avoided the claim to duty by surrendering or selling the policy in the lifetime of the deceased being immaterial inasmuch as he did not in fact do so. Reliance was placed on a series of cases beginning with *A.-G. v. Dobree* (10), which we were invited to follow in preference to *Lord Advocate v. Hamilton's Trustees* (1). We confess our inability to reconcile the last-mentioned case with the earlier authorities bearing on s. 2 (1) (d), the effect of which we should next proceed to review.

In *A.-G. v. Dobree* (10) the deceased settled a policy on his own life in trust for his wife for life with remainders over and covenanted to pay the premiums, which he duly did. On his death, duty was claimed under s. 2 (1) (d) on the sum payable under that policy. The argument was advanced, amongst others, that

"No beneficial interest passed from the deceased to the wife or her trustees on his death. No beneficial interest accrued or arose on his death; it arose or accrued on the making of the settlement."

The Divisional Court (DARLING and CHANNELL, JJ.) rejected this and other arguments and held that duty was exigible. The following passage from the judgment of DARLING, J., is worth quoting at length ([1900] 1 Q.B. 448):

"It was contended by counsel for the defendants that no beneficial interest passed upon Mr. Atlee's death; that all the interest he ever had was in the hands of trustees by virtue of the earlier settlement, and that what passed to Mrs. Atlee upon his death, though it was a benefit or advantage, was not within the words 'beneficial interest accruing or arising by survivorship or otherwise' on his death, and therefore is not taxable. It is material, I think, in order to see what exactly is meant by sub-s. 1 (d), to look at s. 15 of the Act. In (d) not only interests but annuities are dealt with, and s. 15 enacts: 'Estate duty shall not be payable in respect of a single annuity not exceeding £25 purchased or provided by the deceased, either by himself alone or in concert or arrangement with any other person, for the life of himself and of some other person and the survivor of them, or to arise on his own death in favour of some other person.' Now the sum in question here is not an annuity, and the exemption in s. 15 is only in respect of an annuity of a value not exceeding £25. Supposing in this case every circumstance had been the same except that the amount payable by the insurance company upon Mr. Atlee's death had been calculated, not as a lump sum, but had been calculated, as it perfectly well might have been, so as to give her an annuity during her life. If that were so, there would be no difference

between that case and this, except that an annuity had been stipulated for instead of a lump sum. All the other words being the same, what is there to show that s. 2 (1) (d) does not apply if an annuity has not been stipulated for but a lump sum? I can see nothing. I think that s. 15 shows that exactly what was done in the present case does result in a taxable beneficial interest arising upon the death of the person who has insured his life for the benefit of his widow, as Mr. Atlee did, and that such a taxable beneficial

interest would certainly have attached if the money to be paid by the insurance company had been secured to be paid in the way of an annuity, provided that the annuity had not been within the exemption of s. 15 because its value did not exceed £25."

CHANNEL, J., said (*ibid.*, 452):

A "So far I think there is no difficulty in arriving at the conclusion that s. 2 (1) (d) of the Act of 1894 applies to the case before us, and s. 15 of course throws great light on the matter and assists that conclusion."

He then proceeded to discuss and reject (as had DARLING, J.) the claim to exemption under s. 3, and, after reading the section, said (*ibid.*, 453):

B "Applying that section to this policy, if you take the word 'property' as referring to the policy itself, undoubtedly the policy, or the right to it, did not pass on the death of the deceased; it passed on the making of the settlement many years before. If, however, you read the word 'property' as referring to the £1,500 payable under it, then that did pass on the death of the deceased because it became payable then, and in that sense it passed, and it passed also on the death of the deceased, partly, at any rate, by reason
C of the contract with the insurance company."

We have quoted this passage because counsel for the plaintiff placed some reliance on the learned judge's statement that

"the policy, or the right to it, did not pass on the death of the deceased; it passed on the making of the settlement many years before."

D As appears from what we have already said, however, we think the true view is that the benefit of the policy (*i.e.*, of the contract of insurance) passed on the making of the settlement. But the question so far as s. 2 (1) (d) is concerned is whether the right to immediate payment of the policy moneys, which by the terms of the policy arose on the death of the deceased, in the sense that it then became for the first time immediately exercisable, was a beneficial interest accruing or arising on such death within the meaning of the sub-section.
E

In *A.-G. v. Robinson* (11) there was a marriage settlement under which policies of assurance on his own life were assigned by the deceased to the trustees and kept up out of the income of a fund assigned to them by his wife. In the events which happened, the children of the marriage became absolutely entitled to the policy moneys under the trusts of the settlement on the death of the deceased.
F The Irish Queen's Bench Divisional Court (PALLES, C.B., and JOHNSON and BOYD, JJ.) held that the policy moneys attracted duty on the death of the deceased under s. 2 (1) (d). It is necessary to quote at some length from the judgment of PALLES, C.B. He said ([1901] 2 I.R. 88):

"There is one peculiarity in a policy of insurance upon the life of a deceased person which, were it not for s. 2, might have rendered it arguable whether, when it was vested in the deceased himself, at his death the full amount assured would have been liable to duty upon his death. It is this: that during his life the moneys assured thereby were not in existence, *qua* money. Immediately before the death his property in the policies consisted of a contingent right to sue at a future period upon a contract which, at that time, had not been broken. The moneys assured would not in that event have passed on the death, as to so pass they should have previously existed, but on that death, or at some period ascertainable by reference to the death, the right to the moneys accrued or arose for the first time. The words, however, which I have quoted from clause (c) of s. 2 negative any such argument. They render liable to duty, under certain circumstances, 'money received under a policy of insurance' on the deceased's life, although the policy was not vested in him at his death. This satisfies me that 'property' which 'passes on' the death, under s. 1, must be taken to include moneys
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assured by policies of insurance on the deceased's life which are vested in him at his death, although that which really passed was not the actual money assured, but the benefit of the contract of insurance. For the same reasons, I am of opinion that property 'deemed' to be 'included' in 'property passing on the death,' within s. 2, includes property assured by policies of insurance on his life, if such policies or the moneys assured thereby are within any of the descriptions in the cl. (a) to (d) of that section. Thus, the only question appears to me to be, are the policies in the present case, or the moneys assured thereby, within cl. (d)? A moment's consideration of the words of that clause seems to me to be sufficient to demonstrate that they are. 'Any annuity or other interest.' 'Interest' here must plainly mean interest in property. I pass over, for a moment, the next following words, and I come to the words 'to the extent of the beneficial interest accruing or arising, by survivorship or otherwise, on the death of the deceased.' 'Interest . . . to the extent of the beneficial interest,' is not a very happy expression; but the meaning is clear. The thing subjected to taxation is 'the beneficial interest accruing or arising, by survivorship or otherwise, on the death of the deceased, in any annuity or in any other interest in property purchased or provided by the deceased', as mentioned in the section. The words 'accruing or arising' are used in contradistinction to 'passing.' They indicate, not the transfer upon death to another of something which the deceased or some other person had before or at the death, but the springing up, upon the death, and the then vesting in another, of property which previously had not been existing in any one. This is an exact description of money secured by a policy of insurance. If, then, the policy moneys here answer the description in the clause, *viz.*, if they were an interest in property purchased or provided by the deceased, as therein described, they must be included in it. Now, were they so 'purchased or provided'—that is, were they purchased or provided by the deceased in concert or arrangement with his wife? I cannot frame to my mind any doubt that the marriage settlement constituted a provision by the deceased, by arrangement with his wife, that the policies in question should be so kept up that on the death of the survivor of the husband and wife the whole beneficial interest in the moneys thereby assured should accrue and arise to the children of the marriage, that such beneficially acquired interest did in event accrue and arise accordingly, and that the marriage settlement brings such 'interest' of the children into cl. (d) of s. 2. Upon the whole, then, I am of opinion that the true effect of cl. (c) and (d), taken together, in relation to money received under policies of insurance effected by the deceased on his own life, is that the policy moneys, although not vested in the deceased at his death, are liable under cl. (c) to duty, if the policies have been wholly kept up by him for the benefit of another; and that part of such policy moneys is so liable where the policies are partially kept up by him for such benefit. This liability arises from the fact of the policies having been kept up by the deceased, and is independent of the existence of any obligation upon him to do so, or any arrangement between him and any other person in relation thereto. As, however, to policies which are neither vested in the deceased, nor in fact kept up wholly or partially by him for the benefit of others, the only liability to duty is under cl. (d); and this depends upon an arrangement within the meaning of the clause having been made by the deceased."

He referred to *A.-G. v. Dobree* (10) in the following terms (*ibid.*, 91):

"The facts in *A.-G. v. Dobree* (10) were not identical with those before us. There the policies were, in fact, kept up by the deceased, and, for myself, I should have had no difficulty in holding that, for that reason, the moneys assured were within cl. (c) of s. 2. But, in addition to that, the

A premiums were so paid by the deceased under a covenant in a settlement, and therefore the case was also within cl. (d); and the decision was that they were taxable under the latter clause. This was a decision by a court whose jurisdiction is co-ordinate with ours, upon an imperial statute rendering property in England and this country liable to taxation under similar circumstances and at similar rates; and having regard to the grave inconvenience that would result from two different systems of taxation being in operation in the two different countries, under the same enactment, applicable in the same manner to each country, even had I doubts as to the decision I should have bowed to its authority, and left it to be questioned, if at all, in the Court of Appeal and House of Lords. My own opinion, however, is, for the reasons I have already given at length, entirely in accord with the decision."

B In *A.-G. v. Murray* (9), the actual decision was to the effect that a policy of insurance effected by a father on his son's life and settled on his son's marriage was not purchased or provided by the son in concert or by arrangement with his father within the meaning of s. 2 (1) (d), but the arguments advanced against liability to duty included the contentions that a life policy was not an "interest" within the meaning of s. 2 (1) (d) and also that

C "The whole beneficial interest in the contingent debt passed under the settlement on the marriage, and the wife had no greater beneficial interest in it by reason of the husband's death than she had as soon as the the marriage took place".

D *A.-G. v. Dobree* (10) and *A.-G. v. Robinson* (11) were both referred to. COZENS-HARDY, L.J., delivering the judgment of the court, said ([1904] 1 K.B. 172):

E "Secondly, it is contended that a policy of insurance is not an interest within sub-s. (1) (d). We have not been able to appreciate this argument. A policy is plainly property within the scope of s. 2, and we can see no ground for excluding it from sub-s. (1) (d). We are content to adopt the reasoning of PALLES, C.B., in *A.-G. v. Robinson* (11), and we do not think any good object would be attained by attempting to further elaborate it."

F In *Inland Revenue Comrs. v. Scott's Trustees* (12) policies on the life of the deceased had been settled by the deceased with other property on trusts for the benefit of his daughters for life with remainder to their issue. The trustees were directed to pay the premiums, but were empowered at their discretion to sell or surrender the policies, which, however, they in fact retained until the death of the deceased. Duty was then claimed under s. 2 (1) (d), and was held by LORD CULLEN, as Lord Ordinary, to be exigible. His decision was affirmed on appeal, when the Lord President (LORD STRATHCLYDE), said (1918 S.C. 724):

G "It is no doubt true that, during the continuance of the trust, discretionary powers were conferred upon the trustees of selling or assigning or surrendering these policies, but none of these powers was exercised. On the contrary, the trustees continued to pay the premiums throughout the whole period of the trust until the truster's death, and thereupon this money passed as an interest to the daughters and their children. It seems to me, therefore, that it is plainly property passing on the death of the deceased; and, if we are asked for a further definition and description of such property, then we find it in the sub-section referred to on record which sets out, read short, that any interest provided by the deceased, by himself alone, arising on the death of the deceased, is dutiable. It appears to me that these words apply in exact terms to the proceeds of these four policies of assurance. The deceased died, and on his death the interest passed in terms of his trust-assignment."

LORD MACKENZIE said (*ibid.*, 726):

"It is said that the whole beneficial interest passed when the trust was created. I am unable, looking to the terms of the trust-deed, to take that view. It is quite consistent with the setting up of an *inter vivos* trust that certain interests created should pass only at the death of the truster. Nor can I assent to the argument that in consequence of the special terms of this *inter vivos* deed, which conferred a power on the trustees to surrender the policies, it was they, and not the truster, who were providing the funds for the premiums. In point of fact the trustees did continue to fulfil their part of the current contracts, and they did not consider it necessary to surrender the policies; and the result was that on the death of the truster the value of the current policies was enhanced, and it is upon the capital value so created that the Crown is entitled to charge duty."

LORD SKERRINGTON concurred. LORD SANDS, while not formally dissenting, expressed certain doubts to which, as they support the plaintiff's argument, we should, perhaps, refer (*ibid.*):

"I confess that I have certain doubts in this case, but my views are not so clear as to lead me formally to dissent. I may, however, state what my doubts are. These policies belonged, after the creation of the trust, to certain trustees for behoof of certain beneficiaries. Now, no doubt when a man dies who has insured his own life the policy upon his life is part of his estate, and in respect of that part of his estate a beneficial interest accrues to his executors. But I confess I entertain some doubt as to whether, where one already holds as one's own property a policy of insurance on the life of another party, any beneficial interest that was not in the holder before accrues to him at the time of the death of the person whose life is insured. The policy which he had *in bonis* simply matures."

In *A.-G. v. Pearson* (13) liability to duty under s. 2 (1) (d) on the policy moneys in question was not disputed, but it was claimed that the exemption from aggregation afforded by the Finance Act, 1894, s. 4, to property in which the deceased never had an interest was applicable. ROWLATT, J., held that the exemption did not apply. The question with which we are now concerned was, therefore, not in issue. But ROWLATT, J., said of s. 2 (1) (d) ([1924] 2 K.B. 387):

"That the policy moneys in a case like this are liable to duty under that sub-section is clear upon the authorities beginning with the Irish case of *A.-G. v. Robinson* (11)."

Tennant v. Lord Advocate (14) was another case on the question of aggregation, liability to duty under s. 2 (1) (d) being admitted. LORD RUSSELL OF KILLOWEN said ([1939] 1 All E.R. 675), referring to a contention that what passed on the death was "the cash payable by the insurance company and nothing else":

"For myself, I am not prepared to accept without some further consideration the correctness of the first step. Three authorities were cited as establishing it—namely, *A.-G. v. Dobree* (10); *A.-G. v. Robinson* (11); and *Inland Revenue Comrs. v. Scott's Trustees* (12). No doubt language is used in some of the judgments in those cases which might give colour to the view that what passed on the death was the cash, and not the policy, or the value of the policy, but in none of those cases was it material that any such question should be decided. Indeed, it is not easy to see how the question can ever become material. The policy must, if valued, be valued as a matured policy, and with reference to the solvency of the insurance company, with the result that the value of the policy will be the same as the value of the moneys payable thereunder . . . I would wish to keep the question open, in case it should ever hereafter be necessary to decide between the two alternatives."

With respect to these observations, it is proper to note that counsel for the Crown had not been called on to argue. His Lordship went on to decide that the policy moneys were aggregable, expressing agreement with the decision of ROWLATT, J., in *A.-G. v. Pearson* (13).

In *Westminster Bank, Ltd. v. A.-G.* (15) the point at issue was again aggregation, and was decided in favour of the Crown on the authority of *Tennant v. Lord Advocate* (14), which had been decided between the conclusion of the hearing and the delivery of the reserved judgment of the Court of Appeal. But CLAUSON, L.J., delivering the judgment of the court, said ([1939] 2 All E.R. 74):

"The first step is to ascertain with precision what it is that is deemed to pass, on the death of Sir Frederick, in respect of the policy moneys by reason of the operation of s. 2 (1) (d). The answer is in the words of the sub-section: "... [the] interest ... provided by the deceased ... to the extent of the beneficial interest accruing or arising ... on the death of the deceased.' The interest provided by the deceased is the amount of the policy moneys, including the bonuses. It is not, however, the whole of that sum which is deemed to pass. That sum is deemed to pass only to the extent of the beneficial interest accruing or arising on the death of the deceased. In the present case, the extent of the beneficial interest so arising is commensurate with the life interests which spring into being on the death of Sir Frederick—that is to say, the life interests, whether vested or contingent, on attaining twenty-one or marrying, of the five children of Mrs. Van der Goes living at the testator's death. It follows that that which passes in respect of the policy moneys is so much thereof as is equivalent to the value of those life interests therein."

With the exception of *Lord Advocate v. Hamilton's Trustees* (1), these are all the cases to which we need refer. It will be seen that they include three actual decisions (*viz.*, *A.-G. v. Dobree* (10); *A.-G. v. Robinson* (11); and *Inland Revenue Comrs. v. Scott's Trustees* (12)), a judgment of this court in *A.-G. v. Murray* (9), which expressed complete approval of the reasoning of PALLES, C.B., in *A.-G. v. Robinson* (11), and a further judgment of this court in *Westminster Bank, Ltd. v. A.-G.* (15), containing a statement of the effect of s. 2 (1) (d) which entirely accords with that reasoning, while the other two (*viz.*, *A.-G. v. Pearson* (13) and *Tennant v. Lord Advocate* (14)) both proceeded on the footing that the question of liability under s. 2 (1) (d) was well settled. In *Lord Advocate v. Hamilton's Trustees* (1) the deceased, who died in 1936, had in 1912 settled certain policies on his life on trusts for the benefit of his sons and daughter. The sons (as we understand it) were to take absolute interests on attaining twenty-five, while the daughter's share was settled on her for life with remainders over. No other property seems to have been settled. The policies became fully paid in 1914 and 1915, and the premiums payable in the meantime were borrowed by the trustees from the deceased. On the deceased's death, duty was claimed under s. 2 (1) (d) on the amount of the policy moneys less the amount borrowed from the deceased by the trustees in order to pay the premiums, and the claim was rejected by the Inner House, affirming the Lord Ordinary on the grounds that in the circumstances (i) "the property sought to be charged had not been provided by the deceased," and (ii) "there was no beneficial interest accruing or arising on the death of the deceased in the respect that the whole interest in the policies had passed to the beneficiaries twenty-four years before the truster's death, their interest having fully vested." The judgment of LORD WARK is extensively cited by VAISEY, J., in his judgment in the present case. We will not repeat that process, and need only say that, in our view, so far as the second of the above-stated grounds is concerned, *Lord Advocate v. Hamilton's Trustees* (1) seems to us to be in direct conflict with *A.-G. v. Dobree* (10) and *A.-G. v. Robinson* (11).

In this state of the authorities, and, particularly, in view of the express and unqualified approval accorded to *A.-G. v. Robinson* (11) by this court in *A.-G. v. Murray* (9), it seems to us that, notwithstanding *Lord Advocate v. Hamilton's Trustees* (1), our duty is to apply to the present case the law as laid down in *A.-G. v. Dobree* (10) and *A.-G. v. Robinson* (11). Those cases appear to us clearly to proceed on the principle that the terms of the ordinary policy of life assurance are in themselves such as to produce for the owner of the policy on the death of the person whose life is insured a beneficial interest then accruing or arising in the shape of an immediate right to receive the policy moneys in the sense in which the expression "beneficial interest accruing or arising . . . on the death of the deceased" is used in s. 2 (1) (d). Once this principle is accepted, it seems to us to dispose of the plaintiff's argument and to lead necessarily to the conclusion that if a policy has been provided by the deceased and has been so disposed of that on his death the moneys which then became payable under it are payable to or for the benefit of some other person or persons, whether that result is achieved through the medium of a trust created in the lifetime of the deceased or by means of an assignment in his lifetime of the legal as well as the beneficial interest in the policy to such other person or persons, all the conditions of liability under s. 2 (1) (d) are satisfied. Thus, if "A" effects a policy of assurance on his life, assigns the whole legal and beneficial interest in it to "B," and pays or provides for the payment of all premiums down to the date of his death, while "B" retains the policy down to the date of "A's" death and receives the moneys then becoming payable under it, the result on the principle above stated must, as it seems to us, be that a beneficial interest in the shape of the policy moneys—or the right to immediate payment of the policy moneys—will have accrued or arisen to "B" on the death of "A" within the meaning of s. 2 (1) (d), and that it can avail "B" nothing that the contract (*i.e.*, the policy) under which this beneficial interest so accrued or arose to him became his absolute property at the date of the assignment, or that he might, had he chosen, have sold or surrendered the policy at any time after that date.

In the present case, the effect of the Finance Act, 1939, s. 30 (1), appears to be that, subject to the question of insufficiency, the plaintiff can be in no better position for the purposes of the claim under s. 2 (1) (d) than he would have been in if the deceased had himself in fact provided for the payment of all the premiums on the policy from the date of the appointment of Nov. 10, 1934, down to the date of his death, and, if the deceased had in fact done this, the claim would, so far as we can see, have been unanswerable on the footing that *A.-G. v. Dobree* (10) and *A.-G. v. Robinson* (11) are to be taken as correctly stating the effect of s. 2 (1) (d) in relation to policies of life insurance.

We have not overlooked the fact that in all the cases to which we have referred the policies were the subject of settlements or trusts. In our view, as appears above, the principle on which *A.-G. v. Dobree* (10) and *A.-G. v. Robinson* (11) are based in no way depended on this circumstance. On that principle the beneficial interest is to be regarded as accruing or arising under and by virtue of the contract of insurance irrespective of any settlement or trust affecting the policy moneys. The only relevance of a settlement or trust appears to be that where the policy moneys pass under it to a person taking a life interest only, the beneficial interest accruing or arising on the death of the deceased and so attracting duty under s. 2 (1) (d) is limited to the value of that life interest: see *Westminster Bank, Ltd. v. A.-G.* (15). In the course of the argument, counsel for the plaintiff called attention to a statement in *GREEN'S DEATH DUTIES*, 2nd ed., p. 100, that:

"It is not the official practice to claim duty in the case of a fully-paid policy given by the deceased more than five years before his death to a donee absolutely."

Counsel for the Crown admitted that his argument involved the conclusion that duty would as a matter of law be exigible even in those circumstances. That may well be so, but for the present purpose we need only say that this is not such a case. In the result, we would allow this appeal so far as the claim under s. 2 (1) (d) is concerned. As to the question of insufficiency and any consequential reduction in the amount on which duty is exigible, we understand that the parties are content that in default of agreement this should be the subject of an inquiry in the Chancery Division.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Frere, Cholmeley & Nicholsons* (for the plaintiff).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

POOL v. POOL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Havers, J.), July 4, 5, 6, 1951.] ✓

Divorce — Evidence — Privilege — Discussions in counsel's chambers to effect reconciliation—Words "without prejudice" not specifically used.

Before the trial of a petition for divorce filed by the wife two meetings were held in counsel's chambers at which there were present counsel and solicitors for the parties. The husband attended the meetings, but the wife did not. The sole purpose of the meetings was to effect a reconciliation between the parties, and it was proved in evidence that the words "without prejudice" were not actually used. The husband contended that the meetings were privileged and that evidence of the discussions thereat was inadmissible.

HELD: in the circumstances the inference must be drawn that there was a tacit understanding that the conversations were "without prejudice", and the meetings were, therefore, privileged.

Observation of DENNING, L.J., in *Mole v. Mole* ([1950] 2 All E.R. 329), applied.

Bostock v. Bostock ([1950] 1 All E.R. 25), not followed.

AS TO COMMUNICATIONS "WITHOUT PREJUDICE," see HALSBURY, Hailsham Edn., Vol. 13, p. 703, para. 774; and FOR CASES, see DIGEST, Vol. 22, pp. 375-378, Nos. 3836-3860, and 2nd Digest Supp.

Cases referred to:

- (1) *McTaggart v. McTaggart*, [1948] 2 All E.R. 754; [1949] P. 94; [1949] L.J.R. 82; 2nd Digest Supp.
- (2) *La Roche v. Armstrong*, [1922] 1 K.B. 485; 91 L.J.K.B. 342; 126 L.T. 699; 22 Digest 86, 550.
- (3) *Bostock v. Bostock*, [1950] 1 All E.R. 25; [1950] P. 154; 114 J.P. 59.
- (4) *Mole v. Mole*, [1950] 2 All E.R. 328; [1951] P. 21.

SUBMISSION on a preliminary point as to the admissibility of evidence.

Before the trial of a divorce petition brought by the wife two meetings took place in counsel's chambers with a view to bringing about a reconciliation between the parties. The meetings took place in the chambers of Mr. Seymour Karminski, K.C., appearing for the wife, and it was attended by counsel for the husband and solicitors representing the parties. The husband was also present, but the wife was not. Evidence was given that nobody present at the meetings actually used the words "without prejudice," but it was submitted for the wife that what took place at the two interviews, being clearly designed to effect a reconciliation, were privileged. For the husband it was contended that, as there had been correspondence between the parties on the eve of the trial, which was not privileged unless stated so to be, no distinction should be

made between the correspondence and the interviews unless the latter were expressly stated to be without prejudice, which they were not.

Manningham-Buller, K.C., and Petrie for the wife.

P. J. D. Evans for the husband.

HAVERS, J.: I have to determine a preliminary point, which is whether or not what took place at either or both of these meetings which were held in the chambers of Mr. Seymour Karminski, K.C. (now KARMINSKI, J.), on Nov. 18, 1949, and Feb. 28, 1950, was privileged. I have had cited to me a number of authorities, and though I derive guidance from them I agree with the submission which counsel for the wife made to me that the question I have to determine is really one of fact. At those meetings there were counsel present on behalf of both the husband and the wife—Mr. Seymour Karminski, K.C., and his junior, for the wife, and junior counsel who now appears for the husband was also present. Solicitors for the parties attended. The wife herself was not present, but the husband was. KARMINSKI, J., has given evidence before me and it is plain that nobody at the meeting actually used the words “without prejudice.” But it is equally plain that the sole object of the meeting was to try, with the help of counsel, to effect a reconciliation between the husband and the wife, the litigation being on the occasion of the second meeting in such an advanced state that the suit was likely to be heard in the course of the next few days.

The first of the authorities in point of date to which I have been referred is *McTaggart v. McTaggart* (1). I have been referred to passages in the judgment of COHEN, L.J., where he lays down the principle and explains the reason for the principle, which is of great assistance to me. He said ([1948] 2 All E.R. 755):

“In my opinion, the commissioner had no alternative. The privilege, if any, was the privilege of the parties, and they, having given evidence on the point, could not assert the privilege. The result is none the less unfortunate as the success of attempts at reconciliation might be prejudiced if it became known that the probation officer could be called to give evidence about them, and I desire to make it clear that, as at present advised, I think that, if objection had been taken by the wife to the husband’s giving evidence on this issue, the objection would have been valid. Such a conclusion seems to me to be in accordance with the principle that discussions and correspondence in negotiations if ‘without prejudice’ are privileged unless the parties waive the privilege.”

And then he referred to *La Roche v. Armstrong* (2), which counsel for the husband cited, on the question whether certain matters might be admitted in evidence. He quoted the following words from LUSH, J., in that case ([1922] 1 K.B. 489):

“There is no authority upon that point, but my reason is that to rule otherwise would in many cases make negotiations for the settlement of litigation almost impossible. Unless parties to such negotiations can feel safe in making an offer and stating the facts upon which it is based the door to negotiations may be closed. It is for the benefit of litigants and others, that statements should be freely made in order to settle litigation.”

That applies with peculiar emphasis to any negotiations to attempt a reconciliation where there has been a matrimonial dispute between a husband and a wife. In *McTaggart v. McTaggart* (1) DENNING, L.J., said ([1948] 2 All E.R. 755):

“I agree and desire particularly to associate myself with the observations which COHEN, L.J., has just made. It seems to me that negotiations which take place in the presence of the probation officer with a view to reconciliation are made on the understanding, by all concerned that they are to be without prejudice to the rights of the parties. The rule as to ‘without prejudice’

communications applies with especial force to negotiations for reconciliation."

In that case there was a probation officer present, and counsel for the husband submitted that there was a fundamental distinction between a case like that and a case like the present when no probation officer was present. He referred me to *Bostock v. Bostock* (3). That was a decision of ORMEROD, J., and the headnote reads as follows:

"On the hearing of cross-petitions for divorce on the ground of desertion the husband sought to adduce evidence of what had taken place at a meeting between the parties and their solicitors at which a reconciliation was discussed. The wife objected to the evidence being given on the ground that what occurred at the meeting was privileged. Held: what took place at such a meeting was not to be taken as being without prejudice, and, consequently, privileged, if it was not specifically stated to be so, and, therefore, the evidence tendered was admissible."

ORMEROD, J., dealt with the facts and said ([1950] 1 All E.R. 26):

"At the end of November, 1945, there was a meeting between the husband and the wife and their solicitors to discuss a reconciliation. Counsel for the husband tendered evidence of the events which took place at that meeting, but counsel for the wife objected to that evidence being called on the ground that what occurred at the meeting was privileged. In support of his contention he cited *McTaggart v. McTaggart* (1). There a husband and wife who had been separated arranged to see the probation officer with a view to becoming reconciled. The attempt was not successful and there were proceedings at which evidence was given by the probation officer to corroborate the evidence of one of the spouses regarding what had taken place at the interview. The matter came before the Court of Appeal, who held that in the particular circumstances the evidence of the probation officer was not privileged and that he could give the evidence. It was pointed out, however, that the reason why he could do so was that the privilege did not attach to him personally, but attached to the two spouses, and they, having themselves given evidence as to what had happened at the interview, had clearly waived the privilege. COHEN and DENNING, L.JJ., in the course of their judgments, said that, had the privilege not been waived, clearly there would have been privilege, because a meeting arranged with the probation officer for the purposes of reconciliation must be presumed to be without prejudice."

"On the strength of that authority counsel for the wife asked me to say that the interview in the present case between the two parties and their solicitors was without prejudice and, therefore, privileged, as it was clearly arranged for the specific purpose of effecting a reconciliation. I do not think that the learned lords justices in *McTaggart v. McTaggart* (1) ever intended to go so far as to say that a meeting arranged by the parties to a matrimonial dispute to discuss a possible reconciliation must be taken to be without prejudice if it is not specifically stated so to be. It may be that in *McTaggart v. McTaggart* (1) the meeting was without prejudice, but I think that what the learned lords justices were saying there was that that particular meeting, which was not only a meeting to arrange a reconciliation, but one at which a probation officer was present to assist in achieving that purpose, must be taken to be without prejudice because that combination of circumstances compelled that inference to be drawn. Otherwise, if the parties discussed their affairs with the probation officer, with the knowledge that afterwards evidence could be given of the conversations in a court, they would be much less likely to be frank with him, and, therefore, his function would be much less likely to be successful."

Counsel for the husband, naturally, relied on that case very strongly. It is, however, to be observed that though ORMEROD, J., apparently, took the view that such a meeting was not to be presumed to be taken to be without prejudice if it were not specifically stated so to be, he does admit an exception, namely, a meeting to arrange a reconciliation where a probation officer is present. I pay the greatest respect to, and, if I could, would follow, this decision. That case was considered in *Mole v. Mole* (4). The headnote is:

"On the hearing of a petition by a wife for divorce on the ground of the husband's alleged cruelty and desertion, the wife sought to adduce in evidence a letter which the husband had written to a probation officer in answer to a letter written to him by the probation officer after he (the probation officer) had been consulted by the wife with a view to effecting a reconciliation between the parties. The husband objected to the evidence being given on the ground that the letter was privileged, but it was argued that it should be admitted since the husband had not accepted the probation officer as a conciliator. *Held*: the letter was privileged and should not be admitted."

BUCKNILL, L.J., said ([1950] 2 All E.R. 328):

"At the trial, when the probation officer was called, the husband took the objection that this letter was privileged in accordance with the opinions given by two lords justices in *McTaggart v. McTaggart* (1), but the learned commissioner ruled that it was not privileged. He seems, however, to have dismissed the letter by saying that the husband wrote it in a pique and did not mean what he said. In my opinion, the letter was privileged and should not have been admitted. Counsel for the wife argued that the opinions expressed by the lords justices in *McTaggart v. McTaggart* (1) only applied when both sides have accepted the probation officer as a conciliator between them. I do not think that that is what was intended in those opinions."

DENNING, L.J., said (*ibid.*, 329):

"I agree so fully with all that BUCKNILL, L.J., has said that I do not wish to add anything, except to say that I do not accept the correctness of *Bostock v. Bostock* (3). I take it that the principle of *McTaggart v. McTaggart* (1) applies not only to probation officers, but also to other persons such as clergy, doctors, or marriage guidance counsellors, to whom the parties resort with a view to reconciliation when there is a tacit understanding that the conversations are without prejudice. I see no reason why the solicitors of the parties should be in any different position."

I am bound to say that I agree respectfully with the opinion which DENNING, L.J., expressed in that case, and I prefer to follow it rather than the decision of ORMEROD, J., in *Bostock v. Bostock* (3). The view I take about the facts in this case is that the parties were resorting to a number of counsel headed by Mr. Karminski, with a view to reconciliation. I feel bound to draw the inference that, in all the circumstances of this case, there was a tacit understanding that the conversations were without prejudice, and I, therefore, hold on the first point submitted to me that these two interviews were privileged. With regard to the second meeting, I take the view that it was merely a continuation of the first, and held in similar circumstances, and is, therefore, privileged.

Solicitors: *Haslewood, Hare & Co.* (for the wife); *Coode, Kingdon, Cotton & Ward* (for the husband).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

HANGKAM KWINGTONG WOO v. LIU LAN FONG.

[PRIVY COUNCIL (Lord Simonds, Lord Normand, Lord Oaksey, Lord Radcliffe and Rinfret, Chief Justice of Canada), June 12, 13, 14, July 23, 1951.]

Trading with the Enemy—Power of attorney—British territory occupied by enemy
 A —Donor of power in allied territory and donee in occupied territory—
 Validity of acts done by donee under power.

Contract—Frustration—Provisions of colonial ordinance—Agreement for sale of land in Hong Kong during Japanese occupation—Property subject to mortgages
 B —Sale to be free from incumbrances—Purchase price paid in “military yen”—Mortgages paid off in “military yen”—Ordinance subsequently enacted whereby vendor liable to pay to mortgagees sum greater than purchase price.

In October, 1942, the appellant, a resident of Hong Kong, was the owner of a house in Hong Kong which was subject to mortgages for sums amounting to \$103,000 in Hong Kong currency. As he intended to leave Hong Kong, which was then in the occupation of the Japanese, he gave to C. a general power of attorney, dated Sept. 15, 1942, specifically authorising him, *inter alia*, to sell the appellant's property as he should think fit. On or about Oct. 6, 1942, the appellant left Hong Kong, and thereafter he resided in Free China until February, 1946. On May 10, 1943, the Japanese made “military yen” the only permissible currency in Hong Kong, the prescribed rate of conversion being four Hong Kong dollars to one military yen. On Aug. 21, 1943, C. entered into an agreement to sell the appellant's house, which was stated to be free of mortgages or other incumbrances, for the sum of 68,000 military yen. The purchase price, was paid and in September, 1943, an assignment was executed by C. in favour of the purchaser, but the sale was not completed by registration at the Hong Kong Land Office. In September and October, 1943, the mortgages on the property were paid off in military yen. The Japanese occupation came to an end in September, 1945, and in February, 1946, the appellant returned to Hong Kong. By the Debtor and Creditor (Occupation Period) Ordinance, 1948 (Hong Kong Ordinance No. 24 of 1948), the appellant, while not becoming entitled to receive from the purchaser any sum beyond the military yen already received, became liable to pay to the mortgagees a large sum in Hong Kong dollars beyond the military yen already paid in purported full discharge of the mortgage debts. In an action by the purchaser for specific performance of the agreement for sale,

HELD: (i) the reason underlying the common law principle that trading with the enemy was illegal was that the person with whom intercourse was illegal was regarded as an enemy by the court which had to determine the legality of the transaction; in the case of British territory occupied by the enemy, whatever consequences might follow outside the territory if one of its inhabitants, who had left it, sought to maintain or to initiate relations with another who had stayed within it, the courts of the occupied territory could not regard either him who had left it or him who had stayed behind as enemies of the King or enemies of each other; therefore, the power of attorney given by the appellant to C. was not to be regarded by the courts of Hong Kong as abrogated because the parties were temporarily divided by the line of war; and the appellant was bound by the documents executed by C. on his behalf.

(ii) although the passing of the ordinance of 1948 placed on the appellant a burden not contemplated by him or the purchaser at the date of the agreement, the change of fortune was not so fundamental as to strike at the root of the agreement and render impossible its performance in the

manner contemplated by the parties, and, therefore, there was no frustration of the contract.

AS TO TRADING WITH THE ENEMY, see HALSBURY, Hailsham Edn., Vol. 1, p. 460, para. 779; and FOR CASES, see DIGEST, Vol. 2, pp. 162-164, Nos. 330-347.

Cases referred to:

- (1) *Li Tsz Chiu v. Lo Kar Yam*, (1948), 32 Hong Kong Law Reports 121. A
- (2) *Tingley v. Müller*, [1917] 2 Ch. 144; 86 L.J.Ch. 625; 116 L.T. 482; 2 Digest 142, 163.
- (3) *The Hoop*, (1799), 1 Ch. Rob. 196; 165 E.R. 146; 2 Digest 178, 418.
- (4) *The Rapid*, (1814), 8 Cranch 155.
- (5) *Esposito v. Bowden*, (1857), 7 E. & B. 763; 27 L.J.Q.B. 17; 29 L.T.O.S. 295; 119 E.R. 1430; 2 Digest 163, 332. B
- (6) *Cricklewood Property & Investment Trust, Ltd. v. Leighton's Investment Trust, Ltd.*, [1945] 1 All E.R. 252; [1945] A.C. 221; 114 L.J.K.B. 110; 172 L.T. 140; 2nd Digest Supp.

APPEAL from an order of the Supreme Court of Hong Kong (appellate jurisdiction) (WILLIAMS and SCHOLES, JJ.), dated June 10, 1949, dismissing the appellant's appeal from an order of SIR LESLIE GIBSON, C.J., in the Supreme Court of Hong Kong (original jurisdiction), dated Feb. 25, 1949, in an action by the respondent for specific performance of an agreement, dated Aug. 21, 1943, for the sale of property in Hong Kong. C

The property in question belonged to the appellant who was a resident of Hong Kong. During the Japanese occupation of Hong Kong he went to reside in Free China, leaving the management of his affairs to his attorney, who, purporting to act on his behalf, entered into the agreement of Aug. 21, 1943. The appellant contended, *inter alia*, that, under the principles of the common law of England applicable to Hong Kong, he was not bound by the agreement made by his attorney, as at the material time he and the attorney were divided by the line of war, he being in Free China, then in alliance with His Majesty, and the attorney being in enemy-occupied territory. The learned chief justice of the Supreme Court of Hong Kong, applying a previous decision of the Supreme Court in *Li Tsz Chiu v. Lo Kar Yam* (1948) (32 Hong Kong Law Reports 121), held that the appellant was bound by the agreement and decreed specific performance thereof, and his decision was affirmed by the Full Court on appeal. The facts appear in the judgment of the Board delivered by LORD SIMONDS. D

Sir Roland Burrows, K.C., and *Belsham* for the appellant. E

Sir Andrew Clark, K.C., and *Harold Lightman* for the respondent. F

The Board took time for consideration.

July 23. The following judgment of the Board was delivered by

LORD SIMONDS: This appeal is brought from an order of the Supreme Court of Hong Kong in its appellate jurisdiction which dismissed the appellant's appeal from a judgment and order of the chief justice of that court in its original jurisdiction decreeing specific performance of a certain agreement which will be later stated in detail. G

Hong Kong was, from Dec. 25, 1941, until Sept. 1, 1945, in the effective occupation and control of the Japanese between whom and His Majesty a state of war existed. The appellant, who resided in Hong Kong and there carried on the business of a solicitor, was, in September, 1942, apprehensive of arrest by the Japanese and was minded to leave Hong Kong and go to Free China. With a view to the management of his affairs during his absence, he gave to one Chan Hung Cheung, who will be called Chan, two powers of attorney, the one in English dated Sept. 15, 1942, and the other in Chinese. The English power of attorney gave to Chan wide and general powers and specifically H

authorised him to sell the appellant's real and personal property as he should think fit. On or about Oct. 6, 1942, the appellant left Hong Kong and thereafter resided in Free China until February, 1946, when he returned to Hong Kong. He was, at the date of his departure from Hong Kong, the owner of certain land and a messuage thereon known as 48, Kennedy Road. This property, which was registered in his name at the Land Office of Hong Kong as inland lot No. 2153, was subject to a first mortgage for an aggregate sum of \$73,000 Hong Kong currency and to a second mortgage for \$30,000 Hong Kong currency. By an order of May 10, 1943, which was effective from June 1, 1943, the Japanese authorities made "military yen" the only permissible currency in Hong Kong and forbade under heavy penalties the use of Hong Kong dollars which before the occupation were the recognised currency. The prescribed official rate of conversion was four Hong Kong dollars to one military yen.

In these circumstances the appellant, by his attorney, Chan, on Aug. 21, 1943, entered into an agreement with one Koo Wan Sing, who will be called "the purchaser," for the sale to him of the said property, in accordance with the law as proclaimed in Hong Kong, at the price of 68,000 yen in military notes, of which 50,000 yen were expressed to be paid on the date thereof, and it was thereby agreed that the transaction should be put through within one month from that date, when the balance of the purchase money should be paid to the vendor, who should hand over all the title deeds of the predecessors and execute a formal deed of sale in favour of the purchaser. It was also agreed that the property was free of any mortgages, pledges, or other incumbrances. It is not disputed that under this agreement the purchaser was entitled to have the property assigned to him free of incumbrance, nor is it disputed that the balance of the purchase money was duly paid. Certain other documents were executed and acts done, to which reference must be presently made, but for the present purpose it is necessary only to add that the sale was not completed, that on May 25, 1946, the purchaser died, and that on May 24, 1948, the respondent, as his executrix, commenced the proceedings out of which this appeal arises. By her writ she claimed that she was the sole beneficial owner and entitled to possession of the said property, but by her statement of claim she alleged, and claimed specific performance of, the agreement which has been stated, and it is on the basis of this claim that the action proceeded and that this appeal has been brought. The first defence to the claim is that at all material times the appellant and Chan were divided by the line of war, the appellant being in Free China, then in alliance with His Majesty, and Chan being in enemy-occupied territory, and that, therefore, the power of attorney was cancelled or abrogated and the appellant was not bound by documents which Chan purported to have executed on his behalf. On this interesting and difficult question their Lordships have not the advantage of a judgment of the Supreme Court in this case, for that court rightly considered itself bound by its own previous decision in *Li Tsz Chiu v. Lo Kar Yam* (1), to which reference will be made.

The argument for the appellant is thus stated in his formal Case. It is that no relevant ordinance dealing with the matter existed in Hong Kong, and that the principles of the common law of England were applicable, and thereby, during the Japanese occupation of Hong Kong, the residents of Hong Kong became enemies of His Majesty and his allies and were shut off from communication and commercial dealings with those resident in His Majesty's free territories or in the unoccupied territory of an ally of His Majesty, and, in particular, the relationship of principal and agent between the appellant and Chan was determined as soon as they were divided by the line of war. To this contention the respondent replies, first (relying on the authority of *Tingley v. Müller* (2)) that, by the common law of England, a general power of attorney, given by a British subject residing within His Majesty's allegiance to one who is or becomes an enemy of His Majesty, is not abrogated or avoided by the outbreak of war, and, secondly, that there is no principle of the common law

of Hong Kong, which the courts of Hong Kong administer, which constrains them to treat the residents of Hong Kong, when that territory is in enemy occupation, as for all purposes divided by the line of war from former residents who have escaped to some part of His Majesty's dominions, or to the territory of an ally. This latter plea will first be examined by their Lordships, for in a certain event it will be unnecessary to express a final opinion on the former.

As has been said, the Supreme Court of Hong Kong rejected the contention of the appellant on the authority of its own previous decision in *Li Tsz Chiu v. Lo Kar Yam* (1) and it is convenient to examine that case in which SIR LESLIE GIBSON, C.J., delivered a valuable and penetrating judgment. The facts there, so far as they need to be stated, were that during the Japanese occupation of Hong Kong two members of a partnership, which carried on business there, escaped to Free China and the remaining members remained in Hong Kong and continued to carry on the partnership business. The partners were thus said to be divided by the line of war, and the question was whether from the time of such division the partnership was by the law of Hong Kong *ipso facto* dissolved. The chief justice accepted the view that the colony of Hong Kong was the victim of a Japanese occupation and not of a mere invasion, and he further, on a consideration of the authorities, agreed that, according to the common law of England, a partnership is automatically dissolved if, at the outbreak of war, one or more partners are in England and the other partner or partners are in enemy territory, which for this purpose includes enemy-occupied territory, and that the same principle applies if, after the outbreak of war, one or more partners go to enemy territory while the other partner or partners remain in England, and that residents in allied territory are on the same footing as residents in England for the purpose of these principles. SIR LESLIE GIBSON, C.J., said (32 Hong Kong Law Reports 129):

"No doubt also, the common law, in so far as it forms part of the law of Hong Kong, would be similarly interpreted by the courts here in ordinary times. But the question I have to ask myself is 'How would the common law—as part of the law of Hong Kong—be interpreted in Hong Kong while the colony was under enemy occupation?'"

After examining the basis of the principles which he had discussed, he said (*ibid.*, 131):

"To support his argument that the partnership in this case was dissolved, Mr. Wright must go further and his further proposition is not supported by authority. He must argue that under the law of Hong Kong, (a) residents in Hong Kong became enemies on the Japanese occupation of Hong Kong, and (b) residents in Free China were therefore unable to communicate with them or remain in contractual relations with them. I am unable to accede to these propositions. The law of England regarded occupied Hong Kong as enemy territory but it seems impossible to contemplate that the law of Hong Kong itself (and Mr. Wright must rely on the common law as forming part of the law of Hong Kong) could operate to turn all the residents of the colony into enemies. Could it for example by turning them into enemies preclude them from suing in their own courts? It might be that under some law of the Japanese administration (no such law has been established), the principle was applied in reverse on the basis that Free China became the enemy but in that case the result would flow from the Japanese law and not from the common law as in force in Hong Kong."

Their Lordships have thought it proper to set out these passages from the judgment of the learned chief justice at length because they appear to go to the heart of the matter.

It is constantly to be borne in mind that it is the law of Hong Kong which is to be administered and the question, therefore, is: Assuming that the common

law of England in regard to trading with the enemy prevails in the colony, what is the common law of England in this matter if England is itself enemy-occupied territory? To ask this question is to plunge into the unknown. On the answer to it, however, depends the issue: What is the law of Hong Kong when Hong Kong is in enemy occupation? The researches of learned counsel on either side were unable to bring to their Lordships' notice any case law or institutional writings which were of real assistance. This was, perhaps, inevitable, since the soil of England has not, within the period of the development of the common law in this matter, been occupied by the enemy. Nor, though the same problem must in recent times have arisen in occupied Europe, can it be said that such a universal rule has been evolved that it ought to be adopted as part of the municipal law of England or Hong Kong. In these circumstances it appears to their Lordships that the problem must be approached, and, if there is a solution, solved, by examining the principle on which, at common law, trading with the enemy is held to be illegal, and, indeed, criminal, and then asking whether, on that principle, the courts of England (if England were occupied territory) or of Hong Kong, as in the present case, are bound to hold that contractual relations are abrogated between its citizens who are temporarily divided by the line of war. Their Lordships at this stage make no distinction between the relationship of partner to partner and of donor to donee of a power of attorney.

The basis of the principle is variously stated. Their Lordships would refer to McNAIR ON LEGAL EFFECTS OF WAR, 2nd ed., p. 171, as containing an accurate and adequate exposition of this matter and in the following observations borrow freely from it. In *The Hoop* (3) SIR WILLIAM SCOTT could refer (1 Ch. Rob. 198) to the principle as

" . . . a general rule in the maritime jurisprudence of this country, by which all subjects trading with the public enemy, unless with the permission of the sovereign, is interdicted."

A few years later a learned American judge, JOHNSON, J., delivering the judgment of the United States Supreme Court in *The Rapid* (4), could say (8 Cranch 160):

"The individuals who compose the belligerent states, exist, as to each other, in a state of utter occlusion . . . Every individual of the one nation must acknowledge every individual of the other nation as his own enemy—because the enemy of his country."

Other reasons too were ascribed by SIR WILLIAM SCOTT (1 Ch. Rob. 200), as *e.g.*, the procedural disability, shared by enemies generally, which precluded an appeal to the tribunals of one country on the part of the subjects of the other, and

" . . . the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy, and under colour of that, had the means of carrying on any other species of intercourse he might think fit "

—an aspect of the matter which has frequently been emphasised in later authorities. This is closely linked with the reasoning of WILLES, J. (7 E. & B. 779) in *Esposito v. Bowden* (5), who there founds the prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country on

" . . . the presumed object of war being as much to cripple the enemy's commerce as to capture his property . . . "

It is, however, to be observed that the common feature of every statement of the principle and its reason is that the person with whom intercourse is illegal is regarded as an enemy by the court which has to determine the illegality. This is most clearly shown in connection with the rule as to the procedural disability which attaches to enemies. At once the question arises: How can

this doctrine be applied in the courts of an enemy-occupied country? To take the present case, whom were the courts of occupied Hong Kong to regard as an enemy? To whom deny *persona standi in judicio*? Presumably not to the appellant, who had escaped from the occupied territory and sought refuge among the King's allies. To him no taint of enemy character could attach. To Chan, then, the attorney who remained in Hong Kong? But to whom, if not to Chan, were the courts of Hong Kong open? The result seems plainly to ensue that, whatever consequences may follow outside the occupied territory if one of its inhabitants, who has left it, seeks to maintain or to initiate relations with another who has stayed within it, yet the courts of that country cannot regard either him who has left or him who has stayed behind as enemies of the King or enemies of each other. This result may, perhaps, be tested thus. Suppose that the appellant had, instead of going to the territory of an ally, gone to Japan and thence sought to maintain some contractual relations with Chan. Then, apart from any regulation which the occupying power might lawfully make, a court of Hong Kong would be bound to treat him as an enemy, to deny him access to its presence, and to treat the contractual relation as determined. Is he, then, to be regarded as an enemy to whatever territory, British, allied or enemy, he goes?

Enough has been said on this aspect of the case to show that there is a wide divergence between the problems which face the courts of a belligerent power and of an occupied territory. No less striking is the difference in the conditions which must determine whether a particular class of contract should be abrogated. The general grounds of abrogation are, broadly speaking, the danger of intercourse and the desire not to enhance, but to cripple, the resources of the enemy. Often it might be said of this or that communication, or of this or that relationship, that it could not possibly redound to the advantage of the enemy, but rather must benefit this country, yet it is illegal and void, for it cannot be left to the individual to judge what may or may not be harmful or beneficial to his country. Let it be assumed (contrary to the contention of the respondent) that such a relation is that which is established by the grant of a general power of attorney. Yet how different an aspect must such a transaction wear if it takes place in an occupied country. New considerations at once arise which had no place in the formulation of the general rule of law. Is it in the interest of the King that, when British territory is occupied by the enemy, its able-bodied or skilled inhabitants should escape across the line of war and continue to render him service? No one would deny it or give little weight to such a consideration, remembering what is owed to those who, when Europe was overrun, thought it their duty to carry on the fight from English shores. If, for such men, that is their right, or, as some would say, their duty, does public policy demand that, doing it, they should leave their affairs unattended by any responsible agent lest it should be said that, placing them in the hands of a lawful attorney, they were guilty of illegality and crime? If it were so, it would be a powerful deterrent against their rendering the service to the King which they could usefully continue to render. Their Lordships do not think it necessary to assess the general advantage or disadvantage of endeavouring to apply in the courts of Hong Kong the rigid rules of the common law which might have to be applied outside the colony in regard to a transaction taking place within it. The purpose of their observations is to show that the contentions of the appellant involve a grave extension of the common law, and that that extension means, not merely the application of old principles to new circumstances or their adjustment to fresh needs, but the re-writing of them in conditions in which their foundations are shaken. In these circumstances their Lordships are of opinion that the judgment of the court of Hong Kong should be upheld.

It becomes unnecessary to determine whether a general power of attorney is an instrument of a kind which must in ordinary cases be regarded as abrogated when donor and donee are divided by the line of war. For, even if it is, it is

not, as their Lordships hold, to be regarded as abrogated in the extraordinary case now under appeal. It is sufficient to say that *Tingley v. Müller* (2), on which the respondent strongly relied as authority for the proposition that such an instrument remains of full force and effect notwithstanding the division of war, is difficult to reconcile with later cases and has itself been the subject of criticism in the highest tribunal.

A In addition, however, to the defence with which their Lordships have just dealt the appellant also raised two pleas which must now be considered: (i) that, by reason of certain events which will next be mentioned, there was such a change of circumstances as to frustrate the agreement and render its performance in the manner contemplated by the parties impossible; and (ii) that, in any case, in view of the hardship which would be imposed on the appellant, the equitable remedy of specific performance should be denied to the respondent.

B For the consideration of these pleas some further facts must be stated.

As has already been noted, the property was subject to a first and second mortgage in sums expressed in terms of Hong Kong dollars. In September and October, 1943, these mortgages were paid off in military yen at the prescribed rate of exchange. It was not permissible to pay them off in any other currency. Thus, but for the passing of the ordinance of 1948, to which reference will next be made, the way was clear for an assignment of the property free of incumbrances to which the purchaser was entitled, and, in fact, such an assignment was, at some date towards the end of September, 1943, executed by Chan in favour of the purchaser. In this document the consideration was stated to be \$272,000 in Hong Kong currency, a fact at one time relied on by the appellant but no longer relevant in view of the finding of fact by the learned chief justice

C that the agreement was for a sale for military yen and nothing else. This assignment was not, and for obvious reasons could not be, registered at the Land Office of Hong Kong. In 1948 there was passed by the Hong Kong legislature the Debtor and Creditor (Occupation Period) Ordinance, 1948 (Ordinance No. 24 of 1948). It is not necessary to refer at length to the terms of this ordinance, and, in particular, it is not desirable, since the mortgagees are not parties to the proceedings, to attempt to define their rights under it against the appellant or the respondent or the property. It is at least clear, however, as it is alleged by the appellant and made the ground of defence by him, that the result of the ordinance is that, while it imposes on the purchaser no obligation to pay to the appellant any sum beyond the military yen already paid, yet it renders the latter

D liable to pay to the mortgagees a large sum in Hong Kong dollars beyond the military yen already paid in purported full discharge of the mortgage debts.

E On these facts the appellant raises the plea of frustration, a plea rejected by the learned chief justice and by the Full Court on appeal. Their Lordships so fully agree with their reasons and conclusion that they can state their own view very shortly. It is beyond question that the passing of the ordinance placed on the appellant a burden not contemplated by him or by the purchaser at the

F date of the agreement. This is put somewhat graphically by saying that, whereas it was contemplated that the mortgages would be fully discharged out of the purchase money and there would be a balance left over for the appellant, not only is there no balance left for him but he will lose his property and may still remain liable in substantial sums to the mortgagees. That this is an event not contemplated by him or his attorney is certain, though there is no evidence that

G the purchaser was aware that the property was mortgaged. The question, however, is whether this change of fortune is to be regarded as so fundamental as to strike at the root of the agreement and render its performance in the manner contemplated by the parties impossible. In their Lordships' opinion, it clearly is not. The purchaser has long since fulfilled his part of the agreement. The appellant as vendor can fulfil his part by the execution of a single document. It is, therefore, not a case where performance has become impossible. Nor, if, as the result of the ordinance, the appellant has not obtained the advantage

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from the agreement that he had expected, can this be deemed a change of circumstances so fundamental as to satisfy the test laid down by VISCOUNT SIMON, L.C. ([1945] 1 All E.R. 255) in *Cricklewood Property & Investment Trust, Ltd. v. Leighton's Investment Trust, Ltd.* (6), which test was, as their Lordships think, correctly applied by the Supreme Court of Hong Kong.

The final plea, with which their Lordships must deal, is that equitable relief should be refused on the ground of hardship to the appellant. The Full Court cited with approval that part of the judgment of the learned chief justice which dealt with this plea and, as their Lordships respectfully think, his reasoning and conclusion are unimpeachable. That the appellant in the events which happened made a bad bargain is clear enough. That resulted from the fact that the Hong Kong legislature deliberately enacted that in some cases there should, and in others there should not, be a re-valuation of debts incurred or discharged in military yen. The appellant would have been in no better position if the transaction of sale had been fully performed before the ordinance came into operation. It does not appear to their Lordships that any good reason has been shown why the court should, by denying to the purchaser, who has performed his part of the bargain, the appropriate remedy of specific performance, in effect add to or alter the carefully thought out provisions of the ordinance for the adjustment of the rights of certain creditors and debtors. In their Lordships' opinion, therefore, this plea also fails, and they would only add that in any case they would hesitate long before interfering with the exercise of a discretionary jurisdiction by the learned chief justice in which the Full Court concurred. They will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Reid Sharman & Co.* (for the appellant); *Sharpe, Pritchard & Co.* (for the respondent).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

CRISTEL v. CRISTEL.

[COURT OF APPEAL (Somervell, Denning and Hodson, L.JJ.), July 10, 11, 1951.]

Husband and Wife—Legal proceedings—Claim for possession of matrimonial home—Order for possession on provision of suitable alternative accommodation—“Liberty to apply”—Variation of order—No change of circumstances.

The husband, who had deserted his wife, left her and her two children in the matrimonial home. Finding himself in financial difficulties, the husband desired to get possession of the house so that he could sell it with vacant possession, and he took out a summons under the Married Women's Property Act, 1882, s. 17, on which, on July 21, 1949, a consent order was made which provided that the wife should give up possession to the husband, such order to be suspended “until the husband provides suitable alternative accommodation . . . by providing a two or three bedroomed house or bungalow . . . either by renting the same . . . or by purchase . . . Liberty to apply.” On Dec. 5, 1950, the husband took out another summons asking that the order be varied by adding the words “or flat” after “bungalow” and that the wife should give up possession of the house as he had obtained a two-bedroomed flat for her accommodation.

HELD: *prima facie*, the words “liberty to apply” in an order meant that when the order was drawn up its working out might involve matters on which it might be necessary to obtain a decision of the court; they did not confer any right to ask the court to vary the order; and, therefore, the summons must be dismissed.

Poisson & Woods v. Robertson and Turvey (1902) (86 L.T. 302), applied.

Dictum of LANGTON, J., in *Abbott v. Abbott* (1931) (100 L.J.P. 39), on the meaning of "liberty to apply", not approved.

Per SOMERVELL and DENNING, L.JJ.: If the husband could have proved a change of circumstances the court must have allowed the variation sought.

AS TO "LIBERTY TO APPLY," see HALSBURY, Hailsham Edn., Vol. 19, p. 211, para. 509; and FOR CASES, see DIGEST, Practice, p. 678, Nos. 2902-2904, and Digest Supp.

Cases referred to:

(1) *Poisson & Woods v. Robertson and Turvey*, (1902), 86 L.T. 302; Digest, Practice, 678, 2903.

(2) *Abbott v. Abbott*, [1931] P. 26; 100 L.J.P. 36; 144 L.T. 598; Digest Supp.

B APPEAL from an order of DEVLIN, J., dated May 24, 1951, setting aside the decision of a master that the husband's summons for variation of a consent order under the Married Women's Property Act, 1882, s. 17, be dismissed. DEVLIN, J., granted the variation of the order as prayed.

Goodenday for the wife.

Hoolahan for the husband.

C SOMERVELL, L.J.: This is an appeal from an order made by DEVLIN, J., on a summons taken out by a husband under the Married Women's Property Act, 1882, s. 17, which provides:

"In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons . . . to any judge of the High Court . . . or . . . the judge of the county court . . . and the judge . . . may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit . . ."

E The circumstances which led to the husband taking out the summons may be stated briefly. He left the matrimonial home, and his wife, with two children, remained there. The wife took out a summons for the maintenance of herself and her children, and before the justices the husband admitted that he had deserted her. We were told that the house in question was larger than was necessary for the wife and the two children. The husband was in financial difficulties and he wanted to get possession of the house so that he could sell it with vacant possession. As a result of a summons under s. 17 there was a consent order, by which it was ordered that the wife

G "do deliver up possession of 26 Ilmington Road, Kenton, in the county of Middlesex, to the [husband] but that such order be suspended until the [husband] provides suitable alternative accommodation for the wife by providing a two or three bedroomed house or bungalow in the Harrow area either by renting the same unfurnished or by purchase, the [husband] agreeing to pay the wife's expenses of removal. No order as to costs. Liberty to apply."

H That was dated July 21, 1949. On Dec. 5, 1950, the husband took out the summons with which we are now concerned asking that the order which I have just read should be varied and for an order

"that the wife deliver up possession of 26 Ilmington Road, the husband having secured a two bedroomed flat at Cophthorn Court, 347 Alexandra Avenue, Harrow, Middlesex, as alternative accommodation."

That came before the master, who refused to vary the order by inserting the words "or flat" after the words "or bungalow." There was an appeal to the judge. The order as drawn up may be said to be ambiguous, because it provided

that the question whether the accommodation offered by the husband as set out in an affidavit—which, no doubt, stated that it was a flat—was suitable alternative accommodation be referred to a master for determination, and that, if such determination was in the affirmative, so much of the order as ordered possession should be suspended for such time as the master should think fit for the purpose of allowing the wife to move out. It seems to me reasonably plain that *DEVLIN, J.*, proceeded on the basis that the order could be varied as asked for in the summons. He was not, as a matter of construction, deciding that the word “house” in the original order covered “a flat.” I have come to the conclusion that the word “house” in the original order cannot be construed as including “flat.” I think that the fact that it was thought necessary to insert the words “or bungalow” indicates that “house” could not be given a wide meaning, as simply meaning any premises in which a woman with two children could live, but must be construed in its ordinary sense.

The question, therefore, is whether the order can be varied as asked. If it can, the question would then arise whether it should, but the first question is whether it can, and reliance is placed by the husband on the words “liberty to apply.” *Prima facie*, “liberty to apply” is expressed very often—and, if it is not expressed, it will be implied—where the order that is drawn up requires working out and the working out involves matters on which it may be necessary to get the decision of the court. *Prima facie*, certainly, it does not entitle people to come and ask that the order itself shall be varied.

We were referred to several cases. One was *Poisson & Woods v. Robertson and Turvey* (1). The facts were rather complicated. It was about a secret remedy in which the various parties claimed rights. One of the claims made by the plaintiffs was to inspect the recipe or to have the document handed over to them. The trial judge made no order for inspection or possession. There was liberty to apply, and it was sought to make an application under those words for a copy of the document. *STIRLING, L.J.*, said (86 L.T. 304):

“ . . . such an application as the present cannot be made under the ‘liberty to apply’ . . . The judgment contained a declaration as to the interests of the parties . . . with ‘liberty to apply.’ But the insertion of those words . . . does not enable the court to deal with other matters which do not arise in the course of working out the judgment.”

That phrase “working out the judgment” can be found in other cases.

The case on which counsel for the husband mainly relied was *Abbott v. Abbott* (2), in which, as here, a consent order had been drawn up. The subject-matter of the order was alimony *pendente lite*, and after it had been running for some time, the husband applied to have the amount of the alimony reduced. Various arguments were put forward. One was that the order was in form and in fact a final order, by which obviously was meant that it should be construed as an order made by consent between the parties settling alimony *pendente lite* finally and irrevocably for the period down to the suit. That order, as this, contained the words “liberty to apply.” On the other side it was submitted that it should not be treated as a final order and that the expression “liberty to apply” in itself negatived or assisted in negativing that construction. *LANGTON, J.*, held that the order could be varied and the amount payable under it was reduced. In the Court of Appeal *LORD HANWORTH, M.R.*, said that there was no necessity for him to deal with questions of law which had been suggested and he did not think that the consent order made was a final order in the way contended by the petitioner. He thought that *LANGTON, J.*, had taken the right view of the facts of the case.

It seems to me that this was a decision which must be restricted to its subject-matter or similar subject-matters and that what the court decided was that this consent order, with the words “liberty to apply,” was not a final and irrevocable order, but was an order which, on its true construction, the parties

contemplated and agreed could be varied if a change in financial circumstances came about, on the principles familiar to everybody in respect of maintenance orders. I think, with respect, that LANGTON, J., in dealing with these words "liberty to apply," used language which went beyond what was necessary for the decision of the case. He said (100 L.J.P. 39):

- A "The expression 'liberty to apply' means what it says, namely, that leave was reserved to both parties to make any application concerning any part of the order at any subsequent time."

I think that is too wide a statement. *Prima facie*, the words "liberty to apply" refer to the working out of the actual terms of the order. In the present case, I have come to the conclusion that the words "or flat" cannot be inserted.

- B It is a plain alteration of what had been agreed. No change of circumstances such as was put forward in *Abbott v. Abbott* (2) is suggested. It is merely an attempt by the husband to enlarge the categories of alternative accommodation which were expressly limited by the order.

In addition to relying on *Abbott v. Abbott* (2) (which I do not think assists here for the reasons which I have given) counsel for the husband submitted that

C to refuse this application would, in effect, be to take away from the master or judge the discretion which is conferred on them by s. 17 of the Married Women's Property Act, 1882. I do not think that is a good argument. The section confers a wide power on the judge or the court to postpone matters or to reserve power to deal with matters as they arise from time to time, but, if parties agree an order—or, indeed, whether they do or not—once an order of this kind is made,

- D I think it cannot be altered. It would only be in a very exceptional context that the words "liberty to apply" could justify an alteration, and the question of the discretion which is conferred by s. 17 does not arise. I would like to say in conclusion that this is the type of order, on the construction which I have given to it, in which the parties might be expected to ask for the words "liberty to apply" to be inserted. It is true that where an order requires working out,

- E those words will be implied, but it is very usual for counsel, when an order does require working out, to ask that these words should be inserted. On the face of the order obviously a dispute might arise whether the accommodation offered was suitable alternative accommodation, and the court had to provide how that dispute could be resolved. For the reasons I have given, I think this appeal must be allowed and the order of the master restored.

- F DENNING, L.J.: I agree. If there was an unforeseen change of circumstances, as, for instance, if the wife was left by will another house or if she took an adulterer to live with her in this house, I should have thought the "liberty to apply" would enable the court to remedy the position—I should have thought the case of *Abbott v. Abbott* (2) was sufficient authority for that—but when there
- G is no change of circumstances, I do not think the court can alter or vary the agreement of the parties under the "liberty to apply." It can only do what is necessary to carry the agreement into effect. I agree that the appeal should be allowed.

- H HODSON, L.J.: I agree that the appeal should be allowed and the order of the master restored. The words "liberty to apply" in their context in this order added nothing to the order, which, of itself, required something further to be done for it to be worked out. Therefore, without the existence of those words, it would have been open to the husband to come to the court and show that he had provided suitable alternative accommodation in the form of a two or three bedroomed house or bungalow. For the reasons which have been given by SOMERVELL, L.J., I am of opinion that it is not open to him to come to the court and alter the agreement by adding the words "or flat" to the description

of the accommodation contained in the order. I should prefer to reserve my opinion whether change of circumstances would enable an application to be made.

Appeal allowed.

Solicitors: *Osmond, Bard & Westbrook* (for the wife); *Irwin Shaw* (for the husband).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

A

NOTE.

HOLLINGTON BROTHERS, LTD. v. RHODES AND ANOTHER.

[CHANCERY DIVISION (Harman, J.), June 26, 27, 28, 29, July 12, 1951.]

B

Land Charges—Registration—Contract to grant underlease—Contract not registered—Breach—Enforcement by lessees against purchaser with notice—Liability of vendors—Damages—Land Charges Act, 1925 (c. 22), s. 10 (1) class C (iv), s. 13 (2).

ACTION for a declaration that the plaintiffs were entitled against the defendants, Rhodes and Tull, to an underlease for a term of seven years from Michaelmas, 1945, of certain rooms in a block of offices known as Devonshire Chambers, Bishopsgate, in the city of London, and for damages for failure to grant that underlease.

In 1945 the plaintiffs entered into negotiations for an underlease of the rooms with a solicitor employed by the defendants in connection with the legal business relating to the block of offices, which were vested in the defendants as the personal representatives of one J. A. Rhodes, who was trustee for a syndicate of a lease for a term of eighty years less three days from Michaelmas, 1877, at a rent of £1,800 a year. In August, 1945, a draft underlease of the rooms for seven years from Michaelmas, 1945, at a rent of £612 10s. a year, was agreed between the plaintiffs and the solicitor and was engrossed in two parts, the counterpart executed by the plaintiffs being returned to the solicitor on Sept. 11, 1945. The underlease was executed by the defendant, Rhodes, in September, 1945, and by the defendant, Tull, in December, 1947, but was never exchanged with the counterpart, although the plaintiffs periodically asked for the exchange. The plaintiffs were allowed to take possession of the rooms, and from January, 1946, they paid the rent quarterly to the defendants' agents. On Sept. 5, 1947, the defendants entered into a written contract with Daymar Estates, Ltd., for the purchase of the head term of the block of offices, the property being sold subject to and with the benefit of the several leases and agreements for tenancy of the offices comprising the block, as shown in a schedule referred to in the contract. In the schedule the plaintiffs were shown as having an underlease of the rooms which they were occupying for seven years from Apr. 29, 1945, at £612 10s. a year. On Sept. 26, 1947, the term vested in the defendants was assigned to Daymar Estates, Ltd., "subject to and with the benefit of such leases and tenancies as may affect the premises", and on the same day Daymar Estates, Ltd., served on the plaintiffs notice to quit at Michaelmas, 1948, on the footing that they were only yearly tenants. On Mar. 1, 1948, the plaintiffs, being unable to find other accommodation, entered into a written agreement with Daymar Estates, Ltd., for an underlease for four years from Michaelmas, 1948, at a rent of £750 a year with a premium of £2,000. The plaintiffs sought damages against the defendants on the footing (i) that there was a contract between them and the defendants for the grant of an underlease for seven years; (ii) that the agreement was void against Daymar Estates, Ltd., as it was not registered under the Land Charges Act, 1925, s. 10 (1); and (iii) that, by assigning to Daymar Estates, Ltd., without completing the underlease to

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the plaintiffs, the defendants put it out of their power effectively to grant that underlease and thus committed a breach of contract for which they were liable in damages to be measured by the extra cost to the plaintiffs of the residue of the term of seven years unexpired at Michaelmas, 1948. The defendants contended (i) that there was no contract between them and the plaintiffs, and (ii) that, if there was a contract, it was valid against Daymar Estates, Ltd., against whom it could have been enforced, and, therefore, the plaintiffs had suffered no damage for which the defendants were responsible.

Cases referred to:

(1) *Hunt v. Luck*, [1901] 1 Ch. 45; 70 L.J.Ch. 30; 83 L.T. 479; *affd.* C.A., [1902] 1 Ch. 428; 71 L.J.Ch. 239; 86 L.T. 68; 40 Digest 157, 1259.

(2) *Wright v. Dean*, [1948] 2 All E.R. 415; [1948] Ch. 686; [1948] L.J.R. 1571; 2nd Digest Supp.

(3) *Re Monolithic Building Co.*, [1915] 1 Ch. 643; 84 L.J.Ch. 441; 112 L.T. 619; 10 Digest 770, 4818.

Salt, K.C., and *J. A. Brightman* for the plaintiffs.

Upjohn, K.C., *Tonge* and *C. D. Slade* for the defendants.

Cur. adv. vult.

July 12. **HARMAN, J.**, read a judgment in which he held that there was no contract between the plaintiffs and defendants as alleged by the plaintiffs and continued: If I am right, the action fails and I need go no further, but it may be useful that I should express a view on two further points which were fully argued before me:—(i) assuming that there was a contract such as the plaintiffs alleged, was there a breach by the defendants; and (ii) if so, what is the proper measure of damages? After 1925 by virtue of the Land Charges Act, 1925, s. 10 (1), this contract came within class C (iv) as a “charge or obligation affecting land,” and, therefore, might be registered as a land charge in the register of land charges. Accordingly, by virtue of s. 13 (2), this being a land charge of class C, it is void

“ . . . against a purchaser of the land charged therewith, or of any interest in such land, unless the land charge is registered in the appropriate register before the completion of the purchase . . . ”

Moreover, by the Law of Property Act, 1925, s. 199 (1) (i), a purchaser is not to be prejudicially affected by notice of any instrument or matter capable of registration under the Land Charges Act, 1925, which is void against him by reason of non-registration. This land charge was not registered, and, accordingly, it is said that it was void against Daymar Estates, Ltd., notwithstanding their notice or knowledge, and, moreover, that there was no duty lying on the plaintiffs to register the contract to prevent this result. This has been held to be so by **WYNN-PARRY, J.**, in *Wright v. Dean* (2), where he said ([1948] 2 All E.R. 418) that it could not be urged that there was any such duty on the plaintiff. I propose to follow the decision of **WYNN-PARRY, J.**, although I may observe in passing that in the Law of Property Act, 1925, s. 200 (4), there is a reference to

“ . . . the obligation to register a land charge in respect of . . . (b) any estate contract.”

The defendants' answer to this point was that Daymar Estates, Ltd., did not contract to obtain, and did not by the assignment get, any estate in the land expressed to override the plaintiffs' rights, and that, consequently, they took subject to those rights, which are expressly mentioned, and that the land which they purchased was, in fact, only an interest in the land subject to the rights of the plaintiffs in it. This argument seemed to me attractive because it appears at first glance wrong that a purchaser, who knows perfectly well of rights and is expressed to take subject to them, should be able to ignore them. It was, moreover, pointed out that *Wright v. Dean* (2) was distinguishable in this respect

because there the option which was overridden by the conveyance was not mentioned in it, nor did the purchaser take expressly subject to it. It seems to me, however, that this argument cannot prevail having regard to the words in s. 13 (2) of the Land Charges Act, 1925, coupled with the definition of "land" in s. 20 (6) of the Act. The fact is that it was the policy of the framers of the legislation of 1925 to get rid of equitable rights of this kind unless registered. [HIS LORDSHIP referred by way of comparison to *Re Monolithic Building Co.* (3), and, in particular, to the judgment of LORD COZENS-HARDY, M.R. ([1915] 1 Ch. 665), and continued:] Finally, as under the Land Charges Act, 1925, s. 13 (2), an unregistered estate contract is void as against a purchaser of the land, and under the Law of Property Act, 1925, s. 199 (1), the purchaser is not to be prejudicially affected by it, I do not see how that which is void and which is not to prejudice the purchaser can be validated by some equitable doctrine. There is, after all, no great hardship in this. The plaintiffs could, at any time until the completion of the assignment to Daymar Estates, Ltd., have preserved their rights by registration, just as the defendants could have protected their obligations by completing the underlease, of which Daymar Estates, Ltd., could not have complained as they knew all about it. If this be so, in my judgment, there would have been, on this footing, a breach of contract for which the defendants would have been liable in damages, and in substantial damages as *Wright v. Dean* (2) demonstrates. As to the measure of damages, if I had held the plaintiffs to be entitled under a contract, I should also have held that what they did was reasonable, and that the damage which flowed from the breach by the defendants of the contract amounted substantially to the damages claimed in the action, viz., the premium of £2,000 plus the excess rent paid or payable from 1948 to 1952 by the plaintiffs as the price of retaining the occupation of the property which the defendants had contracted to give them. As it is, I dismiss the action with costs on the first ground mentioned.

Action dismissed.

Solicitors: *Geo. & Wm. Webb* (for the plaintiffs); *Vandercom, Stanton & Co.* (for the defendants).

R.D.H.O.

NOTE.

PRICE v. PRICE.

[COURT OF APPEAL (Somervell, Denning and Hodson, L.J.J.), July 5, 1951.]

Divorce—Desertion—Termination—Unconditional offer by deserting wife to resume cohabitation—Offer refused by husband—Liability of husband to pay maintenance—Matrimonial Causes Act, 1950 (c. 25), s. 23 (1).

APPEAL by the husband against an order for maintenance made by PILCHER, J., on Mar. 16, 1951, under the Matrimonial Causes Act, 1950, s. 23 (1), and reported [1951] 1 All E.R. 877.

The parties were married in 1942. In 1949, after a long history of quarrels, the wife left the matrimonial home and filed a petition for divorce on the ground of the husband's cruelty. By his answer the husband denied the charges and cross-petitioned on the ground of his wife's cruelty. On May 18, 1950, both petitions were dismissed, the commissioner finding each party to blame for the various acts alleged as cruelty on either side. On June 7, 1950, the wife's solicitors wrote to the husband's solicitors stating that the wife felt that "good will and a bona fide desire by both parties to . . . forgive might save this marriage . . ."

A and that she was ready and willing to return to the matrimonial home providing the mothers of both parties stayed away from it. In a letter refusing the wife's offer the husband's solicitors said that her letter did not contain any suggestion of repentance and was not *bona fide*. The wife then applied under the Matrimonial Causes Act, 1950, s. 23 (1), for maintenance for herself and the children of the marriage. PILCHER, J., made an order in favour of the wife and the husband appealed.

Cases referred to:

- (1) *Russell v. Russell*, [1895] P. 315; 64 L.J.P. 105; 73 L.T. 295; 27 Digest 318, 2960.
(2) *Simmons v. Simmons*, [1847] 1 Rob. Eccl. 566; 163 E.R. 1137; 27 Digest 303, 2797.
B (3) *Manby v. Scot*, (1663), 1 Keb. 482; 83 E.R. 1065; 27 Digest 201, 1732.
(4) *Clifford v. Laton*, (1927), 3 C. & P. 15; 172 E.R. 302; 27 Digest 191, 1581.
(5) *Emmett v. Norton*, (1838), 8 C. & P. 506; 173 E.R. 594; 27 Digest 191, 1583.
(6) *Jones v. Newtown & Llanidloes Guardians*, [1920] 3 K.B. 381; 89 L.J.K.B. 1161; 124 L.T. 23; 84 J.P. 237; 27 Digest 76, 601.
C (7) *Thomas v. Thomas*, [1946] 1 All E.R. 170; 115 L.J.P. 75; 110 J.P. 203; 2nd Digest Supp.

Ruttle for the husband.

Levene for the wife.

D THE COURT held that, although it was financial difficulties which prompted the wife to make her offer to return, that fact did not prevent the offer being genuine. An offer made by the wife in that state of mind did not turn the husband into a deserter, but it did not thereby follow that she was not entitled to maintenance, because the duty of a husband to maintain his wife depended on the fact that she was his wife and not on the fact that he had deserted her. The law was that a husband was bound to maintain his wife if she was ready to return to live under his roof, whatever her motive might be, so long as she had not been guilty of some grave fault, such as adultery or cruelty. Even if she deserted him without cause, his obligation to maintain her was only suspended, and it revived if and when she elected to return: see *Jones v. Newtown & Llanidloes Guardians* (6) ([1920] 3 K.B. 384, *per* the EARL OF READING, C.J.). PILCHER, J., had decided on sufficient evidence that the wife's offer was genuine. The court could not interfere with his decision and the appeal must be dismissed.

Decision of PILCHER, J., affirmed.

Solicitors: *Edwin Coe & Calder Woods* (for the husband); *Holland & Co.* (for the wife).

J.D.P.

MOODIE v. HOSEGOOD.

[HOUSE OF LORDS (Lord Porter, Lord Morton of Henryton, Lord Reid, Lord Tucker, Lord Asquith of Bishopstone), June 6, 8, 11, 12, July 25, 1951.]

Rent Restriction—Possession—Death of tenant—Contractual tenancy—Widow residing in house at time of tenant's death—Vesting of tenancy in probate judge—Notice to probate judge to quit—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (g).

From November, 1937, until his death intestate on May 20, 1950, M. was the contractual weekly tenant of a dwelling-house to which the Rent Restrictions Acts, 1920 to 1939, applied. The defendant, his widow, was residing at the house at that date, and she continued to reside there. On June 22, 1950, the plaintiff acquired the freehold of the house, and on June 30, 1950, he served on the probate judge notice in writing to quit the house at the end of the next following complete week of the tenancy. The plaintiff then claimed possession. It was not disputed that the tenancy was determined by the notice of June 30, 1950.

HELD: the word "tenant" in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g), included a contractual tenant, and, therefore, the defendant was "the widow of a tenant" within that paragraph and was entitled to remain in possession by virtue of the protection afforded by the Rent Restrictions Acts.

Thynne v. Salmon ([1948] 1 All E.R. 49) and *Smith v. Mather* ([1948] 1 All E.R. 704), overruled.

AS TO RESTRICTIONS ON THE LANDLORD'S RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329-334, paras. 392-401; and FOR CASES, see DIGEST, Vol. 31, pp. 562, 563, 576-578, Nos. 7097-7107, 7256-7269.

Cases referred to:

- (1) *Thynne v. Salmon*, [1948] 1 All E.R. 49; [1948] 1 K.B. 482; [1948] L.J.R. 506; 2nd Digest Supp.
- (2) *Smith v. Mather*, [1948] 1 All E.R. 704; [1948] 2 K.B. 212; [1948] L.J.R. 1209; 2nd Digest Supp.
- (3) *Keeves v. Dean. Nunn v. Pellegrini*, [1924] 1 K.B. 685; 93 L.J.K.B. 203; 130 L.T. 593; 31 Digest 576, 7254.
- (4) *Lovibond (John) & Sons, Ltd. v. Vincent*, [1929] 1 K.B. 687; 98 L.J.K.B. 402; 141 L.T. 116; 93 J.P. 161; Digest Supp.
- (5) *Summers v. Donohue*, [1945] 1 All E.R. 599; [1945] K.B. 376; 114 L.J.K.B. 401; 172 L.T. 310; 2nd Digest Supp.
- (6) *Joint Properties, Ltd. v. Williamson*, 1945 S.C. 68; 2nd Digest Supp.
- (7) *Apsley v. Barr*, [1928] N.I. 183; Digest Supp.

APPEAL by the defendant from an order of the Court of Appeal dated Feb. 5, 1951, dismissing an appeal from an order of His Honour JUDGE CLARK, made at Farnham County Court and dated Nov. 17, 1950.

The defendant was the widow of the contractual tenant of a dwelling-house, and she claimed to be entitled to remain in possession of the house as "the widow of a tenant" within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g). The county court judge and the Court of Appeal regarded a decision in her favour as precluded by authority, and rejected her claim.

Diplock, K.C., and *Wrightson* for the appellant, the widow.

Heathcote-Williams, K.C., and *B. S. Horner* for the respondent, the landlord.

The House took time for consideration.

July 25. The following opinions were delivered.

LORD PORTER: My Lords, in this case I have had an opportunity of reading the opinion about to be expressed by my noble and learned friend, LORD MORTON OF HENRYTON. As I find myself in complete agreement with both his reasoning and the result I have not thought it necessary to add to the opinion to be expressed.

LORD MORTON OF HENRYTON: My Lords, this appeal involves yet another consideration by your Lordships' House of the provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, hereafter referred to as "the Acts."

The appellant is the widow of Mr. William Andrew Moodie, who died intestate on May 20, 1950. From November, 1937, until the date of his death Mr. Moodie occupied a dwelling-house known as "Saint Anne's Lodge," Headley Road, Grayshott, in the county of Hants, as the tenant of the Misses Figgis-Smith at a weekly rent of 15s. That dwelling-house was one to which the Acts applied. Accordingly, if the tenancy had been determined by notice in Mr. Moodie's lifetime, he would have ceased to be a contractual tenant and would have become what is commonly called a "statutory tenant." I shall use that convenient phrase to describe a person who is entitled to the protection given by the Acts, bearing in mind, however, that such a person is not a tenant in the ordinary meaning of that word, since he has no existing contract of tenancy and has no right at common law to retain possession. On the death of Mr. Moodie intestate, his contractual tenancy vested in the probate judge under the Administration of Estates Act, 1925, s. 9. On June 22, 1950, the respondent acquired the freehold of Saint Anne's Lodge by purchase from the Misses Figgis-Smith, and on June 30, 1950, he served on the probate judge a notice in writing to quit the said property at the end of the next complete week of the tenancy after the date of the notice. It is not disputed that the effect of that notice was to determine the tenancy. The appellant was residing at Saint Anne's Lodge with her husband at the time of his death, and she continued to reside there after her husband's death. On Oct. 3, 1950, the respondent issued a plaint in the Farnham County Court against the appellant claiming possession of the house and certain mesne profits. By her defence, the appellant alleged that she was in lawful possession of the house as the widow of Mr. Moodie. This defence was based on certain provisions of the Acts which must now be set out.

Section 12 (1) of the Act of 1920, as amended, provides, so far as material, as follows:

"For the purposes of this Act, except where the context otherwise requires:— . . . (f) The expressions 'landlord,' 'tenant,' 'mortgagee,' and 'mortgagor,' include any person from time to time deriving title under the original landlord, tenant, mortgagee, or mortgagor; (g) The expression 'landlord' also includes in relation to any dwelling-house any person, other than the tenant, who is or would but for this Act be entitled to possession of the dwelling-house, and the expressions 'tenant' and 'tenancy' include sub-tenant and sub-tenancy, and the expression 'let' includes sub-let; and the expression 'tenant' includes the widow of a tenant who was residing with him at the time of his death . . ."

Section 3 (1) of the Act of 1933, which replaced, with certain amendments, s. 5 (1) of the Act of 1920, provides that:

"No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given . . ."

unless certain conditions there specified are complied with. It is common ground that these conditions have not been complied with in the present case.

The arguments of the parties to this appeal can now be summarised. The

appellant contends as follows. Section 3 of the Act of 1933 protects the possession of a tenant. Section 12 (1) (g) of the Act of 1920, as amended, provides that, unless the context otherwise requires, the expression "tenant" includes the widow of a tenant who was residing with him at the time of his death. There is no context which "otherwise requires" in this case. The husband was the tenant of St. Anne's Lodge up to the time of his death. The appellant is his widow and was residing with him at the time of his death. Therefore, she is a "tenant" within s. 3 of the Act of 1933 and her possession is protected by that section. To this contention the respondent replies that the appellant is not "the widow of a tenant" within the meaning of s. 12 (1) (g) because the word "tenant" occurring in that phrase refers only to a "statutory tenant" and has no application to a contractual tenant. Thus the decision of this appeal turns entirely on the meaning of the word "tenant" in the phrase just quoted. Does it mean, or at least include, a contractual tenant, or does it refer only to a statutory tenant?

My Lords, it is plain that if the word "tenant" is to be given its ordinary meaning in the phrase "widow of a tenant," the appellant must succeed, but the county court judge and the Court of Appeal have held that the word "tenant" in this phrase neither means nor includes a contractual tenant. In so holding, both the learned judge and the Court of Appeal followed the decisions in *Thynne v. Salmon* (1) and *Smith v. Mather* (2), but DENNING, L.J., while agreeing that these decisions covered the point in dispute, made some observations which I have found most helpful. *Thynne v. Salmon* (1) and *Smith v. Mather* (2) will shortly be considered, but I shall first point out that there are strong reasons why the word "tenant" in the phrase in question should be construed as including a contractual tenant. In the first place, any other construction involves a departure from the ordinary meaning of the word. In the second place, it would be capricious in the extreme to extend the protection of the Acts to a widow whose husband's contract of tenancy had been determined in his lifetime, and to withhold it from a widow whose husband's contract of tenancy was still subsisting at his death. Finally, it is noteworthy that s. 12 (1) (g) of the Act of 1920, in its original form, enacted that "the expression 'tenant' includes the widow of a tenant dying intestate," etc. A statutory tenant could never bequeath his so-called tenancy by will; therefore, the reference to a tenant "dying intestate" would be wholly inappropriate if the word "tenant" meant only a statutory tenant. It has been suggested that the draftsman may not have appreciated in 1920 that a statutory tenant had no interest which he could bequeath by will, but this point had been made abundantly clear before 1933: see, for instance, *Keeves v. Dean. Nunn v. Pellegrini* (3) and *John Lovibond & Sons, Ltd. v. Vincent* (4). Thus, when the Act of 1933 was passed, it was clear that the words "dying intestate" were appropriate only in the case of a contractual tenant. Yet these words were retained, although s. 12 (1) (g) was amended in another respect. If the question now under consideration had come before the courts between 1933 and 1935, I find it difficult to imagine that the decision would have been against the widow. The last stage in the history of s. 12 (1) (g) is the Act of 1935. The words "dying intestate" were struck out by that Act, but it is surely plain that this was done with the intention of widening the scope of the sub-section and not of narrowing its scope. If the widow of a contractual tenant was protected prior to 1935, it can hardly be imagined that Parliament intended to take away this protection by striking out the words "dying intestate."

For these reasons, in the absence of authority I should have had no doubt that the word "tenant" in the relevant passage included a contractual tenant, and prior to the decision of the Court of Appeal in *Thynne v. Salmon* (1) it appears to have been assumed that this was so: see, as to England, *Summers v. Donohue* (5); as to Scotland, *Joint Properties, Ltd. v. Williamson* (6), when the point was conceded; as to Northern Ireland, *Apsley v. Barr* (7), where the

only question argued was whether the widow had lost on re-marriage the right which she admittedly possessed prior to the happening of that event.

It is convenient at this point to set out s. 15 (1) of the Act of 1920, as the decision of the Court of Appeal in *Thynne v. Salmon* (1) was based entirely on that sub-section.

A "A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled to give up possession of the dwelling-house only on giving such notice as would have been required under the original contract of tenancy, or, if no notice would have been so required, on giving not less than three months' notice: Provided that, notwithstanding anything in the contract of tenancy, a landlord who obtains an order or judgment for the recovery of possession of the dwelling-house or for the ejectment of a tenant retaining possession as aforesaid shall not be required to give any notice to quit to the tenant."

B
C In *Thynne v. Salmon* (1) the facts were that one E. A. Salmon was the monthly tenant of a cottage which came within the scope of the Rent Restrictions Acts. On June 2, 1946, Salmon died intestate, and letters of administration were taken out by his sister, Mrs. Annie Lush, on July 20, 1946. On Oct. 4, 1946, notice to quit, expiring on Nov. 5, 1946, was served on that sister as administratrix. She had at no time been in occupation of the premises, and was not residing with her brother at the date of his death. The defendant, another sister of the deceased, was residing with him at the date of his death and had been so residing from the beginning of the tenancy. She continued in occupation of the premises after his death and was in occupation when the proceedings for possession were begun. No other member of the deceased's family was residing with him at the date of his death. The administratrix had done nothing to create any tenancy as between herself and her sister, the defendant, after the grant of letters of administration. The county court judge made an order for possession, and the defendant appealed. At the hearing her counsel said:

"It is no part of the submission for the defendant that there were two concurrent tenancies here. The defendant became entitled as a statutory tenant the moment the contractual tenancy came to an end."

F The majority of the Court of Appeal felt it impossible to hold either that the "statutory tenancy" of the defendant arose when the contractual tenancy terminated, or that two co-existing tenancies arose on the intestate's death, a "statutory tenancy" of the defendant and the contractual tenancy which vested in Mrs. Lush as the legal personal representative of the intestate. TUCKER, L.J., with whose judgment ROXBURGH, J., agreed, said in the course of his judgment ([1948] 1 All E.R. 51):

G "Whether para. (g) [of s. 12 (1) of the Act of 1920] may apply in the case of a contractual tenant on whose death no executor or administrator is ever appointed, it is not necessary to decide. It is, in my view, sufficient to say that it cannot apply where the tenancy which is vested in a contractual tenant at his death has passed by will or on an intestacy to some person other than his widow or member of his family residing with him at the time of his death, but that it clearly does apply where the deceased tenant was a 'statutory' tenant unable to transmit his statutory interest."

H BUCKNILL, L.J., in a dissenting judgment, said (*ibid.*, 52):

"I do not see any sufficient reason for saying that para. (g) only applies in cases where the tenant was a statutory tenant at the time of his death and does not apply in cases where the tenant was a contractual tenant at the time of his death."

The question left open by TUCKER, L.J., in *Thynne v. Salmon* (1), came before the Court of Appeal for decision in *Smith v. Mather* (2). In that case the contractual tenant of a house within the Acts died intestate. Her son and daughter were living with her at her death. No letters of administration having been taken out, the estate vested in the probate judge on whom the landlords served notice duly terminating the contractual tenancy. They then brought proceedings for possession against the deceased tenant's son and daughter. The Court of Appeal thought that the reasoning in *Thynne v. Salmon* (1) applied to the facts just stated and consequently held that s. 12 (1) (g) of the Act of 1920 had no application to the case.

My Lords, in my view the widow of a tenant, whether contractual or "statutory," who was residing with her husband at the date of his death is entitled to the protection given by the Acts. If a contractual tenancy is still subsisting at her husband's death and devolves on someone other than the widow, it is not destroyed, but the rights and obligations which would ordinarily devolve on the successor in title of the contractual tenant are suspended so long as the widow retains possession of the dwelling-house. If the contractual tenancy is determinable by notice, the landlord or the contractual tenant can determine it by giving the appropriate notice, but such determination will not affect the widow's rights and obligations under s. 15, and, if no notice is given, the contractual tenancy will come into full operation when the widow gives up possession under s. 15. If the contractual tenancy is a lease for years, it will remain in being, but so long as the widow remains in possession she, and not the contractual tenant, is bound to observe the terms and conditions of the lease and has the benefit thereof. This, in my opinion, is the answer to the problem which confronted the Court of Appeal in *Thynne v. Salmon* (1). At no time are there two tenants, each one entitled to the benefit and subject to the burden of the contractual tenancy. The so-called statutory tenant is not a tenant in the true sense. He or she is merely a person who is given certain protection by the Acts and who must observe the terms of s. 15 of the Act of 1920 so long as that protection continues. The position which thus arises involves, of course, a novel intrusion into contractual rights as they are known at common law, but the effect of the Acts as a whole is to bring into existence a being wholly unknown at common law, commonly called a statutory tenant, and the results which I have described seem to follow inevitably from the language of s. 15 (1). That sub-section contemplates that the statutory tenant—and by implication no one else—shall observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as they are consistent with the provisions of the Acts. For these reasons I am of opinion that the cases of *Thynne v. Salmon* (1) and *Smith v. Mather* (2) were wrongly decided, and I think that the decision in *Thynne v. Salmon* (1), and consequently the decision in *Smith v. Mather* (2), might well have been different if the argument in the former case had followed a different course. I would allow this appeal and order the respondent to pay the appellant's costs here and below.

LORD REID: My Lords, I have had an opportunity of reading the speech of my noble and learned friend LORD MORTON OF HENRYTON and I agree with him.

LORD TUCKER: My Lords, it is clear that, unless there is some compelling reason to the contrary, the "widow of a tenant" must include the widow of the person who was the contractual tenant of the premises in question at the date of his death. In *Thynne v. Salmon* (1) I expressed the view that in s. 5 (1) of the Act of 1920 and s. 3 (1) of the Act of 1933 the word "tenant" could only apply to a so-called "statutory tenant" as otherwise there would exist on the death of the contractual tenant, leaving a widow residing with him at the date of his death, two "tenancies" in one and the same dwelling-house, one vested in his executor or in the probate judge and the other a "statutory tenancy"

vested by the Rent Restrictions Acts in the widow. It, therefore, appeared to me that the legislature must have intended the protection afforded by the operation of s. 5 of the Act of 1920 and s. 3 of the Act of 1933 in conjunction with s. 12 (1) (g) of the Act of 1920 to apply only to the widow of a "statutory tenant." This result is not, I venture to think, as illogical as it appears at first sight since s. 5 of the Act of 1920 was clearly designed to prevent the ejectment of tenants whose tenancies had expired or otherwise determined. "Contractual tenants" whose tenancies still subsisted needed no protection. Furthermore, to deprive a tenant of the right to transmit the immediate benefit of his contract of tenancy by his will is a somewhat drastic step in the process of judicial statutory interpretation in the absence of clear and unambiguous language to that effect. I am, however, satisfied on further consideration that the solution suggested by my noble and learned friend, LORD MORTON OF HENRYTON, *viz.*, that the contractual tenancy subsisting at the husband's death and devolving on some person other than the widow is not destroyed but merely suspended so long as the widow retains possession of the dwelling-house, is the real answer to the difficulties which would otherwise result from giving to the word "tenant" its natural and ordinary meaning. In the result, I agree that the majority decision of the Court of Appeal in *Thynne v. Salmon* (1), to which I was a party, was erroneous and that the dissenting judgment of BUCKNILL, L.J., should have prevailed. *Thynne v. Salmon* (1) and *Smith v. Mather* (2) which followed thereon must, I think, be overruled, and the present appeal allowed.

LORD ASQUITH OF BISHOPSTONE (read by LORD MORTON OF HENRYTON): My Lords, I have had the advantage and pleasure of reading the opinion of my noble and learned friend, LORD MORTON OF HENRYTON, and I am in complete accord with it.

Appeal allowed.

Solicitors: *Jaques & Co.* (for the appellant); *Gibson & Weldon*, agents for *Macpherson & Lawson*, Hindhead (for the respondent).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

EAST END DWELLINGS CO., LTD. v. FINSBURY BOROUGH COUNCIL.

[HOUSE OF LORDS (Lord Porter, Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Asquith of Bishopstone), June 12, 13, 14, July 25, 1951.]

Compulsory Purchase—Compensation—Interest in war-damaged hereditament—Flats subject to Rent Acts demolished by enemy action—Cost of works payment—Whether compensation to be assessed on the basis that rents controlled—Town and Country Planning Act, 1947 (c. 51), s. 53 (1) (a).

Before 1944 the claimants owned certain property consisting of fifty-five flats which were subject to the Rent Restrictions Acts. On June 24, 1944, the flats were completely demolished by enemy action, and a cost of works payment in respect of the damage was determined to be appropriate. The vacant site was compulsorily acquired by the local authority, and, as none of the damage had been made good at the date of the notice to treat, which was served on July 28, 1948, the question arose of the amount of compensation payable to the claimants, having regard to the Town and Country Planning Act, 1947, s. 53 (1) (a), which provides that in such a case the value of the interest for the purposes of assessment of compensation shall be taken to be the value which it would have if the whole of the damage had been made good before the date of the notice to treat.

Held: the "damage" referred to in s. 53 (1) (a) of the Act of 1947 could only be the physical damage to the building, and a building which had been completely demolished could only be "made good" if it was re-built, and, therefore, the value to be considered, in determining the compensation payable to the appellants under s. 53 (1) (a) was the value which the building would have had if it had been re-built before the date of the notice to treat; had it been re-built before that date, the appellants would have been freed from the restrictions as to rents which attached to the demolished building; and, therefore, the compensation payable to them was to be assessed on the basis that the rents of the notional building would not be restricted to the amount of the former standard rents.

Ellis & Sons Amalgamated Properties, Ltd. v. Sisman ([1948] 1 All E.R. 44), approved.

Decision of the COURT OF APPEAL ([1950] 2 All E.R. 943), reversed.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 53 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 3, p. 1094.

Case referred to:

(1) *Ellis & Sons Amalgamated Properties, Ltd. v. Sisman*, [1948] 1 All E.R. 44; [1948] 1 K.B. 653; [1948] L.J.R. 929; 2nd Digest Supp.

APPEAL by the claimants, East End Dwellings Co., Ltd., from an order of the Court of Appeal (BUCKNILL and BIRETT, L.J.J., SINGLETON, L.J., *dissentiente*), dated Oct. 20, 1950, and reported [1950] 2 All E.R. 943, allowing an appeal by the respondents, Finsbury Borough Council, from an order of DEVLIN, J., dated May 8, 1950, and reported [1950] 2 All E.R. 81, whereby he upheld the award of an arbitrator assessing at £32,000 the amount of compensation payable to the claimants by the respondents in respect of certain war-damaged land which the respondents had compulsorily acquired.

The appellants were owners of land in the borough of Finsbury on which, before the war, there were fifty-five flats, which were subject to the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. On June 24, 1944, these flats were completely demolished as a result of enemy action and had not been re-built. On Dec. 6, 1947, the Minister of Health confirmed a compulsory purchase order by which the respondents were to acquire the land on which the flats had been situate, and on July 28, 1948, the respondents served a notice to treat on the appellants. On May 9, 1949, the War Damage Commission determined that the appropriate payment under the War Damage Act, 1943, in respect of the damage suffered would, apart from the compulsory purchase order, be a cost of works payment. In assessing the compensation payable in respect of the compulsory acquisition of the land in question, the official arbitrator purported to proceed on the assumption prescribed by the Town and Country Planning Act, 1947, s. 53 (1) (a), that the whole of the war damage had been made good before the date of the notice to treat. On this basis he had assumed that the rents legally recoverable in respect of the dwelling-houses notionally re-built would not have been subject to the statutory limits imposed by the Rent Restrictions Acts on the rents up to the date of the demolition. The respondents contended that this basis of assessment was wrong, as the words "made good" in s. 53 (1) (a) of the Act of 1947 showed that the intention of the enactment was that the building should retain its former identity even after it had been reconstructed and, therefore, the former restrictions on rents would continue to apply. It was agreed between the parties that, if this contention was right, the amount of compensation should be £20,000. DEVLIN, J., held that, although the words "made good" in s. 53 (1) (a) were apt to include re-building the premises in substantially the same form as the previous building, nevertheless, on the authority of *Ellis & Sons Amalgamated Properties, Ltd. v. Sisman* (1), the notional new building would be free from the rental limits attaching to the previous building and compensation ought to be assessed on

that basis. On an appeal by the respondents from this decision, the Court of Appeal held that, by the combined effect of the War Damage Act, 1943, s. 14 (1), and the Town and Country Planning Act, 1947, s. 53 (1) (a), the basis of compensation was the value of the property immediately before the damage was suffered, and, therefore, compensation ought to be assessed on the assumption that the rents of the notional new building would be restricted to the amount of the former standard rents.

Rowe, K.C., and *Squibb* for the appellants.

Lawrence, K.C., and *Harold Brown* for the respondents.

The Solicitor-General (Sir Lynn Ungood-Thomas, K.C.), and *J. P. Ashworth* appeared as *amici curiae*.

The House took time for consideration.

July 25. The following opinions were read.

LORD PORTER: My Lords, this is an appeal from an order of the Court of Appeal, dated Oct. 20, 1950, allowing an appeal by the respondents, Finsbury Borough Council, from an order of *DEVLIN, J.*, who upheld an award by an official arbitrator, dated Feb. 14, 1950. The facts on which your Lordships' opinion is required appear in the award and may be stated in sufficient detail in the following terms. The appellants are the freeholders of two pieces of land, situated in Collier Street and Killick Street, in the metropolitan borough of Finsbury, in the county of London. The portion of the land with which your Lordships are concerned is the site of certain dwellings for the working classes known as Winton Houses, which were completely demolished as a result of enemy action on June 24, 1944. None of the war damage had been made good at the date of the notice to treat hereafter referred to.

Winton Houses, before the occurrence of the war damage, comprised fifty-five working-class dwellings, and when it occurred all these fifty-five dwellings were let to and occupied by weekly tenants at rentals at or below the statutory limits laid down by the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. There were no written tenancy agreements. All the dwellings were, by reason of their rateable values on Apr. 6, 1939, subject to the provisions of the Acts, and were, indeed, the subject of old control. Of the above mentioned fifty-five tenancies, forty-two were statutory tenancies and thirteen were contractual tenancies, but it is agreed between the parties that this diversity is irrelevant to the question which your Lordships have to determine, and that the matter may be treated as one in which all the dwellings were the subject of statutory tenancies. On Dec. 6, 1947, the Minister of Health confirmed a compulsory purchase order by which the respondents were to acquire the land on which the dwellings had been built, and on July 28, 1948, the respondents served a notice to treat on the appellants. Subsequently, by a determination made on May 9, 1949, the War Damage Commission directed that the appropriate payment under the War Damage Act, 1943, in respect of the war damage would, apart from the compulsory purchase order, be a payment of cost of works. In these circumstances an official arbitrator was appointed to assess the compensation payable to the appellants, and in fulfilling his functions he made the following award:

"I assess the compensation payable in respect of the said land on the assumption that, if the whole of the said war damage had been made good before the date of the said notice to treat, the rents legally recoverable in respect of the said dwellings would not be subject to the statutory limits imposed by the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, at the sum of £32,000."

In making his award the official arbitrator has not stated what sum he would have given if he had assumed that the rent of the destroyed dwellings, if made

good, would be subject to control under the Rent Restrictions Acts, but it is agreed that in those circumstances the figure which he would have awarded would have been £20,000.

In this state of facts the appellants maintain that the award is correct and that they are entitled to receive £32,000 as compensation for the damage which they have suffered. In substantiation of this claim, they rely on s. 53 of the Town and Country Planning Act, 1947. The relevant wording is that contained in sub-s. (1) (a) and is as follows:

“the value of the interest for the purposes of the compensation payable in respect of the compulsory purchase shall, subject to the provisions of this section, be taken to be the value which it would have if the whole of the damage had been made good before the date of the notice to treat.”

There is no dispute as to the applicability of the section, but its construction is the subject of acute controversy. The appellants say that, if the damage had been made good before the compulsory acquisition, they would have had a block of flats free from any control imposed by the provisions of the Rent Restrictions Acts, notwithstanding that before their destruction the premises were thus controlled. They would have erected, they say, a new building, which would not necessarily have been identical with the old, but, even if no change had been made, *Ellis & Sons Amalgamated Properties, Ltd. v. Sisman* (1) is an authority for the proposition that a house erected on the old site may be identical in structure to, but is a different building from, that previously standing on the site, and, therefore, not subject to the same incidents as the old. They add, however, that the relevant sections of the Act of 1947 and other material Acts do not compel them slavishly to follow the lines of the old structure. They can alter its form, at any rate if they do not make too great a change. Moreover, the whole development of the law relating to war damage shows, they maintain, an increasing tenderness for the owner of the damaged property and a desire to induce him to re-build a house of the same type, but not necessarily subject to the same limitations. They point out that, by s. 50 (1) of the Act of 1947, the Town and Country Planning Act, 1944, s. 57 (which provided for the assessment of the value interests in land by reference to 1939 values), was not to apply where notice to treat was served after the passing of the Act of 1947 (s. 57 of the Act of 1944 being repealed by s. 113 (2) and sched. IX, Part I, of the Act of 1947), that s. 51 (1) of the latter Act substituted assessment in accordance with the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, *i.e.*, current market value, in place of 1939 values, that s. 51 (2) and sched. III, Part II, para. 3, of the Act of 1947 permit an increase of the building by one-tenth and in the smaller buildings possibly more, and that s. 8 of the War Damage Act, 1943, contemplates the making of alterations and additions to, and, in certain cases, omissions from, the reconstructed building of features which were to be found in the former building and provides for appropriate variation in the compensation payable in respect of the altered edifice. As a result of these provisions the appellants submit that, in a case where a cost of works payment is the appropriate payment under the War Damage Act, 1943 (as it is in this case), and where a building has been totally destroyed and none of the damage has been made good, then the value of their interest in the destroyed property for the purposes of compensation in the case of compulsory purchase is to be taken to be the value which it would have had if the whole of the damage had been made good. That value, they say, would be the value of a building free from control.

This contention was resisted by the respondents for a number of reasons. They maintained, in the first place, that, by the wording of s. 53 (1) (a) of the Act of 1947, the sum payable was to be determined by the value of the building when “made good” and this expression connoted the re-erection of a building substantially identical with that destroyed, with all its incidents and limitation

of value, and one incident or limitation was the control imposed on the former building by the Rent Restrictions Acts. The purpose of the relevant sections was, they said, to put the owner in the same position as if the former building had never been destroyed. One cannot, it was urged, split up the various aspects of a building. It must be regarded as a whole with all its qualities, physical and economic, composing one entity. *Sisman's* case (1) is, they maintain, inapplicable.

- A Whether a house is controlled by the Rent Restrictions Acts is one thing; the compensation to be paid is another and depends on different considerations, *viz.*, the phraseology and apparent object of the Acts under which compensation is to be obtained. No actual existent house is to be envisaged. A hypothetical house alone is to be brought into imaginary existence, and that hypothetical house is one possessing all the qualities which the war-damaged house possessed.
- B The same wording is used whether the house is wholly or partially destroyed. If it had been partially destroyed, it would have been restored or, to use the phrase employed in s. 53 (1) (a) of the Act, "made good," and such making good would have left the house with all its previous advantages and disadvantages, subject, of course, to the owner receiving new materials for old, an incident which there was no method of avoiding. Its hypothetical identity remains unchanged
- C though its physical substance might alter. To decide otherwise, it is suggested, would be to put the owner of a wholly destroyed house for which the appropriate compensation is a cost of works payment into a better position than that enjoyed by an owner of a partially destroyed house, provided that both houses had been the subject of rent control before they suffered war damage. The former would receive the value of a house free from control, whereas the latter would,
- D at best, recover the value which a house subject to control would justify. This type of total loss, they add, is not a physical one for which a value payment is the appropriate compensation, and a cost of works payment is only justified in case of total destruction where there is an economic loss (see s. 7 (2) of the Act of 1943) and as such merits compensation for that loss and not payment for the physical value of a new house free from any limitation on its use. Finally,
- E they say that to adopt the appellants' argument would have the result of compelling them to pay to the claimant more than they would receive from the War Damage Commission, whereas, under the terms of s. 53 (4) of the Act of 1947, they are forbidden to receive more than they have to pay. This circumstance, they argue, should be taken into consideration when the construction of s. 53 (1) (a) is in question. It would be unlikely, so it is contended, that their
- F expenditure and receipt should be calculated on a different basis. This consequence, they submit, follows from the provision contained in s. 53 (1) (b), which enacts:

- G "the right to receive any value payment or share of a value payment which, under the War Damage Act, 1943, is payable in respect of the interest which is compulsorily acquired (including any interest payable thereon) shall, notwithstanding anything in that Act, vest in the person by whom the interest is so acquired."

- H Section 53 (1) (b), therefore, transfers the right to compensation for the interest compulsorily acquired to the acquiring authority, but that authority does not receive the same sum as the original owner. By s. 14 (1) of the War Damage Act, 1943, it is provided:

"Where the appropriate payment in respect of war damage to a hereditament would apart from this provision be a payment of cost of works, if land constituting or forming part of the hereditament, or an interest in such land, is acquired compulsorily by virtue of any enactment, whether passed before or after the passing of this Act, or is acquired by agreement by a person authorised by virtue of any such enactment to acquire it compulsorily, then, notwithstanding any previous determination of the kind of payment

to be made in respect of the damage to the hereditament, (a) the commission shall make a payment or payments in respect thereof as follows, that is to say, in respect of the damage so far as made good before the date of the acquisition, a payment of cost of works, and, in respect of the damage so far as not made good before that date, a value payment . . .”

My Lords, I do not stay to discover what that value payment would amount to or consist of, or on what principle it is computed. It is enough to record that it is a value payment and not a cost of works payment and in the ordinary course would be a lesser sum.

In the case under consideration no making good of the damage has taken place, and, therefore, the respondents, as owners, are entitled only to the value payment, which is declared in s. 10 (1) of the Act of 1943 to be

“ . . . an amount equal to the amount of the depreciation in the value of the hereditament caused by the war damage . . .”

In the present instance the depreciation in the value of the land compulsorily acquired was the loss of a controlled house and, therefore, at best, the respondents would receive as compensation the difference between the value of the land with a controlled house on it and the value of the land with no building on it. To this extent, therefore, the respondents are right in saying that, if the appellants’ contention prevails, they will receive a sum less than that which they will have to pay, and that circumstance would be an element which might influence the construction of s. 53 (1) (a) of the Act of 1947, if that sub-section were doubtful or ambiguous. But, my Lords, the primary duty of a tribunal is to construe the section, and if, on the reading of its terms, it bears in its wording a plain meaning, the fact that an unexpected result is occasioned is no reason for rejecting the obvious meaning and substituting something which might be conceived to be that which Parliament would be more likely to intend to bring about.

In the present case, however, I am by no means sure what that intention was, or that the result is unexpected. It is quite conceivable that the extra expense was imposed on the local authority because it was felt that that body, not being subjected to rent control, should not have the advantage which the private owner obtained and that it did not require the incentive to build which it was desirable for the latter to have. In any case one can only speculate as to what the intention of Parliament was, and I do not think your Lordships would be justified in speculating. As counsel for the appellants pointed out, the argument concerns itself with what it is suggested ought to have been done rather than with what the words of the Act mean. It is not so much an allegation that the construction contended for by the appellants is unreasonable as that the provisions of the Act are unreasonable and, therefore, should be construed in a way consonant with what Parliament might be thought to intend. If what had been intended was to give the owner the value of his property as it existed before the war damage was done, the intention would have been easy to express by substituting, in s. 53 (1) (a) of the Act of 1947, the words “ the value which the interest would have had if the damage had not been done ” for the words of the Act, *viz.*, “ the value which it would have if the whole of the damage had been made good,” and, indeed, s. 10 of the Act of 1943 makes it clear that, where the pre-damage value is intended to be given, apt phraseology had already been employed to produce that result. Nor does it make the use of that language in s. 10 of less weight to point that it is there used of a value, and not of a cost of works, payment. The wording had already been employed to express pre-damage value where pre-damage value was intended to be given as compensation and could have been used in the case of a cost of works payment where it was desired to produce a similar result. The real strength of the argument of counsel for the respondents depends on his ability to establish the contention that

"make good" means restore to the former physical state with all its incidents and limitation of value. It is, however, the damage which has to be made good and damage is in its ordinary meaning a physical thing. It is the building and not the position of the owner which has to be restored. What may result from the "making good" of the building depends, not on any deduction which can be drawn from the use of that expression, but from the law applicable in the case where a house, originally rent controlled, is destroyed and another of a similar type is erected in its place. It is from this aspect that the decision in *Ellis & Sons Amalgamated Properties, Ltd. v. Sisman* (1) takes its importance. In that case a house had been destroyed by enemy action and later on another house identical in form to the house which formerly stood there was erected on the same site, yet it was held that the new house was not the subject of rent control. In my view, that case was rightly decided. The case now before your Lordships is a more favourable one for the landlords, since the hypothetical house postulated as having been erected need not take the same form though it must be a dwelling-house. To that extent this is a stronger case. I find myself in general agreement with the decision of *DEVLIN, J.*, and would allow the appeal with costs.

LORD MORTON OF HENRYTON: My Lords, the interest in land which has to be valued in accordance with the provisions of s. 53 (1) of the Town and Country Planning Act, 1947, is the ownership in fee simple of a property known as Winton Houses. Winton Houses were completely demolished as a result of enemy action occurring on June 24, 1944. Before this event happened they comprised fifty-five working-class dwellings and certain detached sheds. All these fifty-five dwellings were subject to the provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. By s. 53 (1) (a) of the Town and Country Planning Act, 1947, the value of the interest now in question is to

"... be taken to be the value which it would have if the whole of the damage had been made good before the date of the notice to treat."

I think that the "damage" referred to in s. 53 (1) (a) can only be the physical damage to the buildings, and a building which has been completely demolished can only be "made good" if it is re-built. If I am right so far, your Lordships have simply to consider what is the value which Winton Houses would have if they had been re-built before the date of the notice to treat. If they had in fact been re-built before that date, the appellants would have been freed from the restrictions as to rents which attached to the demolished buildings. This is the result of the decision of the Court of Appeal in *Ellis & Sons Amalgamated Properties, Ltd v. Sisman* (1), with which I agree. I am, therefore, of opinion that the assumption on which the official arbitrator assessed the compensation payable to the appellants at £32,000 was correct and that his award should be restored. This conclusion seems to me inevitable if the words in s. 53 (1) (a) are given their literal and natural meaning. The conclusion reached by the majority of the Court of Appeal really involves reading the words "if the whole of the damage had been made good before the date of the notice to treat" as if they had been "if the damage had never occurred." I am unable so to read these words and I can find no context in the Act and no principle laid down in the Act, or in the earlier legislation to which our attention was directed, which would justify your Lordships in departing so far from the literal meaning of the words in question. On the contrary, a comparison of the wording of s. 53 (1) (a) with the wording of s. 56 (2) confirms me in the view which I have just expressed. I would allow the appeal.

LORD REID: My Lords, fifty-five dwellings which belonged to the appellants were completely demolished by enemy action on June 24, 1944, and all that remained of the appellants' property was the bare site of these dwellings. The appellants' property was still in that condition when it was

compulsorily acquired by the respondents, the local authority, the notice to treat being dated July 28, 1948. The question in this case is what is the proper measure of the compensation to be paid by the respondents to the appellants. The statutory provisions which now govern that matter are those of Part V of the Town and Country Planning Act, 1947, which I shall refer to as the Act of 1947. Section 51 (1) of that Act enacts that such compensation shall be assessed in accordance with the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, as modified by the provisions of that section and the next three following sections. Under s. 2 (2) of the Act of 1919 the value of land is to be taken, subject to provisions which would not apply in this case, to be "the amount which the land if sold in the open market by a willing seller might be expected to realise." In this case the market value of the appellants' property was not merely the value of the site. It has been determined by the War Damage Commission that the appropriate payment under the War Damage Act, 1943 (which I shall refer to as the Act of 1943) in respect of the war damage to the appellants' property would, apart from the compulsory purchase, be a payment of cost of works. That means that, if the appellants' property had not been taken by the respondents, the appellants, on erecting a new building to make good the war damage, would have been paid the cost of that building in terms of s. 8 of the Act of 1943, and, if the appellants had sold their property before re-building, the right to recover the cost of works payment would have passed to the purchaser (provided that the purchaser was not an authority entitled to acquire the property compulsorily). So, in effect, the purchaser would have acquired not only the site but also the right to get a new building without cost to himself, and, therefore, the market value must have included both the value of the site and the value of that right. The question then is to what extent the appellants' right to obtain that market value for their property under the Act of 1919 has been modified or altered by s. 51 of the Act of 1947 or any of the three sections therein referred to. The only one of these sections which applies in this case is s. 53, and the present case depends on the proper interpretation of the provisions of that section.

Section 53 (1) of the Act of 1947 provides:

"Where an interest in land the value of which is to be ascertained in accordance with the provisions of s. 51 of this Act is an interest in a hereditament or part of a hereditament which has sustained war damage, and any of that damage has not been made good at the date of the notice to treat, then if the appropriate payment under the War Damage Act, 1943, would, apart from the compulsory purchase or apart from any direction given by the Treasury under s. 20 (2) (b) of that Act, be a payment of cost of works—(a) the value of the interest for the purposes of the compensation payable in respect of the compulsory purchase shall, subject to the provisions of this section, be taken to be the value which it would have if the whole of the damage had been made good before the date of the notice to treat; and (b) the right to receive any value payment or share of a value payment which, under the War Damage Act, 1943, is payable in respect of the interest which is compulsorily acquired (including any interest payable thereon) shall, notwithstanding anything in that Act, vest in the person by whom the interest is so acquired."

The important words in the sub-section are that the value shall

"... be taken to be the value which it would have if the whole of the damage had been made good before the date of the notice to treat."

The appellants say that this means that we are to suppose that the building which they were entitled to have erected with the cost of works payment had been erected before the date of the notice to treat. On that view the modification of the ordinary market value rule made by s. 53 (1) (a) would be comparatively

small. An ordinary purchaser would have got and would have paid for the site and the right to have a building erected on it free of cost to himself, whereas the local authority would pay as if that building had already been completed. If, however, the respondents' contention is right, then s. 53 (1) (a) has drastically altered the ordinary market value rule. They say that s. 53 (1) (a) does not require us to suppose that the cost of works payment has already been spent in a new building, but that it requires us to imagine that in some way the old building which was destroyed has been put back exactly as it was before it was destroyed, or, as BUCKNILL, L.J., put it ([1950] 2 All E.R. 947), that the words of s. 53 (1) (a) postulate the continued existence of the old building. In effect, they wish to re-write the sub-section by substituting for the words which I have quoted some such words as that the value shall "be taken to be the value which it would have had at the date of the notice to treat, if it had not sustained the damage."

On that view, the appellants would not be compensated by the acquiring authority for what, in fact, they owned at the date of the notice to treat, but for what they would, or might then, have owned if there had been no war damage.

It is not disputed that the appellants' interpretation of the words of s. 53 (1) (a) is the more natural, but the respondents contend that this interpretation produces a result which cannot be reconciled with the policy and general scheme of the Acts of 1943 and 1947, and, therefore, Parliament cannot have so intended, so, if it is possible to construe the words in some other sense and produce a result more in line with the rest of the Act, that construction should prevail. To appreciate this argument it is necessary to make a fairly wide examination of the Acts to see whether there is any general scheme or principle with which the natural interpretation of s. 53 (1) (a) would conflict. The respondents' contention is that the intention of the Acts is to give to every owner of damaged property what he had before the bomb fell, and, therefore, the intention of s. 53 (1) (a) must have been that the acquiring authority should pay that and no more. This contention was accepted by the majority of the Court of Appeal. BUCKNILL, L.J., said ([1950] 2 All E.R. 947):

"It seems to me that the cardinal principle of the War Damage Act, 1943, was to compensate the loser by war damage for what he has actually lost, to give him no more and no less. Whether he gets what is called in the Act a cost of works payment or whether he gets what is called in the Act a value payment, this principle is applicable in every case."

My Lords, I cannot find in the Act of 1943 any such equality of treatment of those who, on the one hand, get a cost of works payment and of those who, on the other hand, get a value payment. The owner who gets a cost of works payment is repaid the cost of making good the damage and, where the old building has been wholly or almost wholly destroyed, in effect he gets a new building to replace the old. The recipient of a value payment, however, is in a very different position. He gets a sum of money determined by 1939 values, and this may be very different from the value of a new building. There is no clear-cut distinction between those cases which get a cost of works payment and those cases which get a value payment, and in many cases it is not easy to say which is the appropriate form of payment under the Acts. The rule is that a value payment is appropriate where there is a "total loss," but whether or not there has been a total loss is not determined by the physical condition of the damaged property. Section 7 of the Act of 1943 makes this question depend on a comparison of valuations made at prices current at Mar. 31, 1939. Then there are further provisions which enable the general rule to be varied in certain cases, e.g., s. 20 (2) (b) of the Act of 1943 enables a value payment to be made where under the general rule a cost of works payment would be appropriate. No doubt, there were good reasons in the difficult and uncertain situation of the time for creating this disparity of treatment, but it seems to me impossible to doubt that it was created deliberately, for the fact that the provisions of the Act

of 1943 might create such disparity was recognised in the Act itself. Section 11 (1) gave authority to increase the amounts of value payments if it appeared, when the discharge of value payments generally or in substantial volume became permissible, that the amounts computed under the Act were inadequate. By virtue of this authority the War Damage (Increase of Value Payments) Order, 1947 (S.R. & O., 1947, No. 390), increased value payments generally by certain percentages. By art. 4, for this class of case the increase was sixty per cent. That increase, however, was a fixed increase irrespective of the circumstances of a particular case. It is notorious that some kinds of buildings have increased very much in value since 1939, whereas other kinds of buildings have shown little increase of value since that date and may even have shown a decrease. In every case, however, the value payment still depends on 1939 value plus sixty per cent. Therefore, if the building destroyed was of a kind which has greatly increased in value, it is very much to the advantage of the owner to get a cost of works payment, whereas, if the building was of a kind which had not increased in value, the owner may be better off with a value payment.

I turn now to the provisions of the Acts which deal with the acquisition of damaged property by public authorities. If the case is one for which a value payment is appropriate, the position is simple. The original owner keeps the value payment and the acquiring authority pays for the property in its actual condition at the time of acquisition. The acquisition does not affect the compensation for war damage. The position, however, is more difficult if the property is one for which the appropriate payment would have been a cost of works payment if there had been no acquisition. I have stated that, when an ordinary purchaser acquires damaged property, he also acquires a right to the cost of works payment, but for some reason that provision does not apply when the purchaser is a public authority which can acquire the property compulsorily. The public authority does not get a cost of works payment even if it carries out works which would attract the cost of works payment if they had been carried out by a private purchaser. What happened under s. 14 (1) (a) of the Act of 1943 was that, in effect, the acquisition changed the case from a cost of works case to a value payment case. The owner got no compensation for this change, but the Treasury got the benefit of any difference between the amounts of the cost of works payment which would have been payable but for the acquisition and the value payment which became payable consequent on the acquisition. The owner had been entitled before the acquisition to get a new building, and he was not compensated for the loss of that right. He was not compensated by the acquiring authority because that authority only paid for the property in its damaged state, and he was not compensated otherwise because all he could now get was a value payment, which, as I have said, might be much less valuable than the right to a cost of works payment. It was in those circumstances that s. 53 of the Act of 1947 was enacted. In 1947 considerable benefits were conferred on other owners of damaged property who did not receive cost of works payments, and it seems probable that s. 53 (1) (a) of the Act of 1947 was intended to improve the position of owners who lost their cost of works payments and would only have become entitled to receive value payments under s. 14 (1) (a) of the Act of 1943. If the appellants' interpretation of s. 53 (1) (a) is correct, that sub-section does confer a benefit on such owners. Instead of the value payment under s. 14 (1) (a) it gives to them rights which are as nearly as possible equivalent financially to what they would have had if their property had not been taken. Such an owner, instead of getting a new building by means of a cost of works payment, is paid what the new building would have been worth. If, however, the respondents' interpretation is correct, the dispossessed owner gets neither the equivalent of a cost of works payment nor the equivalent of a value payment. What he gets is not the equivalent of a cost of works payment because the payment to him is calculated as if the old building had survived and not as if the new building had been erected, and it is not the

equivalent of a value payment because a value payment is based on 1939 values with the addition of sixty per cent., whereas this payment would be based on the value which the old building would now have had without any addition. If the old building would have been worth no more now than it was in 1939, the sum payable under s. 53 (1) (a) would be much less than the value payment which the owner would have received if the War Damage Commission had originally decided that the case was one for a value payment and not for a cost of works payment. I find it difficult to suppose that Parliament intended that a decision that the owner was entitled to a cost of works payment should in the end give him less than he would have got if the original decision had been that his property was a total loss and that the appropriate payment was a value payment. I, therefore, think that the interpretation of s. 53 (1) (a) for which the appellants contend is not only the more natural interpretation of the words of the sub-section but is also more in accord with the apparent scheme of the Act than is the respondents' interpretation.

It was pointed out that, if this is right, acquiring authorities will suffer hardship because they will have in many cases to pay to the owner more than the value of the property which they acquire plus the sum which they get from the Treasury. Under s. 53 (1) (b) of the Act of 1947 the acquiring authority only receives the value payment which, under s. 14 (1) (a) of the Act of 1943, would have been paid to the owner. So, if the Act of 1947 has improved the position of the owner, it has done so at the expense of the acquiring authority, because the sum payable by the Treasury as a value payment remains the same as before. This, however, could happen even if the respondents' contention were correct. The respondents say that the acquiring authority is bound under s. 53 (1) (a) to pay to the owner what the original property would have been worth now if it had still been in existence and that might well be considerably more than the value of the site plus the value payment. The value payment is based on 160 per cent. of the pre-war value of the original property and many classes of buildings are today worth more than 160 per cent. of their pre-war value. Therefore, I cannot regard the argument based on hardship to the acquiring authority as a very strong one. On any interpretation of s. 53 (1) (a), such hardship is inevitable in some cases and the most that can be said is that it may occur more often if the appellants' contention is right. In the present case the difference between the sum which the appellants will receive if they are right and the sum which they would receive if the respondents were right is large. The former sum is £32,000 and the latter £20,000. That difference, however, is largely due to the effect of the provisions of the Rent Restrictions Acts. If the respondents were right and the sum which they have to pay were assessed on the footing that the old fifty-five dwellings which were destroyed must be supposed still to exist, then, of course, the old standard rents for these dwellings would also have to be supposed still to exist. But if the appellants are right and it must be supposed that a new building has been erected, then, in my opinion, it cannot be supposed that the old standard rents would apply to it. In the first place, there is no obligation to use a cost of works payment to erect a building which is an exact copy of the destroyed building and it might well be that present-day requirements would compel the new building to be built on a different plan from the old, so that none of the new dwellings could be identified as corresponding with any of the destroyed dwellings. Even if it is to be supposed that the new building would correspond exactly with the old, I agree with your Lordships that that would not mean that the old standard rents survive. The appellants would have been entitled to let the new dwellings at higher rents, and it is for that reason that the capital value of the new building, which we are required to suppose had been erected, so largely exceeds the value which the old building would have had if it had survived. I agree that the appeal should be allowed.

LORD TUCKER: My Lords, if *Ellis & Sons Amalgamated Properties, Ltd. v. Sisman* (1), so far at any rate as relevant for present purposes, was rightly decided, it follows, I think, that this appeal must succeed. As I understand your Lordships to agree with that decision and as I remain of the same opinion, I do not desire to add anything to what I said in that case. This case then turns on the meaning in s. 53 (1) of the Town and Country Planning Act, 1947, of the words:

" . . . if the appropriate payment under the War Damage Act, 1943, would, apart from the compulsory purchase . . . be a payment of cost of works—(a) the value of the interest for the purposes of the compensation payable in respect of the compulsory purchase shall, subject to the provisions of this section, be taken to be the value which it would have if the whole of the damage had been made good before the date of the notice to treat "

It is not disputed that in the events which occurred the appropriate payment would have been a cost of works payment, and the only question is what would have been the value of the appellants' interest in the hereditament if the whole of the damage had been made good before the date of the notice to treat.

As **DEVLIN, J.**, pointed out ([1950] 2 All E.R. 83), once one postulates that the building was completely demolished and that the appropriate payment is a cost of works payment, it follows that the only "making good" which can be referred to in s. 53 (1) (a) is a re-building or reinstatement of the old building in something resembling its old form, and, indeed, it is clear that the words, as used in the War Damage Act, 1943, s. 8, include the reinstatement of a demolished building. The language seems to me unambiguous and I can find no justification for construing it otherwise than in its natural and ordinary meaning. The construction for which the respondents contend, which was accepted by the majority in the Court of Appeal, involves substituting for the language used the words "if the damage had never occurred" or "immediately before the occurrence of the damage." In this connection it is to be observed that in s. 56 (2) of the Act of 1947, where the legislature desired to make the state of the land before the war damage the test, it did so in plain terms. The Act of 1947 restored current market values as the basis of compensation and s. 53 (1) (a) was, I think, clearly designed to put the person whose property had been damaged and not made good, and then compulsorily acquired, on equality with a similar person whose property had not been compulsorily acquired.

My Lords, I can find no justification for interpreting the words "made good" in s. 53 (1) (a) as involving, not only a notional physical reinstatement of the building, but also a restoration of the incidents attaching to the old building or the owners' interest therein. I prefer the reasoning in the judgments of **DEVLIN, J.**, and **SINGLETON, L.J.**, to that of the majority of the Court of Appeal and would allow this appeal.

LORD ASQUITH OF BISHOPSTONE (read by **LORD TUCKER**): My Lords, I concur. The appeal turns on the construction of a few words in s. 53 (1) (a) of the Town and Country Planning Act, 1947. If the meaning of those words were cryptic or equivocal, it would, no doubt, be permissible to interpret them in the light of a number of extrinsic considerations, including any scheme or policy which could be spelt out of this complex of legislation, and any anomalies which might follow from one construction and be avoided by another. Counsel for the respondents, in his ingenious submission, not unnaturally stressed these factors more than the primary meaning of the words themselves. Yet that meaning is the logical starting point, and is, in my view, in this case so plain, that none of these extrinsic factors can properly be invoked to repel or qualify it.

In assessing the compensation for an expropriated interest in land, s. 53 (1) (a) bids the assessing authority to imagine, contrary to the fact, that the damage

had been made good before the acquiring authority served notice to treat. If the damage was partial, "made good" must mean "repaired" and the original building may notionally retain its identity, including its controlled status if controlled it was. If the damage was so extreme as wholly to destroy the original building, the notional "making good" can only mean a notional re-building—the substitution of a new building for the old—and cannot fail to involve (again
A notionally) a complete breach of identity or continuity between the two. The assessing authority is bidden in this last event to imagine a replacement of the old by a new building (an eventuality contemplated, incidentally, in the War Damage Act, 1943, s. 123 (1), the interpretation section, *sub titulo* "make good"). If this had actually occurred, the new building would have been law-
B fully lettable at any rent it could command. It would not have been tied to the 1939 standard rents, and its value, for compensation purposes, would have to be arrived at on this "untied" basis. If one is bidden to treat an imaginary state of affairs as real, one must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied
C it. One of these in this case is emancipation from the 1939 level of rents. The statute says that one must imagine a certain state of affairs. It does not say that, having done so, one must cause or permit one's imagination to boggle when it comes to the inevitable corollaries of that state of affairs. As some of my noble and learned friends have pointed out, if Parliament had intended the meaning contended for by the respondents, nothing would have been easier
D than to provide that the value should be assessed as if no war damage had occurred. Even, however, if the meaning of the words to be construed were not plain and the "policy" of the legislation could legitimately be invoked as an interpretative factor, I am far from subscribing to the view that the policy in question is that for which the respondents contend, or that its importation would produce the result which they desire. It is, however, unnecessary to
E develop that argument.

I agree that the appeal should be allowed. I would only add that, in my judgment, the rather half-hearted challenge by counsel for the respondents of the decision in *Sisman's* case (1) fails. With respect, I am of opinion that that case was rightly decided.

F *Appeal allowed.*

Solicitors: *George C. Carter & Co.* (for the appellants); *John E. Fishwick*, town clerk, Finsbury Borough Council (for the respondents); *Solicitor, Ministry of Health.*

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

CAPITAL AND PROVINCIAL PROPERTY TRUST, LTD. v.
RICE. SAME v. SAME.

[HOUSE OF LORDS (Lord Porter, Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Asquith of Bishopstone), May 30, 31, June 4, 5, July 25, 1951.]

Rent Restriction—Standard rent—Apportionment—Flat let with another flat—Whole dwelling outside Rent Acts—Flat first let as separate dwelling subsequently—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (3). A

From 1934 until 1942 a flat, the rateable value of which brought it within the Rent Restrictions Acts, was let together with another flat as one dwelling, the whole, by reason of its rateable value, being outside the limits of the Acts. In 1946 the flat was first let as a separate dwelling. On an application to determine the standard rent of the flat the landlords contended that the standard rent was the rent at which the flat was let in 1946. The tenant contended that to determine the standard rent it was necessary to apportion the rent at which the two flats were let as a whole on Sept. 1, 1939. B

HELD: although the flat was not let separately on Sept. 1, 1939, it was "let" within the meaning of s. 12 (1) (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and to ascertain the standard rent it was necessary to apportion the rent as at that date as provided by s. 12 (3) of the Act. C

Decision of the COURT OF APPEAL ([1950] 2 All E.R. 174), affirmed.

AS TO STANDARD RENT, see HALSBURY, Hailsham Edn., Vol. 20, p. 312, para. 369 and 1951 Supplement; and FOR CASES, see DIGEST, Vol. 31, pp. 564-566, Nos. 7117-7132, and Digest Supps. D

Cases referred to:

- (1) *Sinclair v. Powell*, [1922] 1 K.B. 393; 91 L.J.K.B. 220; 126 L.T. 210; 31 Digest 565, 7129.
- (2) *Barrett v. Hardy Brothers (Alnwick), Ltd.*, [1925] 2 K.B. 220; 94 L.J.K.B. 665; 133 L.T. 249; 31 Digest 561, 7090. E
- (3) *Woodhead v. Putnam*, [1923] 1 K.B. 252; 92 L.J.K.B. 137; 128 L.T. 281; 31 Digest 572, 7196.
- (4) *Phillips v. Potter*, (1925), 94 L.J.K.B. 819; 133 L.T. 256; 31 Digest 570, 7182.
- (5) *Platman v. Frohman*, [1929] 1 K.B. 376; 98 L.J.K.B. 351; 140 L.T. 405; 93 J.P. 134; Digest Supp. F
- (6) *Upsons, Ltd. v. Herne*, [1946] 2 All E.R. 309; [1946] K.B. 591; 115 L.J.K.B. 433; 175 L.T. 350; 2nd Digest Supp.
- (7) *Sutton v. Begley*, [1923] 2 K.B. 694; 92 L.J.K.B. 1086; 129 L.T. 773; 31 Digest 571, 7195.

APPEALS by the landlords from a decision of the Court of Appeal (BUCKNILL, L.J., and HODSON, J., DENNING, L.J., *dissentiente*) dated May 15, 1950, and reported [1950] 2 All E.R. 174, confirming an order of His Honour JUDGE DALE at Bloomsbury County Court, made on Jan. 27, 1950, whereby he apportioned the rent of a flat at £171 5s. a year. G

The appellants contended that the standard rent should be fixed at £250 a year, the rent at which the flat was first let as a separate dwelling, and not by apportionment of the rent of the whole dwelling consisting of the two flats together. H

L. A. Blundell for the appellants.

The respondent appeared in person.

The House took time for consideration.

July 25. The following opinions were delivered.

LORD PORTER: My Lords, these two appeals were heard together, and concern flat No. 28, which forms part of a building called West Hill Court, Millfield Lane, Highgate. The actions were brought for the purpose of determining the standard rent of that flat. In one case the tenant of the flat, Mr. J. M. Rice, applied to the court to apportion the rent of the flat. In the other case the landlords, the Capital and Provincial Property Trust, Ltd., applied for the standard rent to be determined. It is agreed that, if apportionment is necessary, the rent would be £171 5s., but that, if there was to be no apportionment, the standard rent would be £250.

The facts are simple and undisputed. West Hill Court was built about 1933, and in 1934 the present landlords bought the property. On the first floor of the building there were two flats, No. 27 and No. 28. Each flat was completely self-contained with its own front door leading on to the same landing, a kitchen, w.c. and bathroom, two bedrooms, a dining room and a sitting room. The judge found as a fact that the two flats were constructed as separate dwellings, having a rateable value each of an amount (*viz.*, £79) which would bring them both within the control of the Rent Restrictions Acts. The first tenant of the two flats was a Dr. Davis. He wished to use them both as one dwelling for his family, and entered into one lease for the two flats at a rental of £430 per annum. At his request, and before he signed the lease, the partition wall in No. 28 between the dining and the sitting room was taken down, so as to make one large room, and a communicating door was cut in the wall between this room and the adjacent room in No. 27. Dr. Davis' lease expired in February, 1939, and a Mr. Stephenson then took a similar lease of the premises at a rental of £365 per annum. That lease, however, included a garage the rent of which has been agreed at £22 10s., so that the combined rent for the premises in question is admitted to be £342 10s. During the war the premises were damaged by enemy action. Mr. Stephenson vacated them and his tenancy ended. In 1942 the damage to flat No. 27 was repaired, the doorway which had been cut between the two flats was blocked up, and it was then let as a separate flat at an annual rent of £195. In 1946 No. 28 was also repaired. The partition wall between the two sitting rooms, which had been taken down before Dr. Davis became tenant of the premises, was not replaced, and No. 28 was then let as a separate flat to Mr. Rice at an annual rent of £250.

The question for the decision of the court was whether the standard rent of No. 28 was to be obtained by halving the rent of the two flats of £342 10s. or whether the standard rent was that at which the flat was first let as a separate flat, *viz.*, £250. The learned judge held that:

"... although occupied as one dwelling, these two flats were, in fact, let on Sept. 1, 1939, within the meaning of s. 12 (1) (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended, and to ascertain the standard rent of each it was necessary to apportion the rent as at that date as provided for by s. 12 (3) of the said Act."

That decision was challenged by the appellants, but confirmed by a majority in the Court of Appeal. The solution of the question thus propounded for your Lordships' decision must be decided by a consideration of the relevant sections of the Rent Restrictions Acts and primarily depends on the true construction of s. 12 of the Act of 1920 and of s. 5 of the Act of 1938. The material portions are in the following terms:

Act of 1920.

"s. 12 (1) For the purposes of this Act, except where the context otherwise requires:—(a) The expression 'standard rent' means the rent at which the dwelling-house was let on Aug. 3, 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house, which was first let after the said Aug. 3,

the rent at which it was first let: . . . (e) The expression 'rateable value' means the rateable value on Aug. 3, 1914, or, in the case of a dwelling-house or a part of dwelling-house first assessed after that date, the rateable value at which it was first assessed; . . . (2) This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed— (a) in the metropolitan police district, including therein the City of London, £105; (b) in Scotland, £90; and (c) elsewhere, £78; and every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies: . . . (3) Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just, and the decision of the court as to the amount to be apportioned to the dwelling-house shall be final and conclusive . . . ”

Act of 1938.

“s. 5 Where a dwelling-house to which the principal Acts apply is part of another dwelling-house to which those Acts apply, the standard rent of the first-mentioned dwelling-house as from Sept. 29, 1938, shall be a standard rent ascertained by apportioning the standard rent of the second-mentioned dwelling-house, and s. 12 (3) of the Act of 1920 shall apply accordingly notwithstanding that the first-mentioned dwelling-house was let as a separate dwelling on or before Aug. 1, 1914, or on or before the date on which the second-mentioned dwelling-house was first let.”

To this statement of the law there must be added the fact that in the case of houses under new control Sept. 1, 1939, was substituted by sched. I to the Rent and Mortgage Interest Restrictions Act, 1939, for the date prescribed by s. 12 (1) cited above, and by s. 3 (1) of the same Act of 1939 the Rent Restrictions Acts were made to apply to every dwelling-house (other than those to which they already applied) of which the rateable value did not exceed £100.

Flat No. 28 is rent controlled since its rateable value is £79, but the combined premises, consisting of flats Nos. 27 and 28, were not rent controlled on Sept. 1, 1939, inasmuch as their rateable value was £158 and their rent £342 10s. It was contended on behalf of the appellants that the rent of this combined dwelling could not be apportioned since apportionment is only permitted in the case of a dwelling-house to which the Acts apply, and the Acts never applied to the combined flats nor did they apply to No. 28 until it was let to Mr. Rice. It is, it was said, the house the rent of which is to be apportioned to which the Acts are required to apply, not the comprised portion which only came under control at a later date. In these circumstances the question for your Lordships' determination is whether the rent of a dwelling-house to which the Acts do not apply on Sept. 1, 1939, can be apportioned in order to ascertain the standard rent of a comprised portion which is separately let at a later date and is then for the first time subject to control. If No. 28 had been separately let on Sept. 1, 1939, and its separate rateable value alone is to be considered, the Acts then applied to it, but it was not then let as a separate entity and, it is claimed, was not then let within the meaning of the Acts. What was let, it is said, were the premises consisting of flats Nos. 27 and 28. No. 28 alone was not let until 1946 when a rent of £250 was exacted, and that was its first letting within the meaning of the Acts.

My Lords, arguments that premises have so changed their identity as to have become a different dwelling-house have been presented to the courts from time to time, sometimes successfully, and at other times without success. The line

of demarcation, however, has now been plainly established. There must have been substantial structural alteration before the dwelling can be said to have shed its identity and become a new entity. It was contended in the present case that a sufficient structural alteration constituted one only of the elements required to create a new dwelling, that a small physical change may revolutionise the character of the property, and that in the present case the blocking up of the connecting door created such a change. Accordingly, it was said, a new flat had come into existence at the time when Mr. Rice became the tenant. In a sense it is true that any division of one property into two, or any union of two properties into one, creates something different from the original whole or parts, but a solution founded on such consideration would play havoc with the Acts, defeat their objects, and make apportionment meaningless. Some limit to what constitutes a change of identity must be laid down and that adopted by the courts is, in my view, justified by the language and within the scope of the Acts. Whether in any particular case there has been a sufficient alteration in the premises is a matter for the county court judge, if he has material on which to base his finding. So far as I can ascertain, the contention was not even submitted to him in the present case and it cannot be relied on now. I agree with BUCKNILL, L.J., that flat No. 28 was let on Sept. 1, 1939, and, if let separately then, would have been within the control of the Acts. Although that flat was let on the material date, however, it was not then let as a separate dwelling, nor was the combined flat within the mischief of the Rent Restrictions Acts since both the rent and the rateable value of the two portions together exceeded the required limits. In those circumstances it has to be determined whether the provisions as to apportionment contained in s. 12 (3) of the Act of 1920 have any application. The matter is a little complicated by reason of the impact of s. 5 of the Act of 1938, but I propose first to deal with the position apart from that section and then to consider its effect.

The argument on behalf of the appellant on this part of the case, as I understood it, was as follows:—Section 11 of the Act of 1920 provides that a landlord of any dwelling-house to which this Act applies shall, on being so requested in writing by the tenant of the dwelling-house, supply him with a statement in writing as to what is the standard rent of the dwelling-house. When, therefore, s. 12 (1) (a) says “the expression ‘standard rent’ means ‘the rent at which the dwelling-house was let’”, “the dwelling-house” must refer back to that mentioned in s. 11, *i.e.*, a dwelling-house to which the Act applies. At the relevant date the premises demised were let at a rent which took them outside the control of, and were of a rateable value beyond that bringing them within, the Act. The Act, therefore, did not apply to them and when s. 12 (3) speaks of “any dwelling-house to which this Act applies” it is addressing itself to a case where the rent and the rateable value bring it within the scope of the Act. The rent, therefore, of a house or dwelling which is outside the Act cannot be apportioned even if the divided portions are each within the Act because either their rent or rateable value is below the prescribed figure. This conclusion was reached by SCRUTTON, L.J., in *Sinclair v. Powell* (1) (though his reasoning had not the support of BANKES and ATKIN, L.J.J.) and receives added strength in your Lordships’ House from the observations of BANKES, L.J. ([1925] 2 K.B. 223) in *Barrett v. Hardy Brothers (Alnwick), Ltd.* (2), where he suggests that SCRUTTON, L.J.’s view might have afforded a simple solution. On the other hand, it is contrary to the general line of authority such as *Woodhead v. Putnam* (3), *Phillips v. Potter* (4) and the actual decision in *Barrett’s* case (2) itself. Moreover, it has the grave disadvantage of making the provisions of s. 12 (3) of very little effect.

My Lords, the divergent views expressed by SALTER, J., in *Woodhead v. Putnam* (3), which coincided with the opinions of BANKES and ATKIN, L.J.J., in *Sinclair v. Powell* (1), on the one hand, and that of SCRUTTON, L.J., set out in the latter case and repeated in *Barrett’s* case (2) with some support from

BANKES, L.J., on the other, would require careful consideration if it were necessary to decide between them in the present case. In SALTER, J.'s opinion the rent of any house, however large, could be apportioned in order to ascertain whether a part of the house which had been made into a separate dwelling at a later date was within or without the Acts, and, "if within", what its standard rent was. SCRUTTON, L.J., on the other hand, considered that there was no jurisdiction to apportion except in a case where the house, the rent of which was to be apportioned, was a controlled dwelling. He points out ([1925] 2 K.B. 226) in *Barrett's* case (2) that what has to be determined is the standard rent of a dwelling-house "to which this Act applies," but you cannot determine whether the Act applies until you know what the standard rent is and that, therefore, the Act runs round in a useless circle. He adds (*ibid.*):

"It is said, that you must read the words as if they said: 'Where in order to determine the standard rent or rateable value of any dwelling-house for the purpose of seeing whether this Act applies to it, it is necessary to apportion', etc. The words obviously do not say that in their ordinary meaning."

As I understand the other view, the amount of rent payable in respect of the house out of which the portion is carved is irrelevant. What has to be discovered is the rent of the comprised portion. It is true that it is not possible to say whether that portion is within the Acts or not until apportionment has taken place, but, once the rent has been apportioned, the result is known, and, if the consequence of apportionment is to attribute a rent to the divided portion which brings it within the Act, that is the standard rent.

My Lords, the latter is, I think, a method of construing the section which would protect the tenant while enabling a landlord who has done some substantial constructional work to claim that he has brought into being a fresh dwelling or fresh dwellings and to create as the standard rent for them the rent at which he first let them. The question, however, still remains whether this view is consistent with the provisions of s. 11, s. 12 (1) (a) and s. 12 (2) of the Act. Section 11, like s. 12 (3), uses the expression "any dwelling-house to which this Act applies," and when s. 12 (1) (a) speaks of the "dwelling-house" it must, as I have said, mean the dwelling-house above referred to, *i.e.*, one to which the Act applies. Of the three sections mentioned above s. 11 requires the landlord, if requested by the tenant to do so, to furnish the tenant with a written statement of the standard rent. Section 12 (1) (a) defines "standard rent", and s. 12 (2) specifies the dwelling-houses to which the Act applies. For the purpose of the present case the landlord is required by s. 11 to inform the tenant what the rent of his flat was on Sept. 1, 1939, that being the material date in respect of a house under new control. To this demand the landlord might reply: "I cannot do so, because (i) the flat was not then let; (ii) it had no separate rent; and (iii) it was not let as a separate dwelling." So far as (i) is concerned I have already expressed the opinion that the flat *was* let on Sept. 1, 1939. It is true that it was not let as a separate entity, but nevertheless it was let. But, it is said, that fact is not enough, the dwelling-house in the sub-section means a dwelling-house to which the Acts apply, and it was not a dwelling-house to which the Acts applied on Sept. 1, 1939, because it was not a separate dwelling and because the whole of which it formed part was let at a rent which took it outside the mischief of the Acts.

My Lords, I approach with diffidence the construction of phraseology framed, I believe, to meet a temporary difficulty and, therefore, not so worded as adequately to meet the many circumstances which might be expected to arise over a longer period. The solution which I suggest, however, is that the period to be looked for at which the premises must constitute a separate dwelling is that at which the court is required to apportion the rent, and the premises referred to are the divided portion and not those the rents of which are to be

apportioned. The questions to be answered by the county court judge are: Was flat No. 28 a separate dwelling when proceedings were begun? Was it let on Sept. 1, 1939? Is it necessary to apportion the rent of the property in which it was then comprised for the purpose of determining its standard rent? To all these questions I think he might answer: "Yes," even in a case where the criterion whether the flat was within the Act or not depended on the rent chargeable and was unaffected by the rateable value, but the case now under review does not give rise to so great a difficulty, and it does not require your Lordships to determine the applicability of the provisions of s. 12 (3) of the Act of 1920 in a case where rent and not rateable value is the factor which decides whether the Acts apply to a dwelling-house or not. A definite decision in such a case must wait until its determination is necessary. Flat No. 28 is controlled because its rateable value is £79, and since 1938 that is the sole criterion for determining whether premises are within the Acts or not. In the present instance there is in existence today and was when proceedings were taken in the county court a controlled flat which was let on Sept. 1, 1939. As it was not then separately let, however, its standard rent can only be ascertained by apportionment, and it is, therefore, necessary to apportion the 1939 rent in order to determine what part of the total rent is to be attributed to this letting.

A further proposition has, however, to be dealt with. In the first place, it is said that, whatever may have been true formerly, the provisions of the previous Acts have now been superseded or explained by s. 5 of the Act of 1938 and that section plainly makes it imperative that apportionment should be confined to cases where both the undivided house and the divided portion, the standard rent of which it is desired to ascertain, are dwellings to which the Act applies. It would, as I think, be an odd result of inserting a section in a later Act, without any reference to the terms of an earlier Act dealing with a similar matter, to effect the repeal of the provisions of the earlier Act. I cannot think that s. 5 of the Act of 1938 had any such effect. The solution suggested by HODSON, J. ([1950] 2 All E.R. 182) is, to my mind, the natural explanation of the existence and form of the section. *Platman v. Frohman* (5) had previously accepted the view that, if part of the larger entity from which that part was carved had been separately let before Aug. 1, 1914, the rent of that portion would have been its standard rent and the rent at which the whole was let was irrelevant when the standard rent of the part was in question. Consequently, no apportionment of the rent of the whole was permissible in order to ascertain the standard rent of the part. Section 5 of the Act of 1938 was passed in order to do away with the result of this expression of opinion. It is a mistake to read the first portion of the section as a substantive provision unaffected by its concluding words. Its true effect is to provide that in certain limited instances apportionment is permitted, notwithstanding that part of a dwelling-house had been separately let before Aug. 1, 1914, *i.e.*, in those cases where both the whole and the divided part are within control. In those instances the standard rent of the contained dwelling is to be ascertained by apportioning that of the containing house notwithstanding the separate letting of the part before Aug. 1, 1914. The result is to increase the cases in which apportionment can take place, not to limit the generality of that possibility or to lessen the extent of the power given in s. 12 (3) of the Act of 1920 to ascertain the standard rent of a portion of a house by apportioning the rent of the whole. This provision, however, in no way affects the right to claim apportionment in cases where no question as to the letting of the combined house is complicated by a previous letting of its parts.

My Lords, the Rent Restrictions Acts continue to afford difficult and contentious problems to this House, and, no doubt, similar difficult problems will assail your Lordships in the future. One can only regret that it has not been found possible to make their provisions clearer and more consistent with one another, but, judging as best I can, I would dismiss the appeals with costs.

LORD MORTON OF HENRYTON: My Lords, it is not disputed that flat No. 28, West Hill Court, is a dwelling-house which, by reason of its rateable value of £79, is subject to the provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. The question for decision is whether the standard rent of that dwelling-house is £250 per annum, the rent at which it was first let as a separate dwelling on Sept. 26, 1946, or whether the standard rent must be arrived at by an apportionment under s. 12 (3) of the Act of 1920. If the latter is the correct view it is agreed that the standard rent is £171 5s. per annum.

To arrive at an answer to the question just stated it is first necessary to decide whether on Sept. 1, 1939, No. 28 was "let" within the meaning of s. 12 (1) of the Act of 1920, as amended by s. 3 (1) of the Act of 1939 and sched. I thereto. In my opinion, it was. On Feb. 28, 1939, the owners of West Hill Court demised Nos. 27 and 28 to Mr. Stephenson for a term of three years from Mar. 25, 1939, and that lease was still subsisting on Sept. 1, 1939. I understand that all your Lordships are in agreement with the decision in *Upsons, Ltd. v. Herne* (6), so I may be forgiven for quoting the following passage from the judgment of BUCKNILL, L.J., in the present case ([1950] 2 All E.R. 176):

"The first question to be decided . . . is whether flat No. 28, which at all material times was a dwelling-house or part of a dwelling-house, was, in fact, 'let' on Sept. 1, 1939. I think that if anyone had asked the landlord in 1939 whether flat No. 28 was let, he would have answered 'Yes.' I know of no decided case which has laid down that a flat is not let because it has been let with another flat under one lease. On the contrary, the decision of the Court of Appeal in *Upsons, Ltd. v. Herne* (6), clearly decides the opposite. The relevant facts in that case, in so far as they resemble the facts in the present case, were that until after 1914 two flats, one of which was called flat 2A, together with a shop, were let to one Klein under a single lease at an annual single rent of £150. The three buildings were covered by one roof, but were in all other respects separate. In 1925 flat 2A, the rateable value of which had at all material times been below the limits fixed by the Rent Acts, was let separately to another person, and the question at issue was whether the standard rent of flat 2A was the rent under the separate letting, or whether it was to be fixed by apportionment of the rent of the complex of premises. The Court of Appeal held that the rent was to be fixed by apportionment. MORTON, L.J., in his judgment, said ([1946] 2 All E.R. 311): 'This separate dwelling flat 2A was let to Woolf Klein in 1911 and it was still let to him on Aug. 3, 1914. True, two other premises were included in the letting and the three were let in one lease at one rent instead of in three separate leases at three separate rents, but I cannot see how that prevents flat 2A from being "let" within the meaning of the Act of 1920. Presumably, the three premises were let at a rent which was thought by lessor and lessee to be the fair aggregate annual rental for the three; but, whether this is so or not, I see no escape from the view that if three properties A, B, and C, are let by X to Y under one and the same lease, then each one of them is let by X to Y.' The only material difference that I can see between the facts in that case and the present is that in the present case a doorway was cut in the wall which divided the two flats, but, in my opinion, the principle enunciated by MORTON, L.J., applies with equal force to the present case."

I see no reason to repent of my observations in *Upsons, Ltd. v. Herne* (6), and I agree with the observations of BUCKNILL, L.J., in the passage just quoted. The standard rent must, therefore, be the rent at which No. 28 was let on Sept. 1, 1939, and it is impossible to determine what that rent was without an apportionment of the total rent of £342 10s. attributable to Nos. 27 and 28. The present

case seems, therefore, to be one which comes exactly within the wording of s. 12 (3) of the Act of 1920.

A Counsel for the appellants submitted that "let" in s. 12 (1) of the Act of 1920 means "let as a separate dwelling", and, therefore, No. 28 was not "let" on Sept. 1, 1939. I cannot accept this submission or the alternative construction put forward by counsel, but I need not state my reasons as I have had the privilege of reading in print the opinions of my noble and learned friends, LORD REID and LORD TUCKER. I agree with their reasoning and their conclusions. I agree also with their view that the position is in no way altered, in the present case, by subsequent legislation and that there has been no "change in the identity" of No. 28. I would dismiss both appeals with costs.

B LORD REID: My Lords, the flat which the respondent now occupies, No. 28, West Hill Court, Highgate, has and in 1939 had a rateable value of £79, so, as it is now let as a separate dwelling, it undoubtedly comes within the scope of the Rent Restrictions Acts. The question at issue in this case is the amount of its standard rent. In and before 1939 this flat and the adjoining flat, No. 27, were always let together as a single dwelling-house. In 1939 they C was also £79, so the rateable value of the whole house as then let was £158. Accordingly, so long as the two flats were let together as a single dwelling-house its rateable value was above the limit of £100 and the Rent Restrictions Acts did not apply to any part of the two flats. The flats suffered war damage, and after the war No. 28 was repaired and was let on Sept. 26, 1946, to the respondent as a separate dwelling at a rent of £250. The appellants contend that that rent D of £250 is the standard rent of No. 28, but the respondent contends that the standard rent of No. 28 must be found by apportioning the 1939 rent of £365 between the two flats and the garage.

E As No. 28 only came within the scope of the Rent Restrictions Acts after 1939, it is the Act of 1939 which applies to it. In order to find the standard rent of a house to which that Act applies it is necessary to go first to s. 12 (1) (a) of the Act of 1920 as that sub-section is modified by the Act of 1939. Section 12 (1) of the Act of 1920 is in these terms:

"For the purposes of this Act, except where the context otherwise requires:—(a) The expression 'standard rent' means the rent at which the dwelling-house was let on Aug. 3, 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, F or, in the case of a dwelling-house which was first let after the said Aug. 3, the rent at which it was first let."

The Act of 1939 substituted Sept. 1, 1939, for Aug. 3, 1914, as regards houses to which the earlier Acts did not apply when the Act of 1939 came into force. It is, therefore, necessary, in the first place, to determine whether No. 28 was let on Sept. 1, 1939. In my opinion, this case turns on the answer to that question. G If No. 28 was then let, the statute directs us to find the rent at which it was then let and enacts that that is to be the standard rent. It is only if No. 28 was not let in 1939 that the statute permits us to take as its standard rent a rent which was first charged after 1939.

H The word "let" in its context in s. 12 (1) (a) of the Act of 1920 is ambiguous. In a sense No. 28 was let in 1939 because the whole of the space and accommodation of which it consists was then let, being then a part of the double flat let at that date at a rent of £365. In another sense, however, No. 28 was not then let because No. 28 did not then exist as a separate entity. It only came into existence as a separate entity when the appellants divided the double flat. If the true meaning of "let" in this sub-section is "let as a separate entity" or "let as a separate dwelling," then No. 28 was first let when it was let to the respondent in 1946. On that interpretation there would be no difficulty in finding the standard rent. It would be £250, the rent at which No. 28 was first let after

Sept. 1, 1939, but if No. 28 is to be regarded as having been let in 1939, then there must have been a rent payable for it in 1939 and the only possible way of finding that rent is to take the rent of the double flat of which it then formed part and to apportion that rent of £365 between No. 28 and No. 27, and the garage which together made up the subjects let in 1939.

The problem is to determine what is the meaning of the word "let" in s. 12 (1) (a) of the Act of 1920 as adapted and re-enacted in 1939, and in order to solve this problem it is, I think, first necessary to see what was the meaning of s. 12 (1) (a) when it was enacted in 1920. I shall later consider whether subsequent legislation has in any way altered this meaning. If there had been nothing in the Act of 1920 to authorise the apportionment of a rent in order to find the standard rent of part of the premises to which that rent had applied, that omission would have pointed to the true meaning of "let" in s. 12 (1) (a) being "let as a separate dwelling," because on that interpretation no apportionment could ever have been necessary. The earlier rent of the larger premises would have been irrelevant and the standard rent would necessarily be the rent at which the premises whose standard rent was now being determined was first let as a separate dwelling, but the Act of 1920 did provide for apportionment. Section 12 (3) provided:

"Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just, and the decision of the court as to the amount to be apportioned to the dwelling-house shall be final and conclusive."

The fact that Parliament made this provision for apportionment of rent in order to find the standard rent of a dwelling-house shows that "let" in s. 12 (1) (a) cannot have been intended to mean "let as a separate dwelling," but must have been used in a sense sufficiently wide to include at least some cases where the accommodation which later made up the separate dwelling had been let together with other accommodation on Aug. 3, 1914, so that the rent for the whole accommodation then let had to be apportioned to find out how much of it should be attributed to that part of the whole accommodation which was later severed and made into a separate dwelling. Unless the word "let" in s. 12 (1) (a) was used in this sense the whole of s. 12 (3), in so far as it applies to rent, would be meaningless and of no effect, and it is not to be presumed that Parliament passed a provision of this character.

If the reason which I have just given is not in itself sufficient for rejecting the interpretation that "let" in s. 12 (1) (a) means "let as a separate dwelling," there are two other reasons each of which would, in my opinion, justify the rejection of that interpretation. In the first place, that interpretation would obviously have made it easy for landlords to evade the principal purpose of the Act in very many cases. All that a landlord who had regained possession of a controlled house would have had to do to get more rent from it would have been to divide it and let parts of it as new separate dwellings. He would not then have been tied to the 1914 rent and he could have charged for each part any rent that he could get. I do not think that Parliament can be supposed to have intended a meaning so obviously calculated to defeat one of its main objects. The other reason is that in all the cases decided under the Act of 1920 where this point could have been raised and would have been decisive, none has been found in which it was accepted or even seriously considered. To accept this interpretation now would introduce a revolutionary change into the interpretation of the Rent Restrictions Acts, and even if I thought that it was valid, which I do not, I would not think it right at this late date to give effect to it.

The second argument for the appellants was less revolutionary. This argument proceeded on the footing of admitting that apportionment was legitimate in some cases in order to determine the standard rent of a new separate dwelling carved out of a larger house which had been let as a whole in 1914, but it was argued that in other cases no such apportionment was permissible under s. 12 (3), and, therefore, in these cases the standard rent of the new smaller house could not be fixed with reference to the 1914 rent of the old larger house but
A must be the rent at which the new smaller house was first let after 1914 as a separate dwelling. This argument for a restricted meaning of s. 12 (3) takes several forms and in one form or another it has received support from several eminent judges, but I have seen no explanation of how any form of this argument can be reconciled with any reasonable meaning of the word "let" in s. 12 (1) (a). One form of the argument is that for various reasons the Act cannot
B have contemplated any apportionment except the apportionment of a rent which was at one time a standard rent of a controlled house. That argument leads to a curious result. Let me suppose a house with a rateable value of £70 which was let in 1914 for a rent of £70, and suppose further that it was later divided into two separate dwellings each of which was then let for £60. Was the standard rent of each half £60 or was it an apportioned part of the whole
C 1914 rent of £70? On this form of the argument the answer would depend on whether the sub-division took place before or after the passing of the Act of 1920. A house of £70 rent and rateable value had not been within the scope of the earlier Acts and so if sub-division took place before 1920 the larger house never was a controlled house whereas if sub-division took place after 1920 the larger house was a controlled house with a standard rent before it was sub-divided.
D So on this argument s. 12 (3) would permit apportionment in the latter case, but not in the former case, and, therefore, s. 12 (1) (a) would have to be made to mean that the smaller house was "let" in 1914 in the latter case but not in the former case. No doubt, the Act of 1920 is very loosely drafted, but even so I cannot think that it would be legitimate to give to the word "let" in s. 12 (1) (a) so strange a meaning that each half of the house which I have supposed
E must be regarded as having been let in 1914 if the sub-division occurred in 1921, but cannot be regarded as having been let in 1914 if the sub-division occurred in 1919. I think that s. 12 (3) itself provides an answer to this argument because it authorises apportionment whenever that is "necessary." Once it has been determined that the smaller house was "let" as a part of the larger house in 1914, s. 12 (1) (a) makes it necessary to find the rent at which the smaller
F house was let in 1914, and to do this it is necessary to apportion the 1914 rent of the larger house because there is no other possible way of doing it. There are other ways of stating this argument, but all are, I think, open to the same objection that they require that s. 12 (1) (a) must be given a complicated and unnatural meaning.

Another argument was that if it could be determined before having recourse
G to s. 12 (3) that the new smaller house now let as a separate dwelling was itself a controlled house, being within the limits set out in s. 12 (2), then apportionment of the old 1914 rent of the undivided house would be legitimate to determine the standard rent of the new smaller house, but that otherwise apportionment was prohibited because it would then be necessary to apportion for two purposes: First, to see whether the new separate dwelling was or was not a house to which
H the Act applied, and then, if that question was answered in the affirmative, to find what was its standard rent. It was said that s. 12 (3) authorises apportionment for the second purpose only because its scope is limited by its initial words—"Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies . . ." It appears to me that there are also grave objections to this argument, but I need not elaborate them because in the present case it is clear, without any need to have recourse to s. 12 (3) for any apportionment, that the respondent's flat No. 28 is a dwelling-

house to which the Acts apply. Although Nos. 27 and 28 were formerly let together, they have always had separate rateable values. It is admitted that the rateable value of No. 28 is £79 and that it is, therefore, a dwelling-house to which the Acts apply. So in this case the only purpose of making application under s. 12 (3) is that expressly authorised by its opening words—the purpose of determining the standard rent.

The difficulties involved in giving a restricted meaning to s. 12 (3) are such that I turn now to inquire whether there is any real difficulty in holding that s. 12 (3) means what it says. This sub-section, on the face of it, permits the apportionment of any rent no matter what its character or amount may be and the first obvious objection to such a wide reading is that the rent to be apportioned might not be the rent of a dwelling-house at all. The premises subsequently let as a separate dwelling might, in 1914, have been part of premises which were let for business purposes. Other possible cases are that the larger house might have been let furnished or might have been let at a very low rent. It appears to me, however, that the Act itself excludes cases of this character because s. 12 (2) (i) provides that the Act shall not apply to a house let furnished or with board or attendance; s. 12 (7) provides that the Act shall not apply if the rent was less than two-thirds of the rateable value of the house; and s. 13 makes it clear that the Act only applied temporarily to business premises. So I do not think that it is difficult to hold that the "rent" referred to in s. 12 (3) does not include rents of the kinds which I have just mentioned. I can see no serious difficulty, however, in holding that s. 12 (3) permits the apportionment of rents of unlimited amount, provided that the accommodation which was let in 1914 as part of the larger house remained substantially the same accommodation after it had been severed and let as a separate dwelling. I am, therefore, of opinion that where a large dwelling-house was let in 1914 and was subsequently let out in parts each part being let as a separate dwelling-house, the standard rent of each of these parts ought to be determined by apportioning the 1914 rent for the whole house.

The next argument for the appellants was that division of the double flat had so altered the character of the accommodation in No. 28 that No. 28 in its present form is no longer identifiable with any of the accommodation which was formerly comprised in the double flat. I do not doubt that where in dividing a larger house structural changes have been made which alter substantially the character of the accommodation, recourse can no longer be had to the old rent of the undivided house, and I see no reason to doubt the authorities which deal with that question, but I do not think that they can be extended to cover a case such as the present where there has been no substantial structural alteration. It was argued that there has been a functional change in that using accommodation as a separate dwelling is a different thing from using it as a part of a larger dwelling, and that where there has been such a change structural alterations of a trifling character are sufficient. I cannot accept this argument because it would apply in almost every case of division of a large house into separate dwellings. The Act appears to me to show a clear intention to prevent landlords from setting aside 1914 rents and charging what they like merely by letting off parts of a large house as separate dwellings.

The next argument was that, whatever may have been the position in 1920, the effect of subsequent legislation has been to narrow the scope of apportionment of rent. The only subsequent enactment which appears to me to merit consideration in this connection is s. 5 of the Act of 1938. That section provides:

"Where a dwelling-house to which the principal Acts apply is part of another dwelling-house to which those Acts apply, the standard rent of the first-mentioned dwelling-house as from Sept. 29, 1938, shall be a standard rent ascertained by apportioning the standard rent of the second-mentioned dwelling-house, and s. 12 (3) of the Act of 1920 shall apply

accordingly notwithstanding that the first-mentioned dwelling-house was let as a separate dwelling on or before Aug. 1, 1914, or on or before the date on which the second-mentioned dwelling-house was first let."

It is said that this section in effect repeals or amends s. 12 (3), so that after the passing of the Act of 1938 no apportionment was permissible unless it came within the scope of s. 5 of that Act. I cannot read s. 5 as being intended to repeal anything. The last part of this section clearly recognises that s. 12 (3) will remain
 A in operation, and, further, it extends the scope of s. 12 (3) to cover a case where apportionment was strictly speaking not necessary. The precise scope and purpose of the first part of the section are obscure. I certainly cannot read into it any intention to take away from tenants rights which they previously had to obtain apportionments under s. 12 (3). To bring s. 12 (1) and (3) into line
 B with the first part of this section would require an elaborate and carefully drafted amendment, and I cannot infer an intention to make such an amendment from a provision so ill drawn for that purpose. Accordingly, I agree that the appeals should be dismissed.

LORD TUCKER: My Lords, it is, I think, impossible to accept the view that "let" in s. 12 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, meant (in the years 1920 to 1938) "let as a separate dwelling."

C This would have involved the result that where the comprising dwelling was within the Acts a landlord could have let part of the house at an uncontrolled rent whereas he would have been limited to the August, 1914, rent in the case of the whole house. The Court of Appeal, including SCRUTTON, L.J., rejected this interpretation in such cases: see *Sutton v. Begley* (7). This view has been
 D accepted ever since, and even if I doubted its correctness—which I do not—I would hesitate to disturb a decision which has stood so long and been acted on so often. SCRUTTON, L.J., however, had previously, in *Sinclair v. Powell* (1), expressed the view that where the comprising dwelling was outside the rental and rateable value limits of the Acts, a first separate letting of a part after Aug. 3, 1914, did not require an apportionment of rent of the whole. This view
 E was not shared by BANKES and ATKIN, L.J.J., who were the other members of the court, though BANKES, L.J., subsequently, when sitting in a Divisional Court in *Barrett v. Hardy Brothers (Alnwick), Ltd.* (2), expressed some regret that he had not accepted SCRUTTON, L.J.'s view. A Divisional Court had decided in *Woodhead v. Putnam* (3) that apportionment of rent was necessary to decide whether or not a part of a house first separately let after Aug. 3, 1914, was or was not within the Acts, the whole having been outside the Acts at that date.
 F This decision was followed in 1925 in *Phillips v. Potter* (4). My Lords, SCRUTTON, L.J., never explained how he would as a matter of construction—as distinct from policy—have reconciled his views in these two classes of case. The view that apportionment is required where the comprising whole was within the limits of the Acts involves that "let" in s. 12 (1) does not mean "let as a separate dwelling." It cannot really have a different meaning where the whole was
 G outside those limits. This difficulty, which has never, so far as I know, been explained, fortifies me in my view that, despite the expressed contrary opinion of SCRUTTON, L.J., and the later doubts of BANKES, L.J., the Divisional Court decisions, which have never been overruled and have been widely acted on, were correct and that in both classes of case apportionment of rent is necessary if the standard rent cannot otherwise be ascertained.

H I am unable to accept the argument of counsel for the appellants that the word "let" should be read as meaning "let under such conditions as attract control under the Acts" or "let within the limits prescribed by s. 12 (2)." I can see no ground for introducing any such words. This is an attempt to read the language of s. 12 (1) as applying to the comprising house. I do not think the sub-section is dealing with such a case at all. It is dealing with the dwelling-house or part of a dwelling-house of which it is desired to ascertain the standard rent. It is not until we get to s. 12 (3) that the Act is envisaging comprising

premises. When we get there and turn back to sub-s. (1) we find apportionment is necessary because, although the part was "let" as part of a larger whole at the material date, we do not know how much of the rent is attributable to the part, but it is with the letting of the part that we have throughout been concerned.

With regard to subsequent legislation, if it was intended to alter the generally accepted interpretation of the Act, this should have been done in unambiguous terms. It has not been done. Section 12 (3) has never been repealed and must, in my view, be applied where circumstances so require. In the present case the flat in question is within the Acts. It must have a standard rent. Unless "let" in s. 12 (1) now means "let as a separate dwelling", although from 1920 to 1938 it had no such meaning, how is the standard rent to be ascertained save by apportionment? I share the view of HODSON, J. ([1950] 2 All E.R. 182) that s. 5 of the Act of 1938 was probably designed to meet the anomalous case illustrated by *Platman v. Frohman* (5), but, whatever its origin, it leaves s. 12 (3) in full force.

It only remains to say that on the facts in the present case it is clear that there has been no such change of identity that it could be said flat No. 28 never existed until it was separately let, and I am unable to accept the appellants' contention that there has been some "functional" change which has had the same result. For these reasons I would dismiss these appeals.

LORD REID: My Lords, my noble and learned friend **LORD ASQUITH OF BISHOPSTONE** is unable to be present today and he has asked me to state that he has read the opinion which I have just given and that he concurs with it.

Appeals dismissed.

Solicitors: *Stephenson, Harwood & Tatham* (for the appellants).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

NOTE.

STUDHOLME v. MINISTER OF FUEL AND POWER (NO. 2).

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Birkett, L.JJ.), July 16, 1951.]

Gas—Nationalisation—Stockholders' representative—Costs of arbitration—Gas Act, 1948 (c. 67), s. 27 (1), (3).

ADJOURNED APPLICATION for costs in an appeal under the Gas Act, 1948.

On June 18, 1951, the Court of Appeal dismissed an appeal (*ante*, p. 371) by the applicant, a stockholders' representative appointed under s. 27 (1) of the Act, against a decision of the Gas Arbitration Tribunal. The applicant asked the court to make provision for his costs, but the application was resisted by counsel for the Minister and the court adjourned to enable counsel for the Minister to obtain further instructions. At the adjourned hearing the Minister through counsel offered to pay the costs of the applicant before the tribunal as between solicitor and client, which offer was accepted. Having regard to the importance of the question of costs of a stockholders' representative in connection with the determination of compensation on the nationalisation of an industry, the court was invited to construe s. 27 of the Gas Act, 1948.

Mocatta, K.C., and *Templeman* for the applicant.

Upjohn, K.C., and *J. P. Ashworth* for the Minister of Fuel and Power.

THE COURT OF APPEAL said that, *prima facie*, the position of a stockholders' representative was that of a trustee. As such, he was entitled to take the opinion of the tribunal set up to determine compensation, and, in general, the expenses incurred by him on any such reference were expenses incurred in the proper exercise of his functions within the meaning of s. 27 (3) of the Act and should be paid by the Minister.

Solicitors: *Linklaters & Paines* (for the applicant); *Treasury Solicitor* (for the Minister of Fuel and Power).

F.G.

STEWART v. CHAPMAN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., and Ormerod, J.), July 25, 1951.]

Street Traffic—Careless driving—Notice of intended prosecution—“ Within fourteen days ” of commission of alleged offence—Computation of time for service—Offence committed on Jan. 11—Notice sent by registered post on Jan. 24, and delivered on Jan. 25—Road Traffic Act, 1930 (c. 43), s. 21 (c).

A

The respondent was charged under the Road Traffic Act, 1930, s. 12 (1), with driving a motor car on a road without due care and attention at 7.15 a.m. on Jan. 11, 1951. A notice of the intended prosecution was dispatched to him by registered post at 1 p.m. on Jan. 24, 1951, and was delivered to him at about 8 a.m. on Jan. 25, 1951.

B

HELD: the rule in regard to the computation of time was that, where an act was to be done within a specified time from a certain date, the day of that date was to be excluded, and, therefore, in calculating the period within which notice of intended prosecution was to be served under the Road Traffic Act, 1930, s. 21 (c), the date of the commission of the offence was to be excluded, and the notice was served on the respondent in time.

C

Goldsmiths' Co. v. West Metropolitan Ry. Co. ([1904] 1 K.B. 1), applied.

AS TO PERIOD WITHIN WHICH AN ACT MUST BE DONE, see HALSBURY, Hailsham Edn., Vol. 32, pp. 142-146, paras. 207-214; and FOR CASES, see DIGEST, Vol. 42, pp. 949-951, Nos. 230-238.

FOR THE ROAD TRAFFIC ACT, 1930, s. 21 (c), see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 594.

D Cases referred to:

(1) *Goldsmiths' Co. v. West Metropolitan Ry. Co.*, [1904] 1 K.B. 1; 72 L.J.K.B. 931; 89 L.T. 428; 68 J.P. 41; 42 Digest 686, 1005.

(2) *Bellasis v. Hester*, (1697), 1 Ld. Raym. 280; 91 E.R. 1084; *sub nom. Belasyse v. Hester*, 2 Lut. 1589; 125 E.R. 873; 42 Digest 946, 197.

(3) *R. v. Adderley*, (1780), 2 Doug. K.B. 463; 99 E.R. 295; 42 Digest 947, 200.

E

(4) *Lester v. Garland*, (1808), 15 Ves. 248; 33 E.R. 748; 42 Digest 947, 203.

(5) *Young v. Higgon*, (1840), 8 Dowl. 212; 6 M. & W. 49; 9 L.J.M.C. 29; 4 J.P. 88; 151 E.R. 317; 42 Digest 947, 206.

(6) *Castle v. Burditt*, (1790), 3 Term. Rep. 623; 100 E.R. 768; 42 Digest 947, 201.

F

(7) *Webb v. Fairmaner*, (1838), 3 M. & W. 473; 7 L.J.Ex. 140; 150 E.R. 1231; 42 Digest 950, 232.

(8) *R. v. Shropshire JJ.*, (1838), 8 Ad. & El. 173; 112 E.R. 803; 42 Digest 946, 196.

(9) *Blunt v. Heslop*, (1838), 8 Ad. & El. 577; 7 L.J.Q.B. 216; 112 E.R. 957; 42 Digest 145, 1435.

G

(10) *Russell v. Ledsam*, (1845), 14 M. & W. 574; 14 L.J.Ex. 353; 5 L.T.O.S. 495; 153 E.R. 604; *affd.* on other grounds *sub nom. Ledsam v. Russell*, (1847), 16 M. & W. 633; 153 E.R. 1343; 42 Digest 950, 235.

CASE STATED by Middlesex justices.

At a court of summary jurisdiction sitting at Tottenham on Mar. 29, 1951, an information preferred by the appellant, a police constable, against the respondent that at 7.15 a.m. on Jan. 11, 1951, he drove a motor car on a road at Edmonton without due care and attention, contrary to s. 12 (1) of the Road Traffic Act, 1930, was dismissed. The justices, without hearing evidence, were of the opinion that, as the notice of intended prosecution was dispatched by registered post (as provided by s. 21 (c) of the Act) at 1 p.m. on Jan. 24, 1951, and was not delivered to the respondent until about 8 a.m. on Jan. 25, 1951, it did not comply with the requirement of s. 21 (c) of the Act that the notice should be served within fourteen days of the commission of the offence,

H

Vernon Gattie for the appellant.

J. L. E. Rees for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Middlesex, before whom the respondent was charged with driving a motor car on a road without due care and attention, contrary to s. 12 (1) of the Road Traffic Act, 1930. When the case was opened a preliminary point was taken on behalf of the respondent that notice of the intended prosecution had not been given within fourteen days of the commission of the offence, as required by s. 21 (c) of the Act. No evidence was called on either side on that point. I should like to remind justices that in these cases the onus is on the defendant if he wishes to set up this point, but I think that there can be no doubt in this case that the prosecution accepted the statement of facts which was given by or on behalf of the respondent. On those facts the justices held that the notice had not been given within due time, and, therefore, gave effect to the preliminary point and dismissed the information.

The facts on which they acted, as set out in the Case, were as follows:

" . . . the alleged offence was committed at 7.15 a.m. on Jan. 11, 1951, the notice of intended prosecution was not dispatched by the appellant to the respondent by registered post until 1 p.m. on Jan. 24, 1951, and was not delivered to the respondent until Jan. 25, 1951, at about 8 a.m."

It was contended by counsel for the respondent that, as the notice was not delivered to the respondent until Jan. 25 at 8 a.m., more than fourteen days had elapsed since the commission of the offence, and, therefore, the notice was out of time. Counsel for the appellant contended that, even if Jan. 25 was not the fourteenth day, the notice was given in time because it had been posted on the previous day, but I think that that contention is wrong. Section 21 provides that a person shall not be convicted of dangerous or careless driving unless, *inter alia*:

" (c) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence."

I think that it is not enough to post the letter within the fourteen days. It must be posted within such a time that, in the ordinary course of post, it would reach the person to whom it is addressed within the statutory time. It is not intended that there should be any longer time allowed to the prosecution if they post the document than if they serve it. Moreover, it seems to me that the Interpretation Act, 1889, s. 26, puts the matter beyond all doubt. That section says:

" Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve,' or the expression 'give' or 'send,' or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, pre-paying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post."

Therefore, in these cases, if a notice of the intended prosecution is to be served by post, it must be posted at such a time that in the ordinary course of post it will reach the defendant before the expiration of the fourteen days.

As the letter was received on Jan. 25, the real point in this case, is whether, in calculating the fourteen days, the date of the commission of the offence is to be included, and on that subject a considerable number of cases were cited. In my opinion, there is no doubt how the matter has to be decided at the present

time. In the eighteenth century, when courts were given to making fine distinctions, a distinction seems to have been drawn in cases

“ . . . between a term created which commences with the first day of the term, as in the case of a lease, and a time limited from a fixed date for the doing of an act ”

A —as was said in argument in *Goldsmiths' Co. v. West Metropolitan Ry. Co.* (1). Counsel for the respondent called our attention to *Bellasis v. Hester* (2), decided in 1697, and *R. v. Adderley* (3), in which LORD MANSFIELD delivered the judgment of the court. Those cases drew the distinction to which I have just referred, but, in my opinion, they must now be taken to be overruled. They have been consistently disregarded ever since the rule, if there was one, was broken into in 1808 by SIR WILLIAM GRANT, M.R., in *Lester v. Garland* (4), which was the first case in which the question really arose whether or not there was to be a fixed rule on the subject. SIR WILLIAM GRANT, M.R., said (15 Ves. 254):

C “ It is said for the plaintiffs, that upon this subject a general rule has been by decision established; that, where the time is to run from the doing of an act (and for the purpose of this question it must extend to the happening of an event) the day is always to be included. Whatever *dicta* there may be to that effect, it is clear, the actual decisions cannot be brought under any such general rule.”

After reviewing many of the earlier decisions, he went on to say (*ibid.*, 257):

D “ It is not necessary to lay down any general rule upon this subject: but upon technical reasoning I rather think, it would be more easy to maintain, that the day of an act done, or an event happening, ought in all cases to be excluded, than that it should in all cases be included.”

E In *Young v. Higgon* (5) PARKE, B., gave a judgment in which the other members of the court, ALDERSON, GURNEY and ROLFE, BB., concurred, and they refused to be bound by the earlier general rule. After referring to *R. v. Adderley* (3) and *Castle v. Burditt* (6), PARKE, B., said (6 M. & W. 52):

F “ But since those decisions, the subject has been much considered in the case of *Lester v. Garland* (4), which introduced a new view of the question. I do not say that that case is precisely in point with the present: but looking at the elaborate judgment of the Master of the Rolls, in which all the authorities are collected and commented upon, I should feel little difficulty in saying that the day in this case ought to be reckoned exclusively, on the authority of that case alone.”

After reviewing several other cases, PARKE, B., said (*ibid.*, 54):

G “ In *Webb v. Fairmaner* (7), in which almost all the authorities are cited, this court held, in conformity with the decisions just referred to, that where a party bought goods to be paid for in two calendar months, the day of the sale should be reckoned exclusively in computing the time. That case has been followed up by the decisions of the Court of Queen's Bench in the two cases of *R. v. Shropshire JJ.* (8), and *Blunt v. Heslop* (9): so that the point may now be considered as settled by a course of recent decisions, all proceeding upon the same principle, that the day from which the computation is made ought, in cases like the present, to be excluded; and such appears to me to be the reason and good sense of the matter.”

In 1845 *Young v. Higgon* (5) was considered in *Russell v. Ledsam* (10), in which PARKE, B., said (14 M. & W. 582):

"The usual course in recent times has been to construe the day exclusively, whenever anything was to be done in a certain time after a given event or date . . . "

Most of the cases which I have referred to were considered by the Court of Appeal in 1903 in *Goldsmiths' Co. v. West Metropolitan Ry. Co.* (1), in which SIR RICHARD HENN COLLINS, M.R., stated the two conflicting views which had been taken, according to whether a term was created which commenced with the first day of the term, as in the case of a lease, or whether a time was limited from a fixed date for the doing of an act. He held that it was now well established, whatever the expression used, that the day of the doing of the act was to be excluded. MATHEW, L.J., put the point succinctly and shortly in his judgment. He said ([1904] 1 K.B. 5):

"The true principle that governs this case is that indicated in the report of *Lester v. Garland* (4), where SIR WILLIAM GRANT broke away from the line of cases supporting the view that there was a general rule that in cases where time is to run from the doing of an act or the happening of an event the first day is always to be included in the computation of the time. The view expressed by SIR WILLIAM GRANT was repeated by PARKE, B., in *Russell v. Ledsam* (10), and by other judges in subsequent cases. The rule is now well established that where a particular time is given, from a certain date, within which an act is to be done, the day of the date is to be excluded."

Goldsmiths' Co. v. West Metropolitan Ry. Co. (1), which is binding on this court, seems to me entirely to apply to the words of s. 21 (c) of the Act of 1930:

"within the said fourteen days [*i.e.*, fourteen days of the commission of the offence] a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post . . . "

As the letter, in the case now before us, was received on the morning of Jan. 25, it follows, in my opinion, that the notice was served in time, and, accordingly, this appeal must be allowed. The case must go back to the justices with an intimation that the notice was served in time and a direction to them to continue the hearing of the case.

ORMEROD, J.: I agree.

Appeal allowed.

Solicitors: *Solicitor, Metropolitan Police* (for the appellant); *Ponsford & Devenish* (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

BRITISH MOVIE TONEWS, LTD. v. LONDON AND DISTRICT
CINEMAS, LTD.

[HOUSE OF LORDS (Viscount Simon, Lord Simonds, Lord Morton of Henryton, Lord Tucker), June 25, 26, 27, 28, July 26, 1951.]

A *Contract—Frustration—Change of circumstances—Power of court to qualify literal words of contract—Agreement to remain in force during continuance of statutory order—Order continued by different statute and for different reasons.*

B On July 25, 1941, film distributors contracted with exhibitors to supply "newsreels" for showing at a cinematograph theatre for a minimum of twenty-six weeks, the agreement (the "principal agreement") being thereafter terminable at four weeks' notice by either party and by the exhibitors on four weeks' notice at any time during the currency thereof after the first month. In March, 1943, the supply of film to the distributors was cut by one-third under the Cinematograph Film (Control) Order, 1943, and consequent thereon the distributors and exhibitors entered into a supplemental agreement which provided that: "1. During the continuance of the Cinematograph Film (Control) Order, 1943, the following special conditions shall also apply to the principal agreement:—(a) The principal agreement shall remain in full force and effect until such time as the said order is cancelled and thereafter for any unexpired period stipulated in the principal agreement . . ." On May 24, 1948, although the order of 1943 had not been cancelled, the exhibitors purported to give four weeks' notice to terminate the agreements. The order of 1943 had been made under the Defence (General) Regulations, 1939, reg. 55 (which was made under the Emergency Powers (Defence) Act, 1939), because it appeared to be necessary for maintaining during the war essential supplies of raw film. On Feb. 24, 1946, the Act of 1939 expired, and was replaced by the Supplies and Services (Transitional Powers) Act, 1945, but the order of 1943 was continued in force under that Act to maintain and control essential supplies of film owing to the economic situation which had arisen after the war and to secure their equitable distribution.

F HELD: (i) the words "during the continuance of the Cinematograph Film (Control) Order, 1943," could not, as a matter of construction, be restricted to mean "until the date when the order ceases to be in force by virtue of the Emergency Powers (Defence) Act, 1939;" there was no such change of circumstances in 1946 or change of law operating on the circumstances as to give rise to the operation of the doctrine of frustration; and, therefore, the exhibitors were not entitled to give the notice of May 24, 1948.

Observations on the true limits of the doctrine of frustration.

Decision of the COURT OF APPEAL ([1950] 2 All E.R. 390), reversed.

AS TO EXCUSES FOR NON-PERFORMANCE OF A CONTRACT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 212-220, paras. 296-298; and FOR CASES, see DIGEST, Vol. 12, pp. 383, 384, Nos. 3159-3166.

I Cases referred to:

- (1) *Shirlaw v. Southern Foundries (1926), Ltd.*, [1939] 2 All E.R. 113; [1939] 2 K.B. 206; 108 L.J.K.B. 747; 160 L.T. 353; Digest Supp.
- (2) *Baily v. De Crespigny*, (1869), L.R. 4 Q.B. 180; 38 L.J.Q.B. 98; 19 L.T. 681; 33 J.P. 164; 12 Digest 373, 3099.
- (3) *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp., Ltd.*, [1941] 2 All E.R. 165; [1942] A.C. 154; 110 L.J.K.B. 433; 165 L.T. 27; 2nd Digest Supp.

- (4) *Denny Mott & Dickson, Ltd. v. Fraser (James B.) & Co., Ltd.*, [1944] 1 All E.R. 678; [1944] A.C. 265; 113 L.J.P.C. 37; 171 L.T. 345; 2nd Digest Supp.
- (5) *Sir Lindsay Parkinson & Co., Ltd. v. Works & Public Building Comrs.*, [1950] 1 All E.R. 208; [1949] 2 K.B. 632; 2nd Digest Supp.
- (6) *Bush v. Whitehaven Town & Harbour Trustees*, (1888), 52 J.P. 392; 2 Hudson's B.C., 4th ed., 118; 12 Digest 385, 3167.
- (7) *Jackson v. Union Marine Insurance Co., Ltd.*, (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 12 Digest 386, 3175.
- (8) *John Lee & Son (Grantham), Ltd. v. Railway Executive*, [1949] 2 All E.R. 581; 2nd Digest Supp.
- (9) *Dennis Reed, Ltd. v. Goody*, [1950] 1 All E.R. 919; [1950] 2 K.B. 277.
- (10) *Bennett, Walden & Co. v. Wood*, [1950] 2 All E.R. 134.
- (11) *Bank Line, Ltd. v. Capel (A.) & Co.*, [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 12 Digest 391, 3198.
- (12) *F. A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 85 L.J.K.B. 1389; *sub nom. Re F. A. Tamplin S.S. Co., Ltd. & Anglo-Mexican Petroleum Products Co., Ltd.*, 115 L.T. 315; 12 Digest 390, 3194.
- (13) *Hirji Mulji v. Cheong Yue S.S. Co.*, [1926] A.C. 497; 95 L.J.P.C. 121; 134 L.T. 737; Digest Supp.

APPEAL by the plaintiffs, British Movietonews, Ltd., from an order of the Court of Appeal, dated June 21, 1950, reported [1950] 2 All E.R. 390, reversing an order of SLADE, J., dated Feb. 17, 1950.

SLADE, J., found that the defendants were liable to pay to the plaintiffs under two agreements dated respectively July 25, 1941, and May 3, 1943, the weekly sum of ten guineas in respect of the rental of news films until the expiration of the Cinematograph Film (Control) Order, 1943 (S.R. & O., 1943, No. 430).

Diplock, K.C., and *T. G. Roche* for British Movietonews, Ltd.

Sir Roland Burrows, K.C., *Pearson, K.C.*, and *K. D. Potter* for London and District Cinemas, Ltd.

The House took time for consideration.

July 26. The following opinions were delivered.

VISCOUNT SIMON: My Lords, by a letter dated May 24, 1948, addressed by the respondent company to the appellant company, the former gave notice to terminate as from June 30, 1948, the then existing contract between them. This contract was contained in a principal agreement dated July 25, 1941, as modified by a supplemental agreement dated May 3, 1943. The appellant company refused to accept the notice of termination, claiming that it was not such as the contract authorised and that the respondent company were still bound. The respondent company persisted in their view and the appellant company, by writ issued on Feb. 4, 1949, sued the respondent company for a declaration that the agreement remained in full force and effect and for consequential relief. The question involved in this appeal is thus not difficult to state, but in answering the question there has emerged a difference of opinion between SLADE, J., who tried the action and decided in favour of the appellant company, and the Court of Appeal (BUCKNILL and DENNING, L.J.J., and ROXBURGH, J.), which, in a judgment prepared by DENNING, L.J., allowed the appeal of the respondent company. It now becomes necessary to decide which party in the litigation is right. Moreover, the judgment delivered in the Court of Appeal includes an expression of some general views as to the nature and extent of the judicial function in deciding the rights and obligations of parties under an executory contract which will require careful and candid consideration from the House.

The respondent company is an "exhibitor" of news films and the appellant company is a "renter," *i.e.*, a supplier, of such films. A news film takes some

eight minutes to show and is normally exhibited in the cinema where it first appears for three days, after which it is passed on for showing elsewhere for similar periods. Owing to the necessity of the news it contains being up to date, the total life of a given news film is approximately only two and a half weeks. In consequence of this limited life, although the film for a newsreel is so much shorter than the length of film required for ordinary pictures, the total amount of raw film used up to supply a succession of news films in the various cinemas is much larger than the amount required in the same period for the main exhibits which have a longer currency.

By the principal agreement, the appellant company, as renter, by its agents Twentieth Century Fox Film Co., Ltd. (hereafter called the "distributor") agreed to furnish to the respondent company, as exhibitor, for exhibition at the respondent company's cinema in Aylesbury, commencing on Aug. 4, 1941, two news films a week for the price of ten guineas weekly. The printed form used to embody the contract contains the provision:

"Minimum period of agreement—26 (twenty-six) weeks and thereafter determinable by four weeks' notice."

Below this is a typed insertion as follows:

"Notwithstanding the minimum period of this contract it is agreed that same may be terminated by the exhibitor by giving one month's notice, any time after the expiration of the first month."

Below this, again in the print, is the provision:

"The exhibitor has the right at any time after the expiry of the minimum period to give to the renter or the distributor four weeks' notice in writing to determine this arrangement."

Since it is necessary to treat the typescript insertion as prevailing over the printed provision which it contradicts, the result is that, under the principal agreement, the exhibitor had the option to determine the contract after a minimum period of eight weeks (assuming that "month" means a lunar month of four weeks), while the renter could not take steps to determine it until twenty-six weeks had expired, after which he might give four weeks' notice to end it. Once, however, that the first twenty-six weeks had expired, *i.e.*, as from Feb. 2, 1942, the two parties were in the same position so far as the right to terminate the agreement by giving notice is concerned. Thereafter, it would continue until one party or the other gave four weeks' notice to bring it to an end.

Performance under the principal agreement ran on without either side giving notice to terminate it and on May 3, 1943, the parties entered into the supplemental agreement, the terms of which raise the problem which has to be solved. This supplemental agreement contains the recital that "by the Cinematograph Film (Control) Order, 1943 [S.R. & O., 1943, No. 430], it has become necessary to restrict the consumption of raw film stock." Then come three clauses which must be set out, as follows:

"1. During the continuance of the Cinematograph Film (Control) Order, 1943, the following special conditions shall also apply to the principal agreement:—(a) The principal agreement shall remain in full force and effect until such time as the said order is cancelled and thereafter for any unexpired period stipulated in the principal agreement. (b) One copy of a newsreel will if necessary be used to serve two exhibitors during the same period and this shall if necessary be deemed to include newsreels supplied by other renters not parties hereto. (c) If the newsreel to be supplied hereunder shall be required to serve two theatres during the same period the exhibitor shall comply with any notice in writing whereby he is required to deliver or receive the newsreel to and from another theatre which the renter shall specify. All arrangements governing the crossing over of the

newsreel between performances at the two theatres and any costs incidental thereto shall be the responsibility of the exhibitor or exhibitors concerned and no claim shall arise against the renter by virtue of any failure in the aforesaid cross-over arrangements. (d) The stipulated rental payable under the principal agreement shall continue to be paid irrespective of ownership of the film which is supplied to the exhibitor and notwithstanding that the same may not be that stipulated for in the principal agreement or not actually supplied by the renter party hereto. (e) The rental stipulated in the contract may be increased from time to time by such amount as may be authorised by a committee composed of representatives of the News Reel Association and the [Cinematograph Exhibitors Association] to cover: (i) increased cost of film stock and/or (ii) increased expenses incurred by the renter due to the operation of *force majeure*.

2. All disputes arising out of the interpretation or operation of these special conditions shall be referred to the said joint committee of the News Reel Association and the C.E.A. whose decision shall be final and binding on both parties.

3. All the conditions of the principal agreement shall remain in full force and effect in so far as the same are not excluded modified or varied hereby."

The respondent company advance two arguments. They first contend that the modification in the principal agreement effected by the supplemental agreement does not touch their original right to end the whole arrangement by four weeks' notice at any time. This contention has not prevailed in either of the courts below, and I cannot accept it. Clause 1 (a) provides in effect that the principal agreement is to remain in full force and effect till the Cinematograph Film (Control) Order is cancelled and "thereafter" until four weeks' notice is given to terminate it, and this appears to me to rule out the exhibitor's previous right of determination at any time and to substitute a new minimum period for both parties alike. So long as the order of 1943 continues, neither side can give notice to terminate.

The respondent company next contend—and this raises the real difficulty—that "the Cinematograph Film (Control) Order, 1943," in the sense in which that expression is used in the supplemental agreement, was no longer "continuing" when they gave their notice to terminate, but that it had already been "cancelled" within the meaning of cl. 1 (a) of that agreement on Feb. 24, 1946. To appreciate this contention, and to decide whether it should prevail, it is necessary to set out the history of the order and of the authority which from time to time has given to it statutory force.

The Emergency Powers (Defence) Act, 1939, was passed shortly before the outbreak of war, *viz.*, on Aug. 24, 1939. The long title of the Act describes it as:

"An Act to confer on His Majesty certain powers which it is expedient that His Majesty should be enabled to exercise in the present emergency; and to make further provision for purposes connected with the defence of the realm."

By s. 1, it authorised His Majesty by Order in Council to make such defence regulations

"as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community."

Section 11 of the Act provided that it should continue in force for one year only unless, at a time while the Act was in force, an address was presented to His Majesty by each House of Parliament praying that the Act should be continued in force

for a further period of one year, in which case the Act would continue in force for that further period. Before any addresses were presented, the Act of 1939 was amended by the Emergency Powers (Defence) Act, 1940, which increased the initial duration of the Act of 1939 from one to two years. Thereafter it was continued in force, by the presentation of successive addresses each year, until Aug. 24, 1945. By the Emergency Powers (Defence) Act, 1945, the duration of the Act of 1939 was extended by a further six months, *i.e.*, to Feb. 24, 1946, when it finally expired.

In the meantime, on Dec. 10, 1945, a further Act had been passed with the short title of the Supplies and Services (Transitional Powers) Act, 1945. The long title of this Act described it as:

“An Act to provide for the application of certain defence regulations for purposes connected with the maintenance control and regulation of supplies and services, for enabling defence regulations to be made for the control of prices and charges, for the continuation of defence regulations so applied or made during a limited period notwithstanding the expiry of the Emergency Powers (Defence) Acts, 1939 to 1945”, etc.

Section 1 of this Act provided that if it appeared necessary or expedient to His Majesty that any defence regulation to which that section applied should have effect for the purpose of so maintaining, controlling and regulating supplies and services as (*inter alia*) to secure a sufficiency of those essential to the well-being of the community, or their equitable distribution, or their availability at fair prices, then His Majesty might by Order in Council direct that that regulation should have effect by virtue of this Act

“whether or not it is for the time being necessary or expedient for the purposes specified in sub-s. (1) of s. 1 of the Emergency Powers (Defence) Act, 1939.”

This Act further provided that where an Order in Council made under it directed that any “defence regulation” should continue, then

“all orders and other instruments made under the regulation and in force at the date when the Order in Council comes into operation shall continue in force . . .”

The period of duration of the Supplies and Services Act was five years from its passage, with a provision for its continuation in force for a further period of one year if Parliament adopted the necessary addresses.

Defence Regulation 55 was one of the regulations originally made under the Act of 1939. The regulation authorised a competent authority (in the present case it was the Board of Trade)

“so far as appears to that authority to be necessary in the interest of the defence of the realm, or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community [to provide (*inter alia*)] for regulating . . . the . . . acquisition, use or consumption of articles of any description, and, in particular, for controlling the prices at which such articles may be sold . . .”

It was under this power that the Board of Trade made the Cinematograph Film (Control) Order, 1943. By that order,

“(1) On and after Apr. 8, 1943, no person carrying on a business in the course of which cinematograph film . . . is acquired or supplied, shall, except under the authority of a licence granted by the Board of Trade and subject to any limitation or condition attaching thereto, acquire or supply any such film.”

The effect of this order was, therefore, to control the supply of film to renters such as the appellant company and, as the recital of the supplemental agreement recognised, to restrict the consumption of raw film stock. One result of this

scarcity would be to make it more difficult for renters to supply newsreels for the exclusive use of one exhibitor, and another result would be likely to be that the price charged to exhibitors in future contracts would rise. It was, therefore, in the interests of both parties to arrange for a more economical use of newsreels and, at the same time, to secure that existing prices charged to exhibitors should not be increased unreasonably. Both these purposes were secured by the supplemental agreement, the terms of which were settled by the organisations representing the two parties in a common form.

After the supplemental agreement was made, the Cinematograph Film (Control) Order, 1943, continued under the authority of Defence Regulation 55 without material change until it was revoked by the Cinematograph Film (Control) (Revocation) Order, 1950 (S.I., 1950, No. 1469), made on Sept. 4, 1950, which came into force on Oct. 1, 1950. This, of course, is after the date of the writ in this action, or, indeed, of the judgment in the Court of Appeal which is now before the House. But, whereas Defence Regulation 55 derived its force originally from the Emergency Powers (Defence) Act, 1939, after Feb. 24, 1946, its authority rested on the Supplies and Services (Transitional Powers) Act, 1945. The question is whether, in these circumstances, the supplemental agreement, when referring to "the continuance" of the order and to "such time as the said order is cancelled," ought to be construed as referring to a period which ends when the statutory basis on which Defence Regulation 55 rests is thus altered.

This is, primarily at any rate, a question of construction. The respondent company contend that the expression "during the continuance of the Cinematograph Film (Control) Order, 1943," means so long as the order is and remains in force by virtue of the Emergency Powers (Defence) Act, 1939, or any statutory amendment of the enactment thereto, and that the expression "until such time as the said order is cancelled" means until the date when the order ceases to be in force by virtue of the aforesaid authority, or until the date when the same is revoked, whichever shall be the earlier. This restricted construction is quite legitimate if that is, in the circumstances, the correct interpretation of the language used. But it is not the natural meaning of the words used, and I can find no sufficient ground for construing them in this narrow sense. The economic considerations which must have influenced the parties in making the supplemental agreement did not change on Feb. 24, 1946. The restriction in the consumption of raw film stock, which is referred to in the recital, continued after that date, and though a general licence was issued under the order of July 15, 1946, for the acquisition of film used for other purposes, the restriction on film for newsreels continued until the cancellation of the order late in 1950. The parties to the supplemental agreement chose to define the minimum period of its operation by reference to the continuance of the order. What the length of that continuance might be was necessarily uncertain. It might have come to an end while the war was going on if regulation 55 was revoked, or if Parliament had not adopted addresses to continue in force the Emergency Powers (Defence) Act, 1939. In fact, the order continued for five years after the fighting ceased, but all that time there was in operation a restriction on the consumption of raw film stock. And it was throughout the original order, not a new order in the same terms. I agree with SLADE, J., that the restricted meaning sought to be put on the language of the supplemental agreement by the respondent company is not the correct interpretation of the words used.

It is urged, in the alternative, that the supplemental agreement should be regarded as having terminated in February, 1946, owing to the operation of a doctrine "analogous to a frustration." But what is the change of circumstances in 1946 which would cause the "officious bystander" of MACKINNON, L.J.: see *Shirlaw v. Southern Foundries (1926), Ltd.* (1): ([1939] 2 All E.R. 124); to get instant acceptance from both sides if he suggested that, of course, the supplemental agreement would come to an end, although restriction on the consump-

tion of raw film stock continued, if the Cinematograph Film (Control) Order, 1943, and regulations 55 are no longer authorised by the Emergency Powers (Defence) Act, 1939, but gain their validity from a later Act of Parliament? It is by no means clear to me that the parties would have assented. HANNEN, J., in *Baily v. De Crespigny* (2) (L.R. 4 Q.B. 186) observed that:

“To hold a man liable by words, in a sense affixed to them by legislation subsequent to the contract, is to impose on him a contract he never made.”

But here, though the legislative authority behind the words of the order altered, the words themselves mean the same thing throughout. This is not a case in which there has been “a vital change of the law . . . operating on the circumstances” (to use LORD WRIGHT’s phrase in *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp., Ltd.* (3) [1941] 2 All E.R. 185). Here the restriction on the consumption of raw film stock continued and the order creating the restriction was not changed, vitally or at all.

I should have been glad to conclude at this point by expressing agreement with the careful judgment of SLADE, J., but my colleagues who heard this appeal concur with me in the view that it is desirable, to remove the possibility of misunderstanding hereafter, to refer to certain passages in the judgment delivered by DENNING, L.J., where phrases occur which give us some concern. I will quote from the revision of his written judgment. After a reference to the *Constantine* case (3) and to *Denny Mott & Dickson, Ltd. v. James B. Fraser & Co., Ltd.* (4) the judgment proceeds ([1950] 2 All E.R. 395):

“In these frustration cases, as LORD WRIGHT said, the court really exercises a qualifying power—a power to qualify the absolute, literal or wide terms of the contract—in order to do what is just and reasonable in the new situation, and it can now by statute make ancillary orders to that end. Until recently the court only exercised this power when there was a frustrating event, that is a supervening event which struck away the foundations of the contract. In the important decision of *Sir Lindsay Parkinson & Co., Ltd. v. Works & Public Building Comrs.* (5), however, this court exercised a like power when there was no frustrating event, but only an un contemplated turn of events.”

The learned lord justice went on to give his account of the decision in *Parkinson’s* case (5), which he stated was based on *Bush v. Whitehaven Town & Harbour Trustees* (6), which in turn was based on the leading frustration case of *Jackson v. Union Marine Insurance Co., Ltd.* (7). He goes on (*ibid.*):

“The judgments show that, no matter that a contract is framed in words which, taken literally or absolutely, cover what has happened, nevertheless, if the ensuing turn of events was so completely outside the contemplation of the parties that the court is satisfied that the parties, as reasonable people, cannot have intended that the contract should apply to the new situation, then the court will read the words of the contract in a qualified sense; it will restrict them to the circumstances contemplated by the parties; it will not apply them to the un contemplated turn of events, but will do therein what is just and reasonable . . .

This does not mean that the courts no longer insist on the binding force of contracts deliberately made. It only means that they will not allow the words in which they happen to be phrased to become tyrannical masters. The court qualifies the literal meaning of the words so as to bring them into accord with the contemplated scope of the contract. Even if the contract is absolute in its terms, nevertheless, if it is not absolute in intent, it will not be held absolute in effect. The day is gone when we can excuse an unforeseen injustice by saying to the sufferer: ‘It is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself.’ We no longer credit a party with the foresight of a

prophet, or his lawyer with the draftsmanship of a Chalmers. We realise that they have their limitations and make allowances accordingly. It is better thus. The old maxim reminds us that *qui haeret in litera, haeret in cortice*, which, being interpreted means: He who clings to the letter clings to the dry and barren shell, and misses the pith and substance of the matter. We have of late in this court paid heed to this warning, not only in *Parkinson's* case (5), but also in *John Lee & Son (Grantham), Ltd. v. Railway Executive* (8), *Dennis Reed, Ltd. v. Goody* (9), and *Bennett, Walden & Co. v. Wood* (10); and we must pay like heed now."

With all respect to the learning and acumen of the learned lord justice, I do not agree that there has been a recent change as the result of which the courts now exercise a wider power in this regard than they previously used. Apart from the adjustment effected by the Law Reform (Frustrated Contracts) Act, 1943, which is quite irrelevant to the present point, there has been no recent change. The possibility that a fundamental alteration in circumstances may sometimes bring a contract to a premature end has long been recognised. The general principle on which the court acts is well settled: so LORD FINLAY, L.C., stated in *Bank Line, Ltd. v. A. Capel & Co.* (11) ([1919] A.C. 441). It can be found, for example, as LORD PORTER observed in *Denny Mott v. Fraser* (4) ([1944] 1 All E.R. 687), in EARL LOREBURN's judgment in *F. A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.* (12) ([1916] 2 A.C. 403, 404), where it is thus expressed:

"... a court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract ... no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted."

While the principle remains the same, particular applications of it may greatly vary, and theoretical lawyers may debate whether the rule should be regarded as arising from an implied term, or because the basis of the contract no longer exists. In any view, it is a question of construction, as LORD WRIGHT pointed out in *Constantine's* case (3) ([1941] 2 All E.R. 187) and as has been repeatedly asserted by other masters of the law. When the authorities referred to by DENNING, L.J., as justifying the proposition that judges now exercise a wider power in these matters than they did some years ago are examined, it will be found that they do not support any such notion. The decision of the Court of Appeal in *Parkinson's* case (5) does not mark a new departure at all. No extracts from the judgments in that case were quoted by the lord justice on the ground that they were "so valuable that they should be read in full." When they are read in full, however, it seems to me indisputable that what was there decided was merely that, having regard to the terms of the variation deed and to the circumstances which led up to its execution, the deed could not, on its true construction, be interpreted as authorising the Commissioners of Works at their pleasure to order an infinite quantity of extra work, to be executed over an unlimited time, on which the plaintiffs could never make any profit beyond the figure named. ASQUITH, L.J.'s judgment makes it perfectly clear that the only question was this question of construction. He says ([1950] 1 All E.R. 226):

"Where the language of the contract is capable of a literal and wide, but also of a less literal and a more restricted, meaning, all relevant surrounding circumstances can be taken into account in deciding whether the literal or a more limited meaning should be ascribed to it."

COHEN, L.J., reached the same conclusion as a matter of construction, and incidentally expounded *Bush v. Whitehaven Town & Harbour Trustees* (6)—to which DENNING, L.J., also referred as though it embodied some new doctrine—in a way which shows that no novel principle was involved. SINGLETON, L.J., was of the same opinion. In substance, the decision in *Parkinson's* case (5) was that the work that had been executed by the contractors included more than was covered, on its true construction, by the variation deed, and that the cost had, therefore, to be paid for by a *quantum meruit*.

The three other cases referred to in the Court of Appeal's judgment as further illustrations of the expanded doctrine are equally mere applications of established rules of construction. In *Lee v. Railway Executive* (8) DENNING, L.J., himself so explained the decision, preferring "a limited construction" of which the words were capable to the wider interpretation suggested. *Dennis Reed, Ltd. v. Goody* (9) was again merely a case of interpreting the language of a contract: DENNING, L.J., was again a party to the decision and said so. *Bennett, Walden & Co. v. Wood* (10) is also a pure case of construction; the Court of Appeal held that the words "in the event of our securing for you an offer" referred to a firm offer, which by acceptance would give rise to a contractual relationship. None of these three decisions illustrates the exercise of any recent extension of judicial practice.

It is of the utmost importance that the action of a court, when it decides that, in view of a supervening situation the rights and obligations under a contract have automatically ceased, should not be misunderstood. The suggestion that an "uncontemplated turn of events" is enough to enable a court to substitute its notion of what is "just and reasonable" for the contract as it stands, even though there is no "frustrating event," appears to be likely to lead to some misunderstanding. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate—a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point—not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation. When it is said that in such circumstances the court reaches a conclusion which is "just and reasonable": LORD WRIGHT in *Constantine's* case (3) ([1941] 2 All E.R. 186); or one "which justice demands": LORD SUMNER in *Hirji Mulji v. Cheong Yue S.S. Co.* (13) ([1926] A.C. 510); this result is arrived at by putting a just construction on the contract in accordance with an "implication . . . from the presumed common intention of the parties": LORD SUMNER in *Bank Line, Ltd. v. Capel (A.) & Co.* (11) ([1919] A.C. 455). If the decisions in "frustration" cases are regarded as illustrations of the power and duty of a court to put the proper construction on the agreement made between the parties, having regard to the terms in which that agreement is expressed and to the surrounding circumstances in which it was made, including any necessary implication, such decisions are seen to be examples of the general judicial function of interpreting a contract when there is disagreement as to its effect. What distinguishes "frustration" cases is that the interpretation involves the consequence that, in view of what has happened, further performance is automatically ended. This is because the frustrating event (such, for example, as war or prolonged delay) must be regarded as introducing a new situation to which no limit can be put. There are, of course, many other examples where the court has to put an interpretation on the agreement made, not with the result that the contract is brought to an end by frustration, but with the result that the contract goes on and continues to bind the parties according to

its true construction. *Bennett, Walden & Co. v. Wood* (10), quoted by DENNING, L.J., is an obvious example. The advantage of approaching the topic in this way seems to me to be that it makes plain that in all cases alike the question is really at bottom a question of construction. In my opinion, the appeal succeeds and I move that it be allowed with costs here and below.

LORD SIMONDS: My Lords, I have had the advantage of reading the opinion which my noble and learned friend on the Woolsack has just delivered. I agree so fully with it that I shall add only a few words out of respect for the Court of Appeal from whose judgment we are differing. A

The case is one which, as I think, presents little difficulty. There is first a question of construction, *viz.*: Was the respondent company entitled under the terms of the principal and supplementary agreements, read, as they must be read, as one agreement, to give four weeks' notice to determine it? For the reasons given by my learned and noble friend I think that clearly it was not. I do not understand that the Court of Appeal took a different view on this point. B
Secondly, there is a question, which is also a question of construction and nothing else, whether there should be implied in the agreement a term to the effect that it should continue in force for the duration of the emergency contemplated by the Emergency Powers (Defence) Act, 1939, and (negatively) that it should not continue in force when the Cinematograph Film (Control) Order, 1943, no longer had effect by virtue of the provisions of that Act? My Lords, I can only say that, having considered the many authorities in which it has been held legitimate to imply a term in a written contract, I can find none which by its example or its language would justify your Lordships in implying any such term as that which is postulated in the agreement which these parties have made. On the contrary I think that it would be the merest guesswork to do so. And if I had myself to make a guess it would be that the parties intended the agreement to endure so long as the order of 1943 endured, whether or not that order owed its continued existence to the Act of 1939 or some other Act. On this point I regret that I cannot accept the view of the Court of Appeal, though it is not the primary reason for their decision in favour of the respondents. C D

Next, there was the familiar question of frustration. Here, too, I feel no difficulty. It would, in my opinion, be to push the doctrine to unprecedented and extravagant lengths to say that any event has happened which has caused the contract to be frustrated at law. Similar considerations are involved to those which are relevant to the question of an implied term. I would say with respect that I prefer the view expressed by my Lord on the Woolsack in *Constantine's* case (3) as to the basis on which the doctrine is founded to that which found favour with one at least of the noble and learned Lords who took part in *Denny Mott v. Fraser* (4). But it is unnecessary to pursue this matter, for, as I read the judgment of the Court of Appeal, the respondents' success does not rest on the doctrine of frustration. E F

These were the three grounds on which learned counsel for the respondents invited the House to dismiss the appeal—plain construction, implied term, and frustration—and with each of them I have dealt briefly, for it appears to me that the case against the respondents is overwhelming. But it was not on any of these orthodox grounds, as I may call them, that the Court of Appeal founded its judgment. On this part of the case I wish to say explicitly that I concur in every word that has fallen from my noble and learned friend who has just spoken. I hesitate to make any brief comment on the judgment of DENNING, L.J., lest by taking a passage out of its context I should do injustice to the whole. But I must at least dissent from the suggestion of the learned lord justice ([1950] 2 All E.R. 395) that the court, whether it is exercising its function in construing a document or in applying the law of frustration to particular circumstances, "really exercises a qualifying power . . . in order to do what is just and reasonable in the new situation . . ." Nor can I accept the theory, G H

which appears to underlie his judgment, that in recent cases and in *Parkinson's* case (5) in particular there has been some development of this branch of the law which would justify such a proposition as that just cited. It is, no doubt, essential to the life of the common law that its principles should be adapted to meet fresh circumstances and needs. But I respectfully demur to the suggestion that there has recently been, or need be, any change in the well-known principles of construction or (except so far as the recent Act of 1943 provides) in the application of the law of frustration to commercial agreements, and, if indeed, as DENNING, L.J., appears to suggest, such cases as *Lee v. Railway Executive* (8), *Dennis Reed, Ltd. v. Goody* (9), and *Bennett, Walden & Co. v. Wood* (10) illustrate such a change, they would have to be regarded as of doubtful authority. They can, however, be justified on more orthodox grounds. I agree that the appeal should be allowed and the judgment of SLADE, J., restored.

LORD MORTON OF HENRYTON: My Lords, I agree with the opinions which have just been delivered and I do not desire to add any words of my own.

LORD TUCKER: My Lords, I agree that this appeal should be allowed for the reasons which have been stated by my noble and learned friend on the Woolsack. I also desire to express my concurrence in the observations which he has made with regard to the judgment of the Court of Appeal delivered by DENNING, L.J.

Appeal allowed.

Solicitors: *Freshfields* (for British Movietonews, Ltd.); *Sydney Morse & Co.* (for London and District Cinemas, Ltd.)

[*Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.*]

MOBBERLEY AND PERRY, LTD. v. HOLLOWAY.

[HOUSE OF LORDS (Lord Simonds, Lord Goddard, Lord Morton of Henryton, Lord Radcliffe and Lord Tucker), July 3, 26, 1951.]

Workmen's Compensation—Industrial disease—Certificate of disablement given after July 5, 1948—Workman not insured against disease—National Insurance (Industrial Injuries) Act, 1946 (c. 62), s. 89 (1), proviso (a).

The respondent was employed for thirty years up to Oct. 11, 1946, as a hewer of coal. From Oct. 14, 1946 until May 15, 1949, he was employed in the woodworking industry. On Aug. 29, 1949, a medical board certified him as totally incapacitated as from May 17, 1949, by pneumoconiosis due to his employment as a hewer. By s. 89 (1) of the National Insurance (Industrial Injuries) Act, 1946, it is provided that workmen's compensation shall not be payable in respect of any employment on or after the appointed day (July 5, 1948), provided that "(a) [the Workmen's Compensation Acts] shall continue to apply to cases to which they would have applied if this Act had not been passed, being cases where a right to compensation arises or has arisen in respect of employment before the appointed day, except where, in the case of [*inter alia*, pneumoconiosis] the right does not arise before the appointed day and the workman, before it does arise, has been insured under this Act against that disease or injury." The respondent was not insured under the Act of 1946 against pneumoconiosis. On the question whether he was entitled to workmen's compensation,

HELD: as the respondent's right to compensation had arisen in respect of employment before the appointed day, he came within para. (a), and as he was not insured under the Act of 1946 against pneumoconiosis he did not come within the exception to the proviso, and, therefore, the

provisions of the Workmen's Compensation Acts, including those applicable to the functions of the medical boards, continued to apply, and the respondent was entitled to compensation.

Harris v. Rotol, Ltd. ([1950] 1 All E.R. 867), doubted.

Decision of the COURT OF APPEAL ([1950] 2 All E.R. 761), affirmed.

FOR THE NATIONAL INSURANCE (INDUSTRIAL INJURIES) ACT, 1946, s. 89 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 16, p. 893. A

Cases referred to:

(1) *Harris v. Rotol, Ltd.*, [1950] 1 All E.R. 867; [1950] 2 K.B. 573; 41 B.W.C.C. 359; 2nd Digest Supp.

(2) *Hales v. Bolton Leathers, Ltd.*, [1951] 1 All E.R. 643.

APPEAL by the employers from a decision of the Court of Appeal (BUCKNILL, SOMERVELL and DENNING, L.JJ.), dated July 28, 1950, and reported [1950] 2 All E.R. 761, reversing an order of His Honour JUDGE LANGMAN, made at Stourbridge County Court on May 18, 1950, whereby he dismissed a claim by the respondent under the Workmen's Compensation Acts. B

The appellants, in resisting the respondent's claim, relied on the decision of the Court of Appeal in *Harris v. Rotol, Ltd.* (1) and contended that, although the respondent was not insured under the National Insurance (Industrial Injuries) Act, 1946, as the date of his disablement and that of the certificate of the medical board were subsequent to the appointed day under the Act of 1946, the right to compensation did not arise until the certificate was given, and that before it was given the medical board had become *functus officio*. C

Beney, K.C., and *E. G. H. Beresford* for the appellants. D

Paull, K.C., and *A. E. James* for the respondent.

The House took time for consideration.

July 26. The following opinions were read.

LORD SIMONDS: My Lords, by an order made on July 28, 1950, the Court of Appeal set aside an award of His Honour JUDGE LANGMAN made in an arbitration under the Workmen's Compensation Acts, 1925 to 1943, in favour of the appellants and made an award in favour of the respondent, a workman in their employ. From that order the appellants bring the present appeal and once more your Lordships have to consider the meaning and effect of s. 89 of the National Insurance (Industrial Injuries) Act, 1946, which I will call "the Act of 1946." E

The facts proved at the hearing of the arbitration or admitted are as follows: (a) The respondent had for thirty years prior to Oct. 11, 1946, been employed by the appellants in the coal mining industry as a hewer. (b) On Oct. 14, 1946, he obtained employment at the Laurence Cabinet Works, which he retained until May 15, 1949. During such employment he was engaged in stacking timber. (c) He has done no work since May 15, 1949. (d) On Aug. 29, 1949, the medical board appointed under the provisions of the Silicosis and Asbestosis (Medical Arrangements) Schemes, 1931 to 1943, certified that he was totally disabled from pneumoconiosis and that such disablement commenced on May 17, 1949. (e) He was totally incapacitated for work. (f) His average weekly earnings during the twelve months previous to the date of his disablement were £5 10s. Two other relevant dates should be mentioned. On July 26, 1946, the Act of 1946 received the royal assent. July 5, 1948, was the "appointed day" for the relevant purposes of that Act. F

The learned arbitrator accepted the contention then and thereafter advanced by the appellants that both the date of the respondent's disablement and the date of the certificate of the medical board were subsequent to the appointed day, that the right to compensation did not arise until the certificate was given, and that, before it was given, the medical board had become *functus officio*. G

H

In taking this course he purported to follow the earlier decision of the Court of Appeal in *Harris v. Rotol, Ltd.* (1), which it will be necessary for the House to consider. In the case now under appeal the Court of Appeal found it possible to distinguish *Harris v. Rotol, Ltd.* (1) on the ground that in that case the workman was, but in the present case he was not, insured under the Act of 1946. On this I will say something later. Your Lordships are not bound by that authority and will, I think, prefer to consider the matter afresh in the light of your

A recent decision in *Hales v. Bolton Leathers, Ltd.* (2).

My Lords, it is not and could not be denied that the respondent would be entitled to compensation under the Workmen's Compensation Acts if the Act of 1946 had not been passed. The question is whether his right has been taken from him by s. 89 of that Act. The opening words of the section are significant:

B "Workmen's compensation shall not be payable in respect of any employment on or after the appointed day . . ." Here the words "on or after the appointed day" qualify the word "employment." At once the dividing line appears between employment before and after the appointed day and the way is prepared for different treatment if incapacity arises from one or the other. It was plain, however, that incapacity after the appointed day might be the result of employment before it. Accordingly, it was necessary to provide by means of

C a proviso for such a case. This is done in clear enough terms by the opening words of proviso (a) to s. 89 (1). The enactments, *i.e.*, the Workmen's Compensation Acts, are to continue to apply to cases ". . . where a right to compensation arises or has arisen in respect of employment before the appointed day . . ."

Again the words "before the appointed day" qualify "employment." To this proviso, however, there is an exception, necessitated, as was pointed out in

D *Hales v. Bolton Leathers, Ltd.* (2), by the nature of the subject-matter. The right to compensation in the case of a disease or injury prescribed for the purposes of Part IV of the Act, even where it is in respect of employment before the appointed day, is taken away, if, but only if, two conditions are satisfied:—

(a) that the right to compensation does not arise before the appointed day, and

E (b) that the workman, before it does arise, has been insured under the Act against that disease. The emphasis lies on *that* disease. I am in effect repeating what my noble and learned friend, LORD NORMAND, said in *Hales'* case (2) for the purpose of applying his words to the present case. So applying them, I see no valid answer to the respondent's claim. He was admittedly disabled by pneumoconiosis due to employment before the appointed day; his right to

F compensation did not arise before the appointed day, so that he satisfied the first condition; but he was not insured against pneumoconiosis under the Act of 1946, so that he did not satisfy the second condition. He was, therefore, not within the exception to the proviso.

I have said that he was not insured under the Act of 1946. In the arbitration proceedings and in the Court of Appeal this was common ground between the

G parties, nor was anything to the contrary suggested in the appellants' formal Case in this House. At the hearing of the appeal, however, learned counsel sought leave to argue that he was so insured. It was not entirely clear whether this was a question of law or of fact or of mixed law and fact, but your Lordships were unanimous in thinking that the appellants should not at this stage be

H allowed to resile from a position that they had consistently maintained throughout the proceedings. It was urged that in *Hales'* case (2), where a somewhat similar situation arose, such an indulgence had been granted, but in such a matter each case must depend on its own facts and in the present case there appear to be no facts which would justify a departure from the usual procedure of the House.

So far, then, my Lords, there seems to be no answer to the respondent's claim, but, as I have said, the appellants rested their case on the decision of the Court of Appeal in *Harris v. Rotol, Ltd.* (1). In that case a certifying surgeon on Aug. 17, 1948, purporting to act under s. 43 of the Workmen's Compensation

Act, 1925, certified that the plaintiff, a workman, was suffering from dermatitis produced by dust or liquid and that the date of disablement was Feb. 6, 1948. I remind your Lordships that the appointed day for the relevant purposes of the Act of 1946 was July 5, 1948. The workman claimed compensation. The Court of Appeal held (i) that the right to compensation under the Act of 1925 did not arise until the time of the disability or incapacity; (ii) that under s. 43 of the Act of 1925, until a certificate was given, there was no right to compensation; and (iii) that on Aug. 17, 1948, the certifying surgeon was *functus officio* and could not found a right to compensation by giving a certificate. The court, therefore, held that the claim to compensation was barred by s. 89 (1) of the Act of 1946. That this decision left a possible hiatus between compensation under the old Acts and insurance under the Act of 1946 was recognised by the court, a result clearly to be avoided if the language of the Act fairly admits of any other construction. My Lords, I do not find the decision in *Harris v. Rotol, Ltd.* (1) easy to follow. I do not dissent from the view that the right to compensation in such a case arises only when a certificate is given. This flows, I think, from the decision of this House in *Hales'* case (2). With respect, however, I differ from the opinion of the Court of Appeal, which is really the foundation of its decision, that, where in the case of an industrial disease no certificate has been given before the appointed day, that is an end of the matter—the certifying surgeon is *functus officio*, he cannot give a certificate, and without a certificate a right to compensation cannot arise. As I read the judgment of COHEN, L.J. (in which the other members of the court concurred), this was a proposition of general application and it was so treated by the learned arbitrator in the present case. It was not expressed to depend on the fact that the workman was insured under the Act of 1946, of which there was no evidence. If the judgment was intended to be so limited, I would reserve my opinion on it. If, however, it was intended to cover a case such as the present one, where the workman is not insured under the Act of 1946 and his disability is in respect of employment before the appointed day, I must dissent from it. I see no ground for saying that in such a case the certifying surgeon is *functus officio*. It is clear that he is not for all purposes *functus officio*, see, e.g., the Pneumoconiosis (Medical Arrangements) (Transitional) Regulations, 1948 (S.I., 1948, No. 1396), and it appears to me that, where a workman suffering from a disability is not insured under the Act of 1946 so as to obtain benefit thereunder, there are no provisions of the Act which deny the workman recourse to him for the purpose of obtaining the proper certificate. In these circumstances I move that this appeal be dismissed with costs.

My Lords, my noble and learned friend LORD RADCLIFFE who is unable to be here today, has asked me to say that he concurs in my reasons and conclusion.

LORD GODDARD (read by LORD MORTON OF HENRYTON): My Lords, both in the county court and in the Court of Appeal this case was conducted on the footing that the respondent was not insured under the National Insurance (Industrial Injuries) Act, 1946, against pneumoconiosis, the disease from which he was found to be suffering, nor was the contrary suggested in the appellants' printed Case. Accordingly, your Lordships held that this appeal must proceed on the same state of facts as was assumed or admitted in the courts below. Consequently it is clear that this case cannot fall within the exception to the proviso to s. 89 (1) of the Act of 1946 since one of the conditions necessary to bring it within the exception has not been fulfilled. That section provides that workmen's compensation shall not be payable in respect of any employment on or after the appointed day (July 5, 1948) and repeals as from that day the relevant enactments, but the proviso, subject to the exception, retains their operation in respect of cases where the right to compensation arises or has arisen in respect of employment before the appointed day. This House held in

Hales v. Bolton Leathers, Ltd. (2) that in the first part of the proviso the words "before the appointed day" referred to and qualified the words "in respect of employment." Accordingly, as in the present case the workman had contracted the disease in the course of employment before the appointed day his right to compensation is preserved by the proviso.

A The decision of the Court of Appeal in *Harris v. Rotol, Ltd.* (1), was given before this House had decided *Hales' case* (2). Had it followed, instead of pre-
ceding, *Hales' case* (2) I think the decision might have been different unless it
B be the fact, as SOMERVELL, L.J., thought, that it was assumed throughout that
the workman in that case was insured against dermatitis so that his claim was
barred by the exception to the proviso. I cannot agree that the medical boards
are *functi officio* for all purposes by reason of the repeal of the enactments
C contained in the opening words of s. 89 (1). The proviso continues the application
of the statutes to cases where the right arises or has arisen in respect of employ-
ment before their repeal, and, accordingly, the medical boards have both the right
and the duty of performing their functions in respect of those cases. The object
of the proviso and the exception seems to be that a workman is not to receive
both compensation and insurance payments in respect of the same disease or
injury. His right to compensation arises when the certificate is given and if
at that time he has become an insured person in respect of the disease or injury
for which it is given he is entitled to payments under the Act of 1946 but not
to workman's compensation. I agree that this appeal should be dismissed.

LORD MORTON OF HENRYTON: My Lords, I concur.

D **LORD TUCKER:** My Lords, this appeal has proceeded on the basis that
it was accepted throughout the proceedings below that the workman was not
insured under the National Insurance (Industrial Injuries) Act, 1946. It follows
that the case does not fall within the exception to proviso (a) to s. 89 (1) of the
last-mentioned Act. The only point open to the appellants was, therefore,
E whether the opening words of the proviso were applicable. Section 89 (1) begins
by enacting that workmen's compensation shall not be payable "in respect
of any employment on or after the appointed day" and that the enactments
set out in sched. IX be repealed. Then follows the proviso:

F "Provided that—(a) the said enactments shall continue to apply to cases
to which they would have applied if this Act had not been passed, being cases
where a right to compensation arises or has arisen in respect of employment
before the appointed day . . . "

I think it is clear from the opening words and from the language of the proviso
that to preserve the right to compensation the employment in respect to which
the right arises must have existed before the appointed day. If it did, as in the
present case, it follows that the machinery of the Workmen's Compensation
Acts, including the operations of the medical boards, must continue to function
G so far as is necessary to deal with such cases. This accords with the views ex-
pressed in your Lordships' House in *Hales v. Bolton Leathers, Ltd.* (2) and with the
decision of the Court of Appeal in the present case. On the other hand, the
decision of the Court of Appeal in *Harris v. Rotol, Ltd.* (1) appears to me to
conflict with *Hales' case* (2) and your Lordships' decision in the present appeal,
and must, I think, be regarded as doubtful authority. I would, accordingly,
H dismiss this appeal.

Appeal dismissed.

Solicitors: *E. P. Rugg & Co.*, agents for *Buller, Jeffries & Kenshole*,
Birmingham (for the appellants); *Stafford Clark & Co.*, agents for *Hooper &*
Fairbairn, Dudley (for the respondent).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

FRIENDS PROVIDENT AND CENTURY LIFE OFFICE AND
ANOTHER *v.* INVESTMENT TRUST CORPORATION, LTD.
AND OTHERS.

[HOUSE OF LORDS (Lord Simonds, Lord Goddard, Lord Morton of Henryton, Lord Radcliffe and Lord Tucker), July 10, 26, 1951.]

Company—Dividend—Computation—Payment of dividend tax free up to 6s. in the pound. A

The articles of a company provided: "The 'B' cumulative preference shares confer the right to a fixed cumulative preferential dividend at such rate that after deduction of income tax thereon at the current rate for the time being (irrespective of any allowance or rebate in the case of a particular shareholder) the amount remaining shall be the clear sum of six per cent. per annum on the capital paid up thereon less the amount of any income tax for the time being payable in excess of 6s. in the pound computed on the gross sum of six per cent. per annum on such capital . . ." On the construction of this provision, B

HELD: for any year in which the rate of income tax was more than 6s. in the pound the deduction in respect of the excess ought to be calculated on the amount of £6 per centum on the capital paid up and not on that amount grossed up at 6s. in the pound, so that for a year in which the rate of income tax was 9s. in the pound the net amount of the dividend on £100 'B' cumulative preference shares (fully paid up) would be £6 less 18s. or £5 2s. C

AS TO PAYMENT OF DIVIDENDS FREE OF TAX, see HALSBURY, Hailsham Edn., Vol. 17, pp. 250, 251, paras. 507, 508; and FOR CASES, see DIGEST, Vol. 28, p. 110, No. 680, and Digest Supp. D

Case referred to:

(1) *Austin Motor Co., Ltd. v. British Steamship Investment Trust, Ltd.*, [1950] 1 All E.R. 632; 2nd Digest Supp. E

APPEAL by the Friends Provident and Century Life Office from an order of the Court of Appeal dated Oct. 25, 1950, reversing an order of VAISEY, J., dated Feb. 23, 1949.

VAISEY, J., held that, in computing the net amount of the dividend payable by Messrs. Godfrey Phillips, Ltd., pursuant to their articles of association, to holders of "B" cumulative preference shares of that company, it was proper to assess the amount of income tax deductible in excess of 6s. in the pound on the amount of the dividend (calculated at six per cent.) grossed up at 6s. in the pound. The Court of Appeal held that the amount of excess income tax ought to be calculated on the amount of the dividend at six per cent., and not on the grossed up amount. F

S. Pascoe Hayward, K.C., J. H. Stamp and K. B. Suenson-Taylor for the Friends Provident and Century Life Office. G

Cyril King, K.C., and Instone for the Investment Trust Corporation, Ltd.
R. J. T. Gibson for Godfrey Phillips, Ltd.

The House took time for consideration.

July 26. The following opinions were read. H

LORD SIMONDS: My Lords, this appeal raises a short question of construction of one of the articles of association of the respondents, Godfrey Phillips, Ltd., whom I will call "the company." The question relates to the dividend rights of the "B" cumulative preference shareholders of the company, of whom the respondent, Investment Trust Corporation, Ltd., is one.

The company was incorporated in December, 1908, under the Companies Acts, 1862 to 1907, as a company limited by shares, and is now one of the leading

undertakings engaged in the tobacco industry in the United Kingdom. The present issued share capital of the company is £2,365,990, divided into two hundred and fifty thousand cumulative preference shares of £1 each, three hundred thousand "B" cumulative preference shares of £1 each, three hundred thousand "C" cumulative preference shares of £1 each, £1,431,827 ordinary stock, and 841,630 ordinary shares of 2s. each. All the "B" cumulative preference shares are fully paid up. The ordinary shares and stock rank *pari passu* in all respects. The article which defines the rights in regard to dividend of the "B" cumulative preference shares is art. 5 (A) (ii) and it reads as follows:

"The 'B' cumulative preference shares confer the right to a fixed cumulative preferential dividend at such rate that after deduction of income tax thereon at the current rate for the time being (irrespective of any allowance or rebate in the case of a particular shareholder) the amount remaining shall be the clear sum of six per cent. per annum on the capital paid up thereon less the amount of any income tax for the time being payable in excess of 6s. in the pound computed on the gross sum of six per cent. per annum on such capital, such dividend to rank next after the dividend payable in respect of the said two hundred and fifty thousand cumulative preference shares and in priority to the dividend on the said three hundred thousand 'C' cumulative preference shares and also on the ordinary shares for the time being of the company, but no further right to participate in the profits of the company."

Until 1939 the standard rate of income tax never exceeded 6s. in the pound, but since that year it has always done so. From 1939 to 1945 the company, without any objection being raised, calculated the dividend on these shares in a manner which can conveniently be set out in tabular form (the assumption being that the standard rate of income tax is 9s. in the pound):

					£	s.	d.
	Six per cent. on one hundred shares of £1 each	...	...	...	6	0	0
E	Equivalent to gross (at 6s. in the pound)	...	...	...	8	11	5
	Less income tax at 6s. in the pound	...	...	...	2	11	5
					6	0	0
	Less income tax at 3s. in the pound calculated on the gross						
	sum of £8 11s. 5d.	...	...	...	1	5	8
F					4	14	4

It will be observed that the relevant words in the article "computed on the gross sum of six per cent. per annum on such capital" are treated as a direction that the amount to be deducted from "the clear sum of six per cent." should be the tax at the excess rate calculated on the actual gross amount of the dividend required to produce a net dividend of six per cent. after deduction of tax. I will refer to this method of calculation as "method A."

In 1948 the correctness of this method was challenged by the respondent corporation, and, accordingly, the company instituted proceedings by way of originating summons in the Chancery Division for the determination of the question. In these proceedings the company was plaintiff and the present appellants and the respondent corporation were defendants. On Feb. 23, 1949, VAISEY, J., made an order affirming the practice of the company and in effect approving method A. The learned judge gave no formal judgment and the grounds of his decision are not known. There was not at first any appeal from his order, but, no representation order having been made, only the parties to the proceedings were bound. But, presumably, as a result of attention being thus called to the ambiguity of such provisions, another company, the Austin Motor

Co., Ltd., instituted proceedings for the construction of a provision in its articles which closely resembled that of the company. This matter coming before WYNN-PARRY, J., on Nov. 9, 1949, that learned judge felt himself constrained to adopt the same construction as that given by VAISEY, J. An appeal was, however, taken in the Austin motor case and on Feb. 15, 1950, the Court of Appeal (SIR RAYMOND EVERSHED, M.R., and SOMERVELL and JENKINS, L.JJ.) reversed [*Austin Motor Co., Ltd. v. British Steamship Investment Trust, Ltd.* (1)] the decision of WYNN-PARRY, J., holding that the rate of dividend should be calculated in a manner which I will again set out in tabular form and will call "method B":

	£	s.	d.
Six per cent. on one hundred shares of £1 each	6	0	0
Less income tax at 3s. in the pound, to be borne by the shareholders, and being the excess of the standard rate of tax over the rate of 6s. in the pound calculated on £6		18	0
	5	2	0

It will be observed that this net sum of £5 2s. is equivalent to a gross amount of £9 5s. 5d. after deduction of £4 3s. 5d., being income tax at 9s. in the pound.

It will be clear to your Lordships that, in view of the observations by WYNN-PARRY, J., and by the Court of Appeal on the essential similarity of the two articles and also of the fact that no representation order had been made in the present proceedings, the company was left in an embarrassing situation. In these circumstances, notwithstanding that time for appeal had expired, the respondent corporation applied for, and obtained, leave to appeal from the order of VAISEY, J. On Oct. 25, 1950, the Court of Appeal (SIR RAYMOND EVERSHED, M.R., and ASQUITH and JENKINS, L.JJ.), heard the appeal and, reversing the order of VAISEY, J., adopted method B as the right method of calculating the dividend. Learned counsel for the present appellants, faced with the decision of the Court of Appeal in the *Austin* case (1), limited himself in that court to an attempt to distinguish the two cases, a task in which he was bound to fail and failed. In the meantime proper representation orders were made so that all shareholders of the various classes were bound. The appellants now appeal to this House, and they do so without the constraint of the decision in the *Austin* case (1), which does not bind your Lordships. But, my Lords, in my opinion, their appeal cannot succeed. The question is one of construction of this particular article, and, as it is possible that even slight differences of language may lead to a different result, I do not propose to travel outside the language that we have before us.

My Lords, I think it would be quite wrong to approach the construction of this article with any pre-conceived notion that the draftsmen aimed at achieving a result which in popular language could be described as providing for a dividend tax free up to a certain rate of standard income tax. Nor am I at all sure in what words I should seek to attain that end. The question is: What is the meaning of the words the draftsman has in fact used? The vital words are "computed on the gross sum of six per cent. per annum on such capital" and of these words it is the word "gross" on which the argument for the appellants is founded. It is something different, it was urged, from "the sum" *simpliciter*, and it is used in contrast with "the clear sum of six per cent. per annum" which is to be found a little earlier in the clause, and, if it is something different from the sum of six per cent. per annum *simpliciter*, what can it mean except "the gross sum corresponding at the rate of tax for the time being in force with a clear six per cent. per annum dividend on such capital" or some other formula which indicates the result of a process in recent years dignified by the description of grossing-up?

My Lords, I do not find it possible to accept this argument. I should agree that the word "gross" is unnecessary, but I do not think it is inappropriate in its context. For it serves to indicate that, whereas the "clear" sum, referred to earlier in the clause, was a sum reached after a deduction had been made, the "gross" sum was a sum from which deduction had not been made nor was to be made. In its context it means no more than "the sum", which, indeed, most gross sums are. Nor, my Lords, if I felt impelled to give some other content to the word, should I have any confidence what that content should be. It is not an easy conception that is involved in what I have called "grossing up," and, if I am to speculate what words are to be used to expand the word "gross" so as to give effect to that conception whatever the rate of income tax may from time to time be, I shall be sure of only one thing, and that is that I am not construing the words the draftsman has used but guessing at those he might have used. I prefer to rest on what I think is the natural and intelligible explanation of the use of the word "gross" and construe it in the same way as the Court of Appeal. Certain other points were taken on the language of the article, but they were straws in the wind which were blown away in the course of debate and do not merit further discussion. The company intervened in the proceedings before the House only to intimate its willingness to bear the costs of all parties as between solicitor and client. I move that the appeal be dismissed and the costs provided for accordingly.

LORD SIMONDS: My Lords, my noble and learned friends **LORD GODDARD** and **LORD RADCLIFFE**, who are unable to be present here today, have asked me to express their concurrence in the opinion that I have just delivered.

LORD MORTON OF HENRYTON: My Lords, the question arising for decision on this appeal is: What are the rights as to dividend of the holders of "B" cumulative preference shares in the respondent company, Godfrey Phillips, Ltd., in any year in which the standard rate of income tax exceeds 6s. in the pound? The answer depends on the true construction of art. 5 (A) (ii) of the articles of that company, and counsel on both sides are agreed that no other part of the company's memorandum and articles throws any light on the matter. Article 5 is in the following terms:

"The capital of the company is now £2,000,000, divided into two hundred and fifty thousand cumulative preference shares of £1 each, three hundred thousand 'B' cumulative preference shares of £1 each, three hundred thousand 'C' cumulative preference shares of £1 each, nine hundred and fifty thousand ordinary shares of £1 each, and two million ordinary shares of 2s. each. The said shares confer upon the respective holders thereof the following rights, namely: (A) As regards dividend— . . . (ii) The 'B' cumulative preference shares confer the right to a fixed cumulative preferential dividend at such rate that after deduction of income tax thereon at the current rate for the time being (irrespective of any allowance or rebate in the case of a particular shareholder) the amount remaining shall be the clear sum of six per cent. per annum on the capital paid up thereon less the amount of any income tax for the time being payable in excess of 6s. in the pound computed on the gross sum of six per cent. per annum on such capital, such dividend to rank next after the dividend payable in respect of the said two hundred and fifty thousand cumulative preference shares and in priority to the dividend on the said three hundred thousand 'C' cumulative preference shares and also on the ordinary shares for the time being of the company, but no further right to participate in the profits of the company."

The ordinary capital has been altered somewhat since this article was adopted, but that fact is immaterial for the present purpose. The first part of the article,

ending with the word "thereon" raises no difficulty of construction, but differences have arisen between the holders of "B" cumulative preference shares (represented by the first respondent), on the one hand, and the holders of "C" cumulative preference shares and ordinary shares (represented respectively by the first and second appellants), on the other hand, as to the effect of the words

"less the amount of income tax for the time being payable in excess of 6s. in the pound computed on the gross sum of six per cent. per annum on such capital."

The first respondent's contention is a simple one, which can best be stated by taking as an example a year in which the standard rate of income tax is 9s. in the pound. In such a year, it is said, the first part of the article would entitle a holder of one hundred "B" cumulative preference shares of £1 each to receive the sum of £6, that being "the clear sum of six per cent. per annum on the capital paid up thereon." The later part of the clause would then operate to reduce the sum receivable by 3s. in the pound, being the amount of income tax for the time being payable in excess of 6s. in the pound, computed on the sum of six per cent. per annum on such capital. The shareholder would, therefore, receive a sum of £6 less 18s. or £5 2s. in that year.

My Lords, if the word "gross" had not occurred in the passage now under discussion, there could be no doubt that the contention just set out would be correct. It would correspond exactly with the language of the article. It is said, however, by counsel for the appellants that the word "gross" is of very great importance and they rely especially on the contrast between the words "the clear sum of six per cent. per annum on the capital paid up thereon" in the first part of the article and the words "computed on the gross sum of six per cent. per annum on such capital." They point out that, if the first respondent's argument is correct, these two sums are arithmetically the same, and they contend that the draftsman of the article cannot possibly have used two different words to denote the same sum. On this foundation they have built up a somewhat complicated argument which really amounts to this, that the words "the gross sum of six per cent. per annum on such capital" must be read as meaning what they describe as a "grossed-up" sum, that is, "such a sum as after deduction of tax at the rate of 6s. in the pound will produce a net sum of six per cent. per annum on such capital."

My Lords, in my view, there are three reasons why this contention cannot succeed. In the first place, I do not think that the simple words used in the article are capable of the construction sought to be placed on them by the appellants. In the second place, even if the article could be read as referring to a "grossed-up" sum, I cannot find in the article any indication of the rate of tax which is to be taken for the purpose of the "grossing-up." In the third place, I think that the contrast between the words "clear sum" in the first part of the clause and the words "gross sum" in the latter part is capable of a simple explanation. In the first part of the clause, what is contemplated is a sum which will remain after deduction of income tax at the current rate from a larger sum. Such a sum would naturally be described as a "clear sum." In the latter part of the clause, what is contemplated is a sum from which income tax at a certain rate is to be deducted, and it is not inappropriate to describe such a sum as a "gross" sum. I would dismiss the appeal.

Your Lordships were informed that the second respondent desired a decision on the question in issue and had offered to pay the costs of all parties to this appeal, to be taxed as between solicitor and client. I think that an order should be made in these terms.

LORD TUCKER: My Lords, I concur.

Solicitors: *Gouldens* (for all parties).

Appeal dismissed.

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

COX v. STINTON.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Devlin, JJ.), June 21, 1951.]

Criminal Law—Obscene publications—Destruction—Limitation of time—Representations “otherwise published”—Photographic negatives not intended for sale—Positives sold—Obscene Publications Act, 1857 (c. 83), s. 1.

A On Sept. 23, 1949, a complaint was made on oath by the respondent, an inspector of police, under s. 1 of the Obscene Publications Act, 1857, stating that he had reason to believe that certain obscene representations were kept in the appellant's premises. The justices issued a warrant authorising the respondent to enter the premises, which he did on the following day when he seized a large number of obscene photographs and negatives.

B On July 5, 1950, on a second complaint by the respondent the justices issued a summons to the appellant calling on him to show cause why these photographs and negatives should not be destroyed, and subsequently they ordered the destruction of the photographs and negatives. The appellant contended that the proceedings were out of time because the second complaint had not been made within six months from the time

C when the matter of complaint arose, as required by s. 11 of the Summary Jurisdiction Act, 1848. He further contended that the negatives were incapable of being made the subject of a destruction order.

HELD: (i) s. 11 of the Act of 1848 did not apply to proceedings under the Act of 1857, but *semble*, a summons under the latter Act must be issued within a reasonable time after the complaint and execution of the warrant.

D (ii) photographic negatives, although not intended for sale, were “representations” which were “otherwise published,” within the meaning of s. 1 of the Act of 1857, by the publication of the positives, and so were liable to seizure and destruction.

E *Per curiam*: Only one complaint need be made to a court of summary jurisdiction in a proceeding under s. 1 of the Obscene Publications Act, 1857, *viz.*, the complaint which is made to support the application for a warrant to enter and search. There is no need (as appears to have been done in this case) for a further complaint to be laid as a preliminary to the court's issuing a summons calling on the occupier of the premises entered to show cause why the articles seized should not be destroyed.

F FOR THE OBSCENE PUBLICATIONS ACT, 1857, s. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 5, p. 721; and FOR THE SUMMARY JURISDICTION ACT, 1848, s. 11, see *ibid.*, Vol. 14, p. 781.

CASE STATED by Middlesex justices.

G On Sept. 23, 1949, at a court of summary jurisdiction sitting at Uxbridge a complaint was made by the respondent, a chief inspector of the Metropolitan Police, under the Obscene Publications Act, 1857, against the appellant. The respondent stated that he had reason to believe and did believe that divers obscene representations were kept for the purpose of distribution at premises at 4, Cleveland Road, Uxbridge, occupied by the appellant, and that during 1948 and 1949 sixteen obscene articles, produced, had been distributed to the Leon Publishing Co. and Val Ray Studios at 792 Harrow Road, London, from those premises.

H Being satisfied that the sixteen articles were of such a character that their publication would be a misdemeanour, the justices issued a special warrant authorising the respondent to enter the premises and seize all obscene representations thereon and bring them before the justices. On July 5, 1950, a further complaint was made by the respondent to the justices against the appellant stating that the respondent had entered the premises in pursuance of the special warrant on Sept. 24, 1949, and Feb. 22, 1950, and seized certain obscene photographs and negatives kept there for purposes of sale and gain,

of which some were brought before the justices. The respondent had, in fact, seized 445 of the photographs on Sept. 24, 1949, and entered into an agreement with the appellant under which all the remaining photographs and negatives found on the premises should remain there until the respondent could make convenient arrangements for their removal. He had removed the remaining 3,834 photographs and 5,900 negatives on Feb. 22, 1950. The appellant was summoned to appear before the justices on July 10, 1950, to show cause why 1,845 obscene photographs and 4,729 obscene negatives seized should not be destroyed. The complaint was heard on Aug. 1, 1950, Sept. 29, 1950, and Jan. 29, 1951. The appellant contended: (i) that the warrant was executed on Sept. 24, 1949; that the seizure of all the photographs, including those left with the appellant, was effected on that day; and that the time prescribed by the Summary Jurisdiction Act, 1848, s. 11, for proceedings to be instituted commenced to run on that date, and, accordingly, the summons issued on July 5, 1950, was out of time; and (ii) that the negatives were incapable of being made the subject of a destruction order because there was no intention of distributing them and no evidence that they had been distributed. The respondent contended that all the photographs and negatives were one matter and that, as the seizure was not completed until Feb. 22, the summons of July 5, 1950, was in time; and that a negative was "otherwise published" by the sale of photographs printed from it and so was within the ambit of s. 1 of the Obscene Publications Act, 1857.

The justices held: (i) that the warrant was executed and all the photographs and negatives were seized on Sept. 24, 1949, and that the matter of complaint arose after a reasonable time had elapsed after seizure to allow for the examination of the photographs and negatives, from which time the limit prescribed by s. 11 of the Summary Jurisdiction Act, 1848, began to run; (ii) that the negatives were representations "otherwise published" within the meaning of s. 1 of the Act of 1857 and so were within the ambit of the section. They ordered that 1,170 photographs and 3,569 negatives should be destroyed.

Collard for the appellant.

M. J. H. Turner for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Middlesex arising out of proceedings taken under the Obscene Publications Act, 1857, against the appellant, who makes a living out of producing and selling obscene photographs.

On Sept. 23, 1949, a complaint was made under the Act by the respondent, a chief inspector of the Metropolitan Police, stating that

"he had reason to believe and did believe that divers obscene books, papers, writings, prints, pictures, drawings and other obscene representations were kept in certain premises situate at 4, Cleveland Road, Uxbridge . . . for the purpose of distribution, and that the appellant was the occupier of the said premises."

The justices issued their warrant under the Act authorising the inspector to enter the premises, by force if necessary, and search for these articles. On Sept. 24 the police entered and searched the premises and they took away 445 photographs. The appellant showed the respondent a room full of boxes containing half-plate glass negatives, which the police seized, but which the respondent allowed to remain on the premises on the appellant's agreeing that they should not be removed. The police did not go back to the premises till Feb. 22, 1950, when they took away the remaining photographs and negatives amounting to approximately 5,900 negatives and 3,834 photographs. On July 5, 1950, a complaint was laid before the justices, alleging that

"on Sept. 24, 1949, and on Feb. 22, 1950, by virtue of the special warrant issued pursuant to the Obscene Publications Act, 1857, [the respondent]

duly entered the dwelling-house at 4, Cleveland Road, Uxbridge, aforesaid . . . and then and there had found and seized certain obscene photographs and negatives kept for the purpose of sale and gain."

A summons was duly issued to the appellant calling on him to show cause why the said obscene photographs and negatives should not be destroyed. On Aug. 1 and Sept. 29, 1950, and Jan. 29, 1951, the matter came before the justices who ordered the destruction of a large number of photographs and negatives.

The appellant contends that the latter proceedings were out of time, because they ought to have been commenced within six months of the time when the matter of complaint arose. In my opinion, there is no time limit imposed in relation to offences under the Act of 1857. The Summary Jurisdiction Act, 1848, was intended to codify and regularise the enactments relating to summary jurisdiction which had previously been passed by Parliament, none of them setting out any rules of procedure. Section 11 provides:

" . . . In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

In my opinion, the Obscene Publications Act, 1857, provides its own procedure and is a complete code in itself. It is different from any other class of proceeding coming before justices because, although justices make an order for destruction—and, indeed, the only other order for destruction they can make is one for the destruction of instruments for gaming under the Gaming Act, 1845—no offence is created by the Act of 1857. Publishing obscene matter is a misdemeanour at common law, and the Act was intended, not as an instrument of punishment, but as preventive legislation—to give the authorities the power of seizing and destroying obscene publications before they were distributed. If any distribution had taken place, the person distributing them could, no doubt, have been indicted for a common law nuisance.

Section 1 of the Act of 1857 provides:

" It shall be lawful for any metropolitan police magistrate or other stipendiary magistrate, or for any two justices of the peace, upon complaint made before him or them upon oath that the complainant has reason to believe, and does believe, that any obscene books, papers, writings, prints, pictures, drawings, or other representations are kept in any house, shop, room, or other place within the limits of the jurisdiction of any such magistrate or justices, for the purpose of sale or distribution, exhibition for purposes of gain, lending upon hire, or being otherwise published for purposes of gain, which complainant shall also state upon oath that one or more articles of the like character have been sold, distributed, exhibited, lent, or otherwise published as aforesaid, at or in connection with such place, so as to satisfy such magistrate or justices that the belief of the said complainant is well founded, and upon such magistrate or justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be a misdemeanour, and proper to be prosecuted as such, to give authority by special warrant to any constable or police officer into such house, shop, room, or other place, with such assistance as may be necessary, to enter in the day-time, and, if necessary, to use force, by breaking open doors or otherwise, and to search for and seize all such books, papers, writings, prints, pictures, drawings, or other representations as aforesaid found in such house, shop, room, or other place, and to carry all the articles so seized before

the magistrate or justices issuing the said warrant, or some other magistrate or justices exercising the same jurisdiction; and such magistrate or justices shall thereupon issue a summons calling upon the occupier of the house or other place which may have been so entered by virtue of the said warrant to appear within seven days before such police stipendiary magistrate or any two justices in petty sessions for the district, to show cause why the articles so seized should not be destroyed . . .”

The proceedings are initiated by an application for a special warrant by means of a complaint. That this is a special procedure is shown by the fact that, although in the ordinary way complaints are not made on oath, they are required to be so made under this Act. When the warrant has been granted, the police can go to the premises and seize what they find, and they must bring what they seize before the justices who are required to issue their summons. The Act does not require the justices at that stage to hear a complaint. It is clear that s. 11 of the Summary Jurisdiction Act, 1848, does not apply and that no limitation can be pleaded. It may be that, when the goods were brought before them, if the justices thought that there had been such an unexplained or unreasonable delay as to be prejudicial to the appellant, they would be entitled in their discretion to refuse to issue a summons, but here the justices have found that there has not been any unreasonable delay.

A further point was raised by the appellant which, if we had to give effect to it, would largely nullify the provisions of this Act, because the object of the Act is to prevent the dissemination of these obscene publications. It is said that, while the police could seize and the justices could order the destruction of, the photographs, they could not order the destruction of the negatives. If that is correct it would leave the appellant in possession of his means of reproducing these obscene photographs, and it would mean that there would have to be search after search of his house. In my opinion, there is no ground for that contention. Although the actual negative may not be sold or distributed or lent within the meaning of s. 1 of the Act of 1857, it is, in my view, “otherwise published” when the picture that is taken from it is published, because publication of the positive is publication of the negative. The negative has the photograph on it, and is published by distributing positives. That seems to me to be a matter of common sense. There is no ground for saying that these negatives were not matter that was “otherwise published.” They are in themselves pictures, and are pictures kept to be published, as the justices have found, for sale or gain. For these reasons, in my opinion, both points fail, and this appeal is dismissed with costs.

HILBERY, J.: I am of the same opinion.

DEVLIN, J.: I agree. I wish only to add that the reasons which my Lord has given on the first point, with which I agree, are not the reasons given by the justices. I think they misconceived the point which they had to determine. They thought it was necessary under s. 1 of the Act of 1857 that before the summons calling on the appellant to show cause why these photographs should not be destroyed should be issued there should be a complaint, and they addressed themselves to the question on the assumption that s. 11 of the Act of 1848 applied to the question whether that complaint was within time or not. For the reasons my Lord has given there is no necessity for a further complaint before the summons to show cause is issued. Counsel for the appellant put the point very well when he contended that it was implicit in the word “summons” that a complaint must immediately precede it, but I do not think that that construction can be put on this section. I should not like it to be thought, however—and, indeed, my Lord has already dealt with this point—that it is open to the police or other authorities to take any amount of time they want over this type of procedure merely because the statutory time limit does not

apply. The warrant was issued on Sept. 23, and the summons to show cause was not issued until July 5. That interval of time has, to some extent, been explained by the Case, but the Act of 1857 does, I think, contemplate that the acts which are set out in s. 1 shall follow one another at any rate within a reasonable time, and, in particular, the duty to carry all the articles so seized before the justice does not mean that that can be done with any amount of delay which the police like to impose. If there were unreasonable delay, but the justices thought it right to issue a summons, it might well be that the appellant would have some cause of complaint, but that is not the point we are asked to decide in this case and I need say no more than that, if the construction of that part of the section ever does arise, I should want to deal with it.

Appeal dismissed.

Solicitors: *Seifert, Sedley & Co.* (for the appellant); *Director of Public Prosecutions* (for the respondent).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

BRITISH MOTOR TRADE ASSOCIATION v. GILBERT.

[CHANCERY DIVISION (Danckwerts, J.), July 24, 1951.]

Trade—Covenant in restraint of trade—Covenant not to re-sell motor car within two years—Breach—Measure of damages.

On Jan. 2, 1951, the defendant purchased a new motor car for £1,263 3s. 11d. and entered into a deed of covenant with the plaintiffs and the dealer which provided, *inter alia*: “1. The covenantor hereby covenants with the [plaintiffs] and (as a separate covenant) with the dealer that in the event of the said vehicle being delivered to him he will not during the period of two years from the date of such delivery or of first registration under the Road Vehicles Registration and Licensing Regulations (of which he agrees to give full particulars to the [plaintiffs] in the case of a chassis) whichever is the later, without the consent of the [plaintiffs] such consent not to be unreasonably withheld, use the said vehicle or permit the same to be used for any purpose whatever other than for his private, professional or trade purposes so that (without prejudice to the generality of the foregoing) he will not during the said period sell, give, pledge, hire (whether by way of hire purchase or otherwise) or otherwise deal with the said vehicle in any manner whereby the property therein is or may be transferred to any other person. 2. The covenantor further covenants with the [plaintiffs] that if during the said period of two years he wishes to obtain such consent he will apply therefor in writing and at the same time will offer the said vehicle for sale to the [plaintiffs] who shall have the irrevocable right (to be exercised at their option) of purchasing the same or nominating such person as they may select to purchase the same at the original list price plus purchase tax less such sum as is reasonable in respect of wear and damage prior to delivery up; if not mutually agreed such sum to be settled by arbitration. And the covenantor further covenants that upon making such application he will pay to the [plaintiffs] the sum of two guineas to cover the expenses of the [plaintiffs] in relation to such application.” Prior to Feb. 9, 1951, the defendant sold the car. The plaintiffs claimed damages for breach of the covenants. Evidence was given that the price which the car would realise in the market would be approximately £2,100. It was admitted that, if the restrictions were valid, the defendant was in breach of them.

HELD: (i) the restrictions on re-sale were designed to advance the interests of the public and to protect honest dealers in motor cars; they were not wider, nor was the period of two years longer, than was reasonably necessary

for the protection of the plaintiffs' interests or those of the public; and, therefore, the restrictions were valid and binding.

(ii) notwithstanding that there was in fact no legitimate open market for the car while it was subject to the deed of covenant and that in order to assess the open market value assumptions must be made that there would occur circumstances which the deed of covenant was designed to prevent, the proper measure of damages was the difference between the list price of the car and the estimated price obtainable in the open market, namely £836 16s. 1d.

Rodocanachi v. Milburn (1886) (18 Q.B.D. 67), applied.

AS TO THE REQUISITES OF A VALID RESTRAINT OF TRADE, see HALSBURY, *Hailsham Edn.*, Vol. 32, pp. 403-421, paras. 674-704; and FOR CASES, see DIGEST, Vol. 43, pp. 19-30, Nos. 120-234.

Cases referred to:

- (1) *British Motor Trade Association v. Gray*, (1951), unreported.
- (2) *Rodocanachi v. Milburn*, (1886), 18 Q.B.D. 67; 56 L.J.Q.B. 202; 56 L.T. 594; 39 Digest 669, 2570.
- (3) *Williams Brothers v. Ed. T. Agius, Ltd.*, [1919] A.C. 510; 83 L.J.K.B. 715; 110 L.T. 865; 39 Digest 670, 2571.
- (4) *Brading v. McNeill (F.) & Co., Ltd.*, [1946] Ch. 145; 115 L.J.Ch. 109; 174 L.T. 140; 2nd Digest Supp.

ACTION by the British Motor Trade Association for an injunction restraining the defendant from selling a motor car in breach of certain covenants made by him with them, and for damages.

On Feb. 2, 1951, HARMAN, J., granted on motion an injunction for one week against the disposal of the car. On Feb. 9, 1951, before HARMAN, J., the defendant admitted that he had sold the car, and the motion was directed to stand over pending trial of the action.

Aldous for the plaintiffs.

The defendant did not appear.

DANCKWERTS, J.: This is an action by the British Motor Trade Association, which includes all the motor manufacturers in England in its membership and is also a trade union under the Trade Union Act, 1913, against one James William Shenhstone Gilbert, who purchased, on Jan. 2, 1951, a new Jaguar 3½ litre sports car, the index number of which was LHX 844, and the price of which was the sum of £1,263 3s. 11d.

On the occasion of his purchase of this car the defendant entered into a covenant restricting the disposal of the car for a certain period of time. The covenant differs in certain respects from the covenants which have come before this court on more than one occasion, one of the differences being that the period during which disposal of the car is restricted has been extended from the previous period of one year to a period of two years. The plaintiffs allege that the defendant has broken the terms of this covenant, and they claimed an injunction against his disposing of the car on information given to their representatives which seemed to indicate that the defendant was proposing to dispose of the car, but had not yet disposed of it. On Jan. 26, 1951, the writ in the action was issued. On Feb. 2, 1951, on a motion before HARMAN, J., an injunction against disposal of the car was granted for one week. On Feb. 9, 1951, when the motion came on for hearing again, the defendant admitted that he had sold the car, and, accordingly, the motion was directed to stand over until the trial, and the costs of the motion were reserved. It appears that the defendant had, in fact, disposed of the car, which was offered to a representative of the plaintiffs, for a purchase price of £2,200. In the defence, the defendant admits his execution of the covenant. He admits that he has disposed of the car without the plaintiffs' consent, and he admits that, if the covenant is binding and effective in law,

he has committed breaches of that covenant. The objections taken in the defence, which, however, the defendant has not thought fit to appear and support by counsel or in person, are that the provisions of the covenant were and are invalid by reason of the fact that they are wider than is reasonably necessary for the protection of the plaintiffs' interests, that each of them imposes restrictions greater than are reasonably necessary for the protection of the plaintiffs or in the interests of the public, and that the period of two years specified in each of the covenants is excessive and unreasonable, and he denies that the plaintiffs have suffered any damage.

The covenant is under seal and dated Jan. 2, 1951, and was entered into between the defendant, thereafter called "the covenantor", of the first part, and the plaintiffs, the British Motor Trade Association, of the second part. After reciting that "the covenantor has ordered and agreed to purchase from the dealer a new motor vehicle" of Jaguar make, type 3½ litre XK 120 sports, which is referred to as "the said vehicle," and that the dealer and the manufacturer of the vehicle were members of the association, and after setting out the objects which the plaintiff association desires to forward by virtue of this scheme of covenants, the deed witnessed as follows:

"1. The covenantor hereby covenants with the association and (as a separate covenant) with the dealer that in the event of the said vehicle being delivered to him he will not during the period of two years from the date of such delivery or of first registration under the Road Vehicles Registration and Licensing Regulations (of which he agrees to give full particulars to the association in the case of a chassis) whichever is the later, without the consent of the association such consent not to be unreasonably withheld, use the said vehicle or permit the same to be used for any purpose whatever other than for his private, professional or trade purposes so that (without prejudice to the generality of the foregoing) he will not during the said period sell, give, pledge, hire (whether by way of hire purchase or otherwise) or otherwise deal with the said vehicle in any manner whereby the property therein is or may be transferred to any other person."

Except for the period of two years being mentioned instead of one year, that is generally in accordance with the covenant which was in use, as it appears, previously to Dec. 30, 1950.

The second relevant provision is as follows:

"2. The covenantor further covenants with the association that if during the said period of two years he wishes to obtain such consent he will apply therefor in writing and at the same time will offer the said vehicle for sale to the association who shall have the irrevocable right (to be exercised at their option) of purchasing the same or nominating such person as they may select to purchase the same at the original list price plus purchase tax less such sum as is reasonable in respect of wear and damage prior to delivery up; if not mutually agreed such sum to be settled by arbitration. And the covenantor further covenants that upon making such application he will pay to the association the sum of two guineas to cover the expenses of the association in relation to such application."

The validity of a covenant of this kind, though covenants restraining trade have often come before the courts of England for consideration, has never, it appears, been previously argued, but, on the other hand, the objection in regard to restraint of trade in relation to such a deed of covenant has been taken in the Scottish Court of Session, and I have had the advantage of reading four speeches by the judges of that court delivered at first instance on Aug. 4, 1950, and on appeal to the Inner Division on Jan. 26, 1951, in *British Motor Trade Association v. Gray* (1). That case concerned a covenant in the older form, that is to say, that in which the period of restraint was one year. The judges

of the Court of Session came to the conclusion that the covenant in that form was not such as the rules against the restraint of trade would require to be held invalid. I agree respectfully with the reasons which the judges of the Court of Session gave for the conclusions which they reached in that case. It seems to me that a covenant of this kind, which is designed, not to enforce restrictions unfair or undesirable in the interests of the public, but to forward the interests of the public and protect honest dealers in the motor trade against those who are prepared to sacrifice principles for profit, cannot be otherwise than proper to protect the interests of the persons concerned. A

It seems to me, therefore, that the conclusion which the judges of the Scottish Court of Session reached was clearly the correct result. I cannot believe that the extension of the period to two years alters that position, particularly as it appears from the evidence given in this case that it was at the instance of His Majesty's government that the scheme was altered in that respect. It is true that the fact that the scheme is sponsored by His Majesty's government is not, for the purposes of this court, conclusive, but it seems to me that this is a scheme which exists in the interests of the general public and of fair dealing, and not against the interests of fair and reasonable trade. Accordingly, I come to the conclusion that the objections to the validity of the deed fail. B

I then come, there being admitted breaches of the covenant, to the question whether the plaintiffs are entitled to recover any damages, and, if so, what. Evidence has been given before me establishing what is said to be the value of the car in the open market. Of course, in one sense there is no proper open market for a car of this kind, because, if people observe the covenants, they cannot dispose of a car for a period of two years from the time when they obtain delivery. Such dealings as there are with cars which are subject to covenants of this nature are surreptitious. On the other hand, at the end of two years a purchaser of such a car could sell his car on the open market and would obtain a price of which evidence has been given. It appears that in 1953 a vendor who purchased this car in January, 1951, could legitimately obtain a price, not of £1,263 odd, but of some £2,500. It has been suggested that the price of £2,200 at which the car was offered to the representative of the plaintiffs was not greatly different from the price which could have been obtained in the open market, and very much the same figure is reached by taking that figure of £2,500 for 1953, and discounting on a $7\frac{1}{2}$ per cent. basis, so reducing it to a present price of £2,100. One way and another, therefore, it seems that, if I am to take the value in the open market, whether I treat it as what can be obtained surreptitiously at the present time, or a legitimate purchase price in 1953 discounted, I would come to the conclusion that the market value would be £2,100. C D E F

It is contended by counsel for the plaintiffs that the measure of damages which is obtainable by reason of the failure of the defendant to offer the car to the plaintiffs in accordance with the terms of the deed of covenant is the difference between the list price of the car, £1,263 3s. 11d., and that market value of £2,100, which is a figure of £836 16s. 1d. On the other hand, it does appear to me strange that the plaintiffs should be entitled to demand payment of a sum of money which can only be considered at the present time, so far as dealings at the present time are concerned, on the footing that the scheme of the plaintiffs is not being carried out, but is being, surreptitiously or otherwise, evaded. The one thing, of course, which the plaintiffs, very properly, I think, are endeavouring to do is to prevent the inflation in the value of motor cars on the market owing to the limited supply which is permitted under government control for the purposes of the home market. The price which is obtainable on the footing which I have mentioned is far beyond that which is the proper list price of the car as delivered by the manufacturers through dealers to an ordinary purchaser. It is argued, however, by counsel for the plaintiffs that the authorities compel me to come to that conclusion. The relevant cases are *Rodocanachi v. Milburn* (2), a decision of the Court of Appeal and approved by the House of Lords in *Williams* G H

Brothers v. Ed. T. Agius, Ltd. (3), applied and followed in the case of real property by EVERSLED, J., in *Brading v. F. McNeill & Co., Ltd.* (4). EVERSLED, J., in *Brading's* case (4), applied the rule laid down in the earlier cases with some doubt, as he felt that it was anomalous in some respects, as I do myself. It appears anomalous to apply the open market value in all cases without regard to the special circumstances of the particular plaintiff. In *Rodocanachi's* case (2) the plaintiff agreed to sell the property of which he failed to obtain delivery owing to the defendant's default at a price lower than the open market price, so that the result of applying the rule would be, in a case of that kind, that the plaintiff would receive as damages a greater sum than he would have realised if the contract had in fact been carried out according to its proper terms. However that may be, and having regard to the rules laid down by the general provisions of the Sale of Goods Act, 1893, s. 51, I feel that I am bound to apply the rule that the measure of damages obtainable by the plaintiffs for the failure of the defendant to deliver the car to them on their option is that difference between the market value and the actual price to be paid in the ordinary way, under the limited scheme. The plaintiffs are entitled to £836 16s. 1d. damages, and there will be judgment for the plaintiffs for that sum.

Judgment accordingly.

Solicitors: *Osmond, Bard & Westbrook* (for the plaintiffs).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

WALTERS v. LUNT AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Ormerod, JJ.), July 24, 1951.]

Criminal Law—Larceny—Receiving property known to have been stolen—Goods taken by child aged seven—Larceny Act, 1916 (c. 50), s. 1 (1), s. 1 (2) (i) (d), s. 33 (1)—Children and Young Persons Act, 1933 (c. 12), s. 50.

The respondents were charged under the Larceny Act, 1916, s. 33 (1), with receiving from a child, aged seven years, certain articles knowing them to have been stolen.

HELD: under the Children and Young Persons Act, 1933, s. 50, the child could not be guilty of larceny as he was under the age of eight years; therefore, the property taken by the child was not property "stolen or obtained . . . under circumstances which amount to felony or misdemeanour," within s. 33 (1); and the respondents could not be convicted under that sub-section of receiving the property knowing it to have been stolen.

R. v. Creamer ([1919] 1 K.B. 564), applied.

Semble: The respondents could have been convicted of larceny as bailees under s. 1 (1) of the Act of 1916, or of larceny by finding under s. 1 (2) (i) (d).

FOR THE LARCENY ACT, 1916, s. 33, see HALSBURY'S STATUTES, Second Edn., Vol. 5, p. 1032.

FOR THE CHILDREN AND YOUNG PERSONS ACT, 1933, s. 50, see *ibid.*, Vol. 12, p. 1010.

Case referred to:

(1) *R. v. Creamer*, [1919] 1 K.B. 564; 88 L.J.K.B. 594; 120 L.T. 575; 83 J.P. 120; 15 Digest 974, 10898.

CASE STATED by Lincolnshire justices.

On Apr. 12, 1951, on information preferred by the appellant the respondents were charged under the Larceny Act, 1916, s. 33 (1), with receiving from their son, aged seven, goods which had been stolen, knowing them to have been stolen. The goods, which were taken by the child from the premises of their respective owners, were found on the premises of the respondents, who contended that

they did not know that the goods were stolen. It was contended by the appellant that the Children and Young Persons Act, 1933, s. 50, which provides that "no child under the age of eight years can be guilty of any offence," did not enact that a child under that age was not capable of committing an offence, and, therefore, although the child could not be convicted as a principal, the receivers of property stolen by him were none the less liable to be convicted, and, under the Larceny Act, 1916, s. 33 (3), the respondents could be convicted even though the child, as the principal offender, was not amenable to justice. After adjourning the case until May 10, 1951, the justices dismissed the informations on the ground that, as the child, being under the age of eight, could not be found guilty of any criminal offence, he could not in law commit a crime and the property taken by him was not property "stolen or obtained . . . under circumstances which amount to felony or misdemeanour," within s. 33 (1) of the Act of 1916, and, therefore, the respondents could not be convicted of receiving stolen property.

T. R. F. Butler for the appellant.

The respondents did not appear.

LORD GODDARD, C.J.: This is a Case stated by justices for the city of Lincoln, before whom the respondents, a husband and wife, were charged under the Larceny Act, 1916, s. 33 (1), that

" . . . they between Aug. 1 and 31, 1950, at the city of Lincoln, jointly feloniously did receive from Richard Norman Lunt (aged seven years) a child's tricycle of the value of £2, the property of Walter Cole, which had theretofore been feloniously stolen, knowing the same to have been so stolen."

There was a similar charge in respect of a child's fairy cycle alleged to have been received by them on Mar. 11, 1951, from Richard Norman Lunt, aged seven years, and we infer from the Case that Richard Norman Lunt is the child of the respondents. The justices refused to convict on the ground that, as the child was under eight years of age, under the Children and Young Persons Act, 1933, s. 50, he was incapable of stealing and could not be convicted of the felonious act of larceny, and, therefore, the respondents could not be convicted, under s. 33 (1) of the Act of 1916, of receiving stolen property because the property taken by the child was not property "stolen or obtained . . . under circumstances which amount to felony or misdemeanour."

In my judgment, *R. v. Creamer* (1) makes it clear that the decision of the justices was correct. The facts in that case were different, as the parties there involved were husband and wife. The Court of Criminal Appeal held that the effect of the Larceny Act, 1916, s. 36, was that no crime was committed by a wife who took her husband's goods unless she took them when she was leaving, or about to leave, him, and, therefore, a man who received from the wife property taken by her from the husband could not be convicted of receiving because the facts necessary to convict the wife of larceny from the husband (*i.e.*, that she was leaving or about to leave him) had not been proved. In the case now before us the child could not have been found guilty of larceny because he was under eight years of age, and, unless he is eight years old, he is not considered in law capable of forming the intention necessary to support a charge of larceny. Therefore, the justices came to a perfectly proper decision in point of law on the charge of receiving.

This, however, will not prevent the prosecution from preferring a further charge against the respondents for larceny, because, in my opinion, the facts show that it would be open to the justices to convict them either of larceny as bailees or of larceny by finding. Larceny is defined in the Larceny Act, 1916, s. 1, as follows:

"(1) A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof; Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner: (2)—(i) the expression 'takes' includes obtaining the possession . . . (d) by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps."

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In the case before us the child brought the goods home, and the respondents took possession of them and kept them. It can, therefore, be submitted to the justices that the respondents put themselves in the position of bailees of the true owner, and, by doing the acts and telling the untruths which they did, provided a ground on which the justices could find that they converted the goods to their own use. Alternatively, it could be submitted to the justices that this was a case of larceny by finding, the respondents finding the goods in their house, brought there by the child. If the justices come to the conclusion that at the time when the respondents found the goods, *i.e.*, when the child brought them home, they believed that the owner could be discovered by taking reasonable steps—and I should not think the justices would have much difficulty in finding that—the respondents will be guilty of larceny by finding. Therefore, we dismiss this appeal. It will be for the police to decide whether they will prefer any further charge before the justices. If they do so, the decision of the justices on the receiving charge will be no bar to a conviction if they find the facts for larceny.

HILBERY, J.: I am of the same opinion.

ORMEROD, J.: I agree.

Appeal dismissed.

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Solicitors: *Sharpe, Pritchard & Co.*, agents for *J. H. Smith*, town clerk, Lincoln (for the appellant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

F

PARKINSON AND ANOTHER v. AXON.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Ormerod, JJ.), July 24, 1951.]

G

Street Traffic—Goods vehicle—Driver—Limitation of time on duty—"Time spent . . . on other work in connection with a vehicle or the load carried thereby"—Assisting at depot after period of driving—Unloading vans and sorting parcels—Road Traffic Act, 1930 (c. 43), s. 19 (1) (i), s. 19 (2) (b).

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After driving motor vehicles constructed to carry goods other than the effects of passengers from 2 p.m. until not later than 6.30 p.m., the appellant, a driver employed by a road haulage executive, was allowed by the executive to do additional work at their depot until 8.30 p.m., assisting porters and sorters to load and unload vans and sort parcels.

HELD: the words "time spent by a driver on other work in connection with a vehicle or the load carried thereby" in s. 19 (2) (b) of the Road Traffic Act, 1930, were designed to cover work done by a driver on his vehicle on the road (*e.g.*, in the case of a breakdown), or time spent, *e.g.*, in delivering goods from the vehicle, and, therefore, the time spent by the appellant at the depot after his period of driving was over did not fall within those words, and he had not committed a breach of s. 19 (1) (i) of

the Act by driving (or doing "other work" within the meaning of s. 19 (2) (b)) for a continuous period of more than five and a half hours.

FOR THE ROAD TRAFFIC ACT, 1930, s. 19, see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 592.

Case referred to:

(1) *Thomson v. Clanmorris* (Lord), [1900] 1 Ch. 718; 69 L.J.Ch. 337; 82 L.T. 277; 32 Digest 320, 57.

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CASE STATED by justices for the county of Lancaster.

At a court of summary jurisdiction sitting at Manchester on Apr. 4, 1951, on informations preferred by the respondent, the appellant, John Parkinson, a motor driver, was charged with having on Sept. 4, 6, 18 and 19, 1950, driven certain motor vehicles constructed to carry goods other than the effects of passengers for a continuous period of more than five and a half hours, contrary to s. 19 (1) (i) of the Road Traffic Act, 1930, and the appellants, British Road Services Road Haulage Executive, Group 33 Manchester Parcels Group, were charged with having unlawfully permitted the appellant driver, who was employed by them, so to drive the motor vehicles, contrary to the section. At the hearing of the informations, it was proved that the appellant driver, after driving a motor vehicle for not more than four and a half hours, voluntarily continued to work by assisting porters and sorters in unloading vans and checking and sorting parcels at the depot for a further period, so that he was working for a continuous period of more than five and a half hours. It was contended by the respondent that the additional work done by the driver at the depot was "work in connection with a vehicle or the load carried thereby," within the meaning of s. 19 (2) (b) of the Act of 1930, and, therefore, the time spent on it should be reckoned as time spent in driving. The appellants contended that the time should not be so reckoned, as the appellant driver had completed his driving for the day and was then employed as a porter, the additional work being unconnected, except coincidentally, with any vehicle which the appellant driver had driven during the day. The justices held that the expression "time spent by a driver on other work in connection with a vehicle or the load carried thereby," in s. 19 (2) (b), was not confined to time spent on work in connection with the particular vehicle driven by the appellant driver and that it included the time spent by the appellant driver on the additional work, and they convicted both appellants.

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T. M. Backhouse for the appellants.

R. J. Parker for the respondent.

LORD GODDARD, C.J.: This is a Case stated by the justices of the petty sessional division of Manchester before whom informations were preferred against the first appellant, John Parkinson, a motor driver, for a breach of s. 19 (1) (i) of the Road Traffic Act, 1930, and against the second appellants, British Road Services Road Haulage Executive, Manchester Parcels Group, for permitting a breach of the section.

G

Section 19 provides:

"(1) With a view to protecting the public against the risks which arise in cases where the drivers of motor vehicles are suffering from excessive fatigue, it is hereby enacted that it shall not be lawful in the case of . . . any motor vehicle constructed to carry goods other than the effects of passengers; for any person to drive or cause or permit any person employed by him or subject to his orders to drive—(i) for any continuous period of more than five hours and one half . . . (2) For the purposes of this section . . . (b) any time spent by a driver on other work in connection with a vehicle or the load carried thereby, including in the case of a public service vehicle any time spent on a vehicle while on a journey in any

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other capacity than as a passenger shall be reckoned as time spent in driving."

The appellant driver drove his vehicle from 2 p.m. to a time not later than 6.30 p.m., but he stayed on at the depot until a later hour because, owing to the difficulty of obtaining casual labour, it was the practice in this depot to permit, and, indeed, to invite, any drivers on parcels collection and other short-distance journeys who so wished to augment their wages by working "on the deck" after the completion of their actual driving, so as to assist the staff of porters and sorters normally employed there during the busy period until 8.30 p.m. Working on the deck consisted of unloading vans on to the loading deck, checking and sorting the parcels so unloaded, and re-loading the same into other vans. The justices were of opinion that in these circumstances in doing the additional work the appellant driver was working "in connection with a vehicle or the load carried thereby," within the meaning of s. 19 (2) (b).

In *Thomson v. Lord Clanmorris* (1) SIR NATHANIEL LINDLEY, M.R., said ([1900] 1 Ch. 725) that, in construing a statute

"... regard must be had not only to the words used, but to the history of the Act, and the reasons which led to its being passed."

The reasons which led to s. 19 of the Act of 1930 being passed appear in the preamble to the section. The opening words of s. 19 (1) show that the object of the limitation of time is to protect

"... the public against the risks which arise in cases where the drivers of motor vehicles are suffering from excessive fatigue . . ."

If men are out on the road driving their vehicles for a great number of hours, there is a danger in their driving because they may fall asleep or may not have the quick reaction which a driver has to possess. Therefore, it seems to me that the object of s. 19 (1) (i) and s. 19 (2) (b) is that drivers should not be on the road for a continuous period of more than five and a half hours. Parliament had, I think, to consider the case where a driver, who was out with a load, spent his day, not only in driving the vehicle, but in delivering goods. Section 19 (2) (b) was enacted to ensure that, when the driver was out, say, for seven hours, it should not be open to him or his employer to say that he had been driving for only five and a half hours and was delivering goods for the rest of the time.

In my view, there is no provision in s. 19 of the Act that a driver must not do any other work, or must take a rest. He must have an opportunity for rest, but there is nothing to provide that he must rest in the sense that he must sit down or go to bed or something of that sort. It is contended by the respondent that a driver can employ himself in any work that he likes except that it must not be anything to do with a vehicle or the load carried thereby. That is not the way in which I read s. 19 (2) (b), which says:

"any time spent by a driver on other work in connection with a vehicle or the load carried thereby, including in the case of a public service vehicle any time spent on a vehicle while on a journey in any other capacity than as a passenger, shall be reckoned as time spent in driving."

I think that that paragraph is designed to cover the case where a driver has to do work on his vehicle on the road in the case of a breakdown, or something of that sort, and it also deals with the work which he does in connection with the load carried by his vehicle, e.g., delivering goods. In this case, when doing the work in the depot, the appellant driver was not acting in the capacity of a driver. He was acting as a porter or sorter. It is true that he was a driver of vehicles, but I do not construe the words of s. 19 (2) (b) as meaning that, although a driver may engage in any form of work or activity which he likes after he has driven, he commits an offence if the work which he does is connected in some way with parcels which are going by road. According to the contention of the respondent,

he could go to a railway station to sort parcels if they were going by rail, but not if they happened to be going by lorry. I think that that is putting a construction on s. 19 (2) (b) which the preamble to s. 19 (1) does not require and which I do not think Parliament intended. For these reasons I think that the decision of the justices was wrong.

HILBERY, J.: I agree.

ORMEROD, J.: I agree.

Appeal allowed.

Solicitors: *M. H. B. Gilmour* (for the appellants); *Treasury Solicitor* (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

LINES v. HERSOM.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Ormerod, JJ.), July 18, 1951.]

Street Traffic—Driving while disqualified for holding licence—Fine—"Special circumstances"—Test to be applied—Road Traffic Act, 1930 (c. 43), s. 7 (4).

The respondent was convicted before a court of summary jurisdiction of driving a motor vehicle while disqualified for holding or obtaining a licence, contrary to s. 7 (4) of the Road Traffic Act, 1930, and of driving the vehicle while uninsured against third-party risks contrary to s. 35 (1) of the Act. He was sentenced to one month's imprisonment and disqualified for holding or obtaining a driving licence for the first offence and to one month's imprisonment for the second offence, the sentences to run concurrently. On appeal to quarter sessions a fine of £15 in respect of both offences was substituted for the sentences of imprisonment. In a Case Stated the appeal committee asked whether they were justified in substituting a fine for the prison sentences in view of the following facts: (a) the respondent had only driven once since he was disqualified, on an occasion when he had missed his last train through working late; (b) he was of good character, had served in the war and been seriously wounded, and was in receipt of a war disability pension; (c) he was registered as a disabled person and as such was more than ordinarily dependent on mechanical transport; and (d) he was in business on his own account, and, if he were not able to attend to it personally, the business would come to an end.

HELD: section 7 (4) of the Act of 1930 required the imposition of a sentence of imprisonment unless a fine was adequate in "the special circumstances of the case"; such circumstances must be special to the offence and not to the offender: *Whittall v. Kirby* ([1946] 2 All E.R. 552), applied; none of the circumstances of the present case was special to the offence; and, therefore, none could be taken into account in determining to impose a fine and not imprisonment.

FOR THE ROAD TRAFFIC ACT, 1930, s. 7 (4), see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 580.

Cases referred to:

- (1) *Whittall v. Kirby*, [1946] 2 All E.R. 552; [1947] K.B. 194; [1947] L.J.R. 234; 175 L.T. 449; 111 J.P. 1; 2nd Digest Supp.
- (2) *Hadley v. Perks*, (1866), L.R. 1 Q.B. 444; 35 L.J.M.C. 177; 14 L.T. 325; 30 J.P. 485; 33 Digest 315, 322.

CASE STATED by the appeal committee of the Hertford Quarter Sessions.

The respondent was convicted of two offences by a court of summary jurisdiction sitting at Watford on Oct. 12, 1950, namely, driving a motor van while

uninsured in respect of third-party risks, contrary to s. 35 (1) of the Road Traffic Act, 1930, and driving when disqualified for holding or obtaining a licence, contrary to s. 7 (4) of the Act. He was sentenced to one month's imprisonment for each offence, the sentences to run concurrently, and was disqualified for holding or obtaining a driving licence for twelve months for the former offence. He appealed to quarter sessions against the sentence of imprisonment, contending that in all the circumstances a fine would be an adequate punishment and that power to impose such a fine on the second charge was permitted by s. 7 (4) of the Act of 1930. Quarter sessions substituted a total fine of £15, or one month's imprisonment in default of payment, for the two sentences of one month's imprisonment. The prosecutor appealed.

F. H. Lawton for the appellant.

Milton for the respondent.

LORD GODDARD, C.J.: This is a Case stated by the appeal committee of the Hertford Quarter Sessions to whom the respondent appealed against a conviction by a court of summary jurisdiction sitting at Watford. The first conviction was on a charge of having unlawfully used

"a certain motor vehicle, namely a motor van, on a certain road . . . there not being in force in relation to the user of the said vehicle such a policy of insurance"

as was required by the Road Traffic Act, 1930, s. 35, and the second was on a charge that the respondent

"being disqualified under Part I of the Road Traffic Act, 1930, for holding or obtaining a driving licence, unlawfully did drive a certain vehicle, namely, a motor van, on a certain road, contrary to s. 7 of the Road Traffic Act, 1930."

Of both of those offences petty sessions convicted the respondent and passed sentences of one month to run concurrently. Those are very lenient sentences for such grave offences as driving when disqualified and driving without being insured. On appeal the appeal committee quashed both sentences of imprisonment, varying them by imposing a fine of £15 for both offences. One must be technical about these things and one ought to be strict, and it seems to me that that was a bad sentence because they ought to have imposed a separate fine on each summons. They stated a Case with regard to the conviction of driving while disqualified, and they said:

"We were of opinion that in the circumstances of the case a fine would be an adequate punishment, and we, therefore, allowed the appeal, varying the said sentences of imprisonment to a total fine of £15, such fine to be paid within one month from Nov. 14, 1950, and subject to one month's imprisonment in default of payment."

The question they ask us is:

"Whether in the circumstances we were justified in substituting a fine for the sentence of imprisonment?"

With regard to the charge of driving while disqualified, the marginal note to the relevant section of the Act, s. 7, is: "Provisions as to disqualifications and suspensions." Sub-section (4) provides:

"If any person who under the provisions of this Part of this Act is disqualified for holding or obtaining a licence applies for or obtains a licence while he is so disqualified, or if any such person while he is so disqualified drives a motor vehicle, or, if the disqualification is limited to the driving of a motor vehicle of a particular class or description, a motor vehicle of that class or description, on a road, that person shall be liable on summary conviction to imprisonment for a term not exceeding six months or if the

court think that, having regard to the special circumstances of the case, a fine would be an adequate punishment for the offence, to a fine not exceeding £50, or to both such imprisonment and such fine, and a licence obtained by any person disqualified as aforesaid shall be of no effect."

I do not think any particular importance is to be attached to the fact that the section says "shall be liable . . . to imprisonment for a term not exceeding six months," because that is the expression commonly used in every criminal statute, and it is customary to find in all classes of statutes which impose penalties an alternative penalty of a fine. For instance, under s. 8 (4) of this statute a person applying for a licence who does not disclose the fact that his previous licence has been endorsed is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding £50. There the legislature is giving justices a complete discretion whether they will impose imprisonment or a fine. But, as we said in *Whittall v. Kirby* (1), the fact that the words "having regard to the special circumstances of the case" are inserted in a sub-section in relation to a mitigation of the penalty shows that Parliament intended to limit the discretion of justices. Therefore, they have not got an unfettered discretion under s. 7 (4) to refrain from sending an offender to prison. They can only do so if there are special circumstances which so entitle them. *Prima facie*, the punishment for an offence under s. 7 (4) is imprisonment. *Prima facie*, for dangerous driving or driving uninsured or driving when drunk there is to be a disqualification, and justices must remember that in such cases the discretion that is given to them is not an unfettered discretion, for the words I have read limit the discretion.

Counsel for the respondent has called attention to the fact that the words used in s. 7 (4) are not quite the same as they are in the later sections in the Act. In my opinion, there is no difference in substance between them. It is not at all an uncommon thing to find in a statute, which has to go through committees in both Houses of Parliament and may be the subject of amendments moved there, that an amendment which is moved to an early section is worded in one way, while another amendment, moved to a later section and expressing exactly the same idea, is worded in another way. It does not thereby follow that the legislature intends something different because the language is not exactly the same. BLACKBURN, J., in *Hadley v. Perks* (2), said (L.R. 1 Q.B. 457):

"It has been a general rule for drawing deeds and other legal documents from the earliest times, which one is taught when one first becomes a pupil to a conveyancer, never to change the form of words unless you are going to change the meaning, and it would be as well if those who are engaged in the preparation of Acts of Parliament would bear in mind that that is the real principle of construction. But in drawing Acts of Parliament, the legislature, as it would seem, to improve the graces of the style, and to avoid using the same words over and over again, constantly change them . . ."

BLACKBURN, J., pointed out in that case that, although the words in one section in some respects differed from the words in a later section, the construction to be put on them was the same and Parliament merely changed the language without changing the meaning. Speaking for myself, I can find no different meaning to be attached to the words of s. 7 (4) from the meaning to be attached to those in, e.g., s. 15 (which deals with driving when under the influence of drink), in s. 11 (which deals with dangerous driving), and in s. 35 (which deals with driving while uninsured).

When, in *Whittall v. Kirby* (1) this court considered what reasons—to use the language in s. 15 (2)—would justify justices in refraining from disqualifying an offender under that section, in an endeavour to make it clear to justices what they must find, we used a formula which had been used in an address I gave to a grand jury at Chelmsford in 1937 and was subsequently adopted by

the court in Northern Ireland as the best way it could be put—that the reasons must be special to the case and not to the offender. It is often difficult to maintain a sharp distinction between the case and the offender, but we meant that matters which might be pleaded as mitigation, *e.g.*, the defendant's previous good character, particular hardship, or something of that sort, were irrelevant and ought to be left out of account. The words of s. 7 (4) "having regard to the special circumstances of the case," emphasise that for the purpose of that

A sub-section the circumstances must be special to the case. I will not say that the conditions relating to the offender are to be ignored altogether, because that is almost impossible, but it is the circumstances which are special to the case which are to be the primary consideration. We also pointed out in *Whittall v. Kirby* (1) that, where Parliament says that the circumstances are to be special, they are obviously contrasting circumstances that are special with circumstances that are general. For instance, we know perfectly well that before *Whittall v. Kirby* (1) justices used to be asked to refrain from disqualifying because the defendant had been driving for a great number of years without complaint—in other words, because he was a first offender. We pointed out that that could not possibly be a special circumstance. It was a circumstance of the most general application, because, even now, although motoring cases are numerous in the courts, the majority of motorists have not been convicted, and it cannot be a special circumstance that a motorist has never been convicted. Another reason was that, if Parliament had wished that to be regarded as a special circumstance, it could have so provided. All these considerations lead me to the clear opinion that the proper interpretation to be put on s. 7 (4) is that, *prima facie*, for this very serious offence a motorist should be sent to prison. It

D is about as serious an offence as he can commit—to set his disqualification at defiance and drive at a time when, if he cannot pay, nobody will get any compensation for injury received in an accident with which he may meet, because no insurance company will be liable. Parliament says that prison is the proper penalty. Questions of disqualification often involve great hardship, but whether there is great hardship or whether it is a severe penalty is not a matter for the court if Parliament has ordained it. Our duty is to apply the law which Parliament has laid down, and, if Parliament has said that, *prima facie*, the penalty for a particular offence is imprisonment, it is the duty of the courts to impose imprisonment. For offences under s. 7 (4) the courts are clearly told by Parliament to impose a sentence of imprisonment unless there are special circumstances of the kind which would justify a lighter sentence, *i.e.*, a fine.

E Although we laid down general principles in *Whittall v. Kirby* (1) and the cases which followed it and tried to make the matter as clear as possible to justices, we have always recognised that, provided there is evidence of facts which can amount to special circumstances, it is for the justices to say whether or not they will disqualify, or, as in this case, send to prison. If there are facts on which the justices can exercise their discretion, this court will not interfere,

G although, if they had been trying the case, all or some of the members of the court might not have exercised the discretion in the same way.

The facts of the present case seem to me to be about as serious as can be brought before a court. If any comment had to be made on the sentence of one month concurrent on each of the two offences it would be that the justices at Watford erred on the side of mercy. Justices often forget that the gravity of the offence of driving a motor vehicle while uninsured is that, if an accident occurs, an injured person will have no insurance company to look to for compensation. Justices should understand clearly it is no mitigation of the offence that an accident does not take place.

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On March 28, 1950, the respondent had been fined £5 and disqualified for holding a licence for twelve months for the offence of driving a motor vehicle while uninsured, and on June 20, 1950, he was found driving a motor van. The justices found that that was the only occasion on which he had driven. He had

bought the van for re-conditioning and re-sale and drove it at 11.30 p.m. because he had been working late and had missed his last train home. Is that any excuse? Disqualification was designed especially to be part of the punishment for the offence. Being unable to produce a certificate of insurance or driving licence when he was stopped and questioned by the police, the respondent aggravated his offence by falsely giving the name and address of his brother-in-law. On Oct. 6, 1950, the respondent was convicted of producing the false certificate and driving licence and representing that they were his own. For each offence he was fined £10 and was again disqualified for holding or obtaining a driving licence for a period of twelve months, his brother-in-law being convicted of the two offences and for each being fined £10. The justices state that the respondent paid a total sum of £44 4s. in respect of the fines and costs ordered to be paid by him and his brother-in-law. As he placed his brother-in-law in this trouble, it certainly was just and reasonable that he should pay his fines, but how does that afford a special circumstance or mitigate his own offence in any way? Apart from this matter, the justices say, the respondent "is a man of perfectly good character." To describe a person who has conspired to deceive the court by putting forward false documents as a man of good character seems a very curious finding.

The real special circumstances justifying the imposition of a fine instead of imprisonment seem to be that the respondent served in the army from 1940 to 1944, that he was seriously wounded in action and was finally demobilised because of disabilities described as a duodenal ulcer and a weak heart. His military character was given as exemplary. Justices cannot take such matters as those into account as special circumstances mitigating the offence on a charge of driving a motor vehicle when disqualified. Nor is the fact, as the justices found, that the respondent is in receipt of a sixty per cent. war disability pension and is registered under the Disabled Persons (Employment) Act, 1944, as a disabled person, and, therefore, "more than ordinarily dependent on mechanical transport," a special circumstance to be taken into account. That only shows that of all classes of persons he should be insured because, being partly disabled, he is more likely than a normal person to meet with an accident.

The justices also found "that the respondent is in business on his own as a motor body repairer, and that, if he were unable to attend to it, the business which he has built up would come to an end." That is simply ignoring the express decision of this court in *Whittall v. Kirby* (1) that financial hardship is not a matter which the court is entitled to take into account. Parliament has not drawn any distinction between various classes of offenders, and it is not, therefore, for the courts to draw one. If Parliament has said that all people are to be disqualified for those offences it is not for the courts to say: "We will not disqualify this man because we think it is a hardship, but we might disqualify a man on whom there would not be the same hardship." No different considerations apply to the "special circumstances of the case" mentioned in s. 7 (4) from those which apply to the "special reasons" mentioned in the other sections. It is only, in my view, a difference of expression such as BLACKBURN, J., called attention to in *Hadley v. Perks* (2).

There were no circumstances found by the justices here which could be special to this case, and, accordingly, we answer the question submitted to us in the negative.

HILBERY, J.: I am of the same opinion. Not only do I not dissent from what my Lord has said at the conclusion of his judgment, but I think the ground for saying that is even stronger under s. 7 (4) than it is under the other sections in the Act where "special reasons" are referred to, because in s. 7 (4) the words used are "special circumstances of the case" in the passage

“or if the court think that, having regard to the special circumstances of the case, a fine would be an adequate punishment for the offence . . .”

I regard the words that the court think a fine would be an adequate punishment for the offence as of some importance as showing that in this section the statute is contemplating, not the offender, but, essentially, the offence, and the special circumstances which the court must find are circumstances of the case and not of the offender. There must be an adequate punishment for the offence, disregarding any circumstances special to the offender. I am entirely of the same opinion as my Lord.

ORMEROD, J.: I agree.

Appeal allowed.

Solicitors: *Solicitor for Metropolitan Police* (for the appellant); *Penman, Johnson & Ewins* (for the respondent).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

NOTE.

EIFERT v. HOLT'S TRANSPORT CO., LTD.

D [COURT OF APPEAL (Singleton and Morris, L.JJ., and Roxburgh, J.), July 18, 1951.]

Damages—Apportionment—Apportionment between widow and child of damages for tort causing husband's death—Right of defendant to object to method of apportionment—Fatal Accidents Act, 1846 (c. 93), s. 2.

E APPEAL by the defendants from an order of BARRY, J., dated Feb. 22, 1951.

The plaintiff, suing as administratrix of her late husband's estate on behalf of herself and her infant child, claimed under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Act, 1846, damages for negligence resulting in her husband's death. Liability was admitted. The judge awarded as damages the total sum of £6,750, of which £350 was to be treated as damages under the Act of 1934, and £6,400 was to be apportioned, under the Act of 1846, between the widow and the child. After hearing counsel for the widow, the judge apportioned the £6,400 as to £2,000 to the widow and as to £4,400 to the child. On appeal, the defendants contended that the amount apportioned to the child was excessive, and that, by reason thereof, the amount of the total award should be reduced.

G *Fox-Andrews, K.C.*, and *A. K. Allen* for the defendants.
Scarman for the plaintiff.

THE COURT held that, if—as, in their view, it did—the total sum awarded as damages fairly represented the family loss, it was no concern of the defendants how that total sum was apportioned.

Solicitors: *Stanley & Co.* (for the defendants); *Curwen, Carter & Evans* (for the plaintiff). C.N.B.

R. v. TORQUAY LICENSING JUSTICES. *Ex parte* BROCKMAN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Ormerod, JJ.), July 17, 24, 1951.]

Licensing—Justices—Hearing of application for licence—General rule not to issue full licence to holder of restricted licence—Duty to consider facts of each case.

Licensing justices at the general annual licensing meeting in March, 1950, announced that in future they would only grant a full licence in place of a restricted or table licence in very exceptional circumstances. An application made by the applicant, who held a restricted licence for a residential hotel, was refused and he moved for an order of *mandamus* on the ground that the justices had pre-determined the issue by laying down a general rule.

HELD: no fault could be found with justices laying down a general rule that they would look with disfavour on persons who had obtained restricted licences subsequently applying for full licences and would consider that in such cases there was a very considerable onus thrown on the applicant, but, if such an application were made, the justices were bound to hear it and to consider whether the particular facts took it out of the general rule. The justices had done that in the present case and, therefore, the motion for an order for *mandamus* failed.

R. v. Rotherham Licensing JJ. Ex p. Chapman ([1939] 2 All E.R. 710), distinguished.

AS TO THE ABSOLUTE DISCRETION OF JUSTICES, see HALSBURY, Hailsham Edn., Vol. 19, p. 70, para. 187; and FOR CASES, see DIGEST, Vol. 30, pp. 28, 29, Nos. 190-193, and Digest Supp.

Cases referred to:

- (1) *R. v. Rotherham Licensing JJ. Ex p. Chapman*, [1939] 2 All E.R. 710; 160 L.T. 558; 103 J.P. 251; Digest Supp.
- (2) *R. v. Walsall JJ.*, (1854), 3 C.L.R. 100; 24 L.T.O.S. 111; 18 J.P. Jo. 757; 30 Digest 29, 204.
- (3) *R. v. Holborn Licensing JJ. Ex p. Stratford Catering Co., Ltd.*, (1926), 136 L.T. 278; 90 J.P. 159; Digest Supp.

MOTION for *mandamus* directing the Torquay licensing justices to hear and determine an application for a full licence for a residential hotel.

R. Stock for the applicant.

Curtis-Bennett, K.C., and *Field-Fisher* for the justices.

Cur. adv. vult.

July 24. **LORD GODDARD, C.J.**, read the following judgment of the court. Counsel for the applicant, Mr. W. J. Brockman, moved for an order of *mandamus* directed to the licensing justices of the borough of Torquay requiring them to hear and determine according to law an application for a new justices' licence at the Rosetor Hotel, of which the applicant is the manager and licensee. The grounds of the application are that the justices at the general annual licensing meeting refused an application for a new licence free from the condition that there should be no bar on the premises, a condition which was attached to the licence granted to the applicant in 1948 for three and a quarter years; that the justices refused the application because they had laid down a pre-determined rule that full licences would not be granted in place of restricted licences; and that they failed to decide the application on its merits and were prevented from so doing by reason of the said rule.

In 1948 a licence was granted to the applicant for the sale of intoxicating liquors at the Rosetor Hotel for a period of three and a quarter years, and a condition was attached that liquor should only be supplied to residents and to those taking *bona fide* meals at the hotel and that there should be no bar on

the premises. It appears that at the adjourned general annual licensing meeting held on Mar. 6, 1950, the then chairman of the licensing justices said that in future circumstances would have to be very exceptional before they would grant full licences in place of restricted licences. He said that it was the unanimous opinion of the bench that as licensing justices they had treated residential hotels very generously in the past, that applicants applied for restricted licences and said that that would meet their ends, and that the justices felt that they were not receiving due reciprocal duty by the continual attempts to get full licences in place of restricted ones.

When the applicant applied on Feb. 8, 1951, the chairman, in dismissing the application, said:

"The bench carefully considered the application, but is not prepared to alter the policy for the table licences as granted. The licence for the Rosetor Hotel will be renewed on the old terms."

The chairman in an affidavit said that the justices had been advised by their clerk that it was illegal for them to lay down any hard and fast rule with regard to these applications and that they were fully aware that each application must be heard and judged solely on its individual merits. The justices heard counsel for the applicant and for the opposition and retired and fully considered the matter and were of the opinion that the needs of the public were not such as to justify them in renewing the licence with the deletion of the no bar clause. Counsel for the applicant argued that the justices were not entitled to limit their discretion by laying down a rule or to say that they would only depart from it in very exceptional circumstances. He contended that this case was covered by the decision of this court in *R. v. Rotherham Licensing JJ. Ex p. Chapman* (1).

The present case is not without importance because, in effect, it challenges the right of licensing justices to lay down for themselves a policy, or, at least, to announce that they have such a policy, but it would seem clear that, if the justices have decided on a policy to guide them in considering applications, it is only fair that they should make it public so that applicants may know what to expect. That there is no objection to justices deciding among themselves the general lines on which they will exercise their judicial discretion has been recognised in a number of cases. In *R. v. Walsall JJ.* (2), decided in 1854, the justices had made it known that they would not hear applications for any new licences, and, when an application was made to them at the annual licensing meeting, they refused to hear what was to be urged on behalf of the applicant. The court held that the justices were not entitled to take up that position, and that, as the applicant wished to be heard, he was entitled to be heard, but it is clear that the court considered that there was nothing wrong in the justices prescribing a policy for themselves, although they were bound to hear any application which a person was entitled to make and it would be for them to decide whether the general policy was to be applied in that particular case. LORD CAMPBELL, C.J., said (18 J.P. Jo. 757):

"[The justices] cannot exercise the discretion reposed in them unless they hear the facts and arguments which the applicant is prepared to adduce."

ERLE, J., said (*ibid.*):

"There may have been good reason why a general resolution, otherwise proper, ought not to be applied in the case of this individual."

The observation of that judge seems to contain the kernel of the matter. Justices cannot make a rule to be applied in every case without hearing it. They may lay down for themselves a general rule, but they are bound to consider whether it is applicable to any particular case.

A later case is *R. v. Holborn Licensing JJ. Ex p. Stratford Catering Co., Ltd.* (3), where an application was made for the transfer of a licence. The justices had made a general rule that they would not permit a transfer to a person who had not an agreement entitling him to at least three months' notice to terminate his engagement and they refused the particular application because the proposed transferee was liable to have his tenancy terminated at a month's notice. The justices had considered the case and the court came to the conclusion that they had not refused to transfer merely because they had laid down for their own guidance this general rule, but had in fact inquired into the merits of the particular case, and accordingly they refused the *mandamus*. *SALTER, J.*, said (136 L.T. 281):

" . . . it is impossible to prevent [justices], in the privacy of their own room, from adopting any standard or practice which seems to them right, and, if they do, I think it is both right and convenient that they should state their practice publicly for the information of all concerned. They must, of course, apply their minds properly to the circumstances of each particular case,"

which again shows that there is nothing wrong in justices laying down a line of policy for themselves provided they consider whether a particular case before them calls for the application of that policy.

In *R. v. Rotherham Licensing JJ. Ex p. Chapman* (1) an application was made for an occasional licence, which the justices refused. The chairman filed an affidavit saying that the justices had adopted a rule that, in considering applications for occasional licences, they would seriously challenge the existence of special circumstances whenever an application was made on behalf of the same organisation on more than two occasions in any period of twelve months, but that they would not exclude from their consideration the existence of special circumstances. He added that they had refused the application on its merits and that they were impressed by the answer given by the secretary of the company, when asked what was the special requirement for a liquor licence, that a dance could not be made to pay without a bar. They added that, in their opinion, the purpose of an occasional licence was to add a reasonable amenity to an already planned function and not to provide the promoters of the function with a means of making money from the sale of liquor in order to offset the financial loss incurred in running the function without such an additional amenity. The court in that case granted a *mandamus* and distinguished it from *R. v. Holborn Licensing JJ. Ex p. Stratford Catering Co., Ltd.* (3). A careful perusal of the judgments, more especially that of *HUMPHREYS, J.*, makes clear, the ground on which the *mandamus* was ordered. The combined effect of s. 64 of the Licensing (Consolidation) Act, 1910, and s. 13 of the Revenue Act, 1862, is that occasional licences are to be granted by the Commissioners of Inland Revenue subject to the consent of two justices whenever they shall consider it conducive to public convenience, comfort, and order to do so. No doubt, the justices whose consent has to be obtained have to consider exactly the same matters as the Commissioners of Inland Revenue. The justices in *R. v. Rotherham Licensing JJ. Ex p. Chapman* (1) did not consider whether the occasion was one on which it would be conducive to public convenience to grant an occasional licence. They said, that, while they would grant an applicant a licence on two occasions, they would not grant him one on a third. That is bringing into consideration matter outside the Act altogether. If it is conducive to public convenience, comfort, and order that an occasional licence should be granted, it matters not whether the applicant has on one or more occasions applied for a licence or whether the result of granting a licence would be that the occasion would result in a profit instead of a loss. *HUMPHREYS, J.*, said in terms ([1939] 2 All E.R. 715):

" I by no means desire to whittle away the powers which, in my opinion, the licensing justices undoubtedly possess to make certain general rules . . . "

and after referring to the *Holborn* case (3) went on (*ibid.*):

A "... but in regard to these occasional licences, seeing that they are to be granted subject to the consent of two justices by those who are, in effect, the officers of excise, and with the approval of the Inland Revenue Commissioners, whenever they shall consider it conducive to public convenience, comfort or order to do so, I myself very much doubt whether the justices ought to say in advance, or have power to say in advance: 'We shall consider it not conducive to public . . . order in certain circumstances.' . . . I think that it is plain that in fact these justices did not consider the merits of the particular application, but regarded themselves as being required to start their consideration of this case by paying attention to a rule that normally there should be only two, and no more, grants of occasional licences . . . to any applicant in respect of an entertainment or entertainments promoted by the same promoter."

B It appears to us that the justices in that case took into account an entirely irrelevant consideration. In the present case, in our opinion, no fault can be found with the justices determining that as a general rule they would look with disfavour on persons who had come before them and obtained a restricted licence subsequently applying for a full licence and would consider that in such a case there was a very considerable onus thrown on the applicant. We think that is well within their powers, but when an application is made in respect of premises which have hitherto held a restricted licence for one without conditions, the justices are bound to hear it and to consider whether, on the facts of the particular case, there is enough to take it out of the general rule which they have laid down.

D That is what we think the justices did in the present case. We think they meant to decide that they were not prepared to alter in the particular case before them the general line of policy which they had laid down in this class of case. For these reasons, in our opinion, the application fails and should be dismissed with costs.

Application dismissed.

E Solicitors: *Wood, Nash & Co.*, agents for *Kitsons, Easterbrook & Co.*, Torquay (for the applicant); *J. E. Lickfold & Sons*, agents for *Carter, Fisher & Co.*, Torquay (for the justices).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

F R. v. SURREY QUARTER SESSIONS APPEAL COMMITTEE. *Ex parte* LILLEY.

applied. R. v. NOTTINGHAM QUARTER SESSIONS. [1952] 2 All E.R. 78. (Lord Goddard, C.J., Hilbery and Ormerod, JJ.),

G *Child-Minder—Registration—Requirements—Applicant's appeal allowed by justices—Local authority ordered to pay costs—Right of council to appeal to quarter sessions—"Person aggrieved"—Public Health Act, 1936 (c. 49), s. 301—Nurseries and Child-Minders Regulation Act, 1948 (c. 53), s. 6 (4).*

H Acting under s. 1 (1) (b) of the Nurseries and Child-Minders Regulation Act, 1948, a county council registered the applicant as a child-minder, but imposed certain requirements under s. 2 (2) and (3) of the Act. On appeal by the applicant under s. 6 (4) against the requirements imposed on her, a court of summary jurisdiction found that the council had no power to make the order against which the applicant appealed, and, accordingly, allowed the appeal and ordered the council to pay costs. The council appealed under s. 301 of the Public Health Act, 1936 (applied for the purposes of s. 6 of the Act of 1948 by s. 6 (5) thereof), to quarter sessions, which allowed their appeal. On an application by the applicant for an order of *certiorari* to bring up and quash the order of quarter sessions

HELD: "person aggrieved" in s. 301 of the Act of 1936 included a local authority; the council was a "person aggrieved" since it had been ordered by the court of summary jurisdiction to pay costs; and, therefore, quarter sessions had jurisdiction to entertain the council's appeal.

Jennings v. Kelly ([1939] 4 All E.R. 464), applied.

R. v. London Sessions Appeal Committee. Ex p. Westminster City Council ([1951] 1 All E.R. 1032), distinguished.

FOR THE NURSERIES AND CHILD-MINDERS REGULATION ACT, 1948, s. 1 (1) (b) and s. 6, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 1155 and p. 1158, respectively; FOR THE PUBLIC HEALTH ACT, 1936, s. 300 to s. 302, see *ibid.*, Vol. 19, pp. 473, 474.

Cases referred to:

- (1) *R. v. London Sessions Appeal Committee. Ex p. Westminster City Council*, [1951] 1 All E.R. 1032; 115 J.P. 350.
- (2) *Jennings v. Kelly*, [1939] 4 All E.R. 464; [1940] A.C. 206; 109 L.J.P.C. 38; 162 L.T. 1; Digest Supp.
- (3) *Ex p. Sidebotham. Re Sidebotham*, (1880), 14 Ch.D. 458; 49 L.J. Bey. 41; 42 L.T. 783; 4 Digest 225, 2114.
- (4) *R. v. London County Keepers of the Peace & JJ.*, (1890), 25 Q.B.D. 357; *sub nom. R. v. London JJ. Ex p. Fulham Vestry*, 59 L.J.M.C. 146; 63 L.T. 243; 55 J.P. 56; 26 Digest 460, 1760.

MOTION for *certiorari* to remove and quash an order of the appeal committee of Surrey Quarter Sessions.

On Mar. 8, 1951, the appeal committee allowed an appeal by the respondents, the Surrey County Council, against the decision of a court of summary jurisdiction sitting at Kingston-on-Thames allowing an appeal of the applicant from a decision of the council, dated Jan. 20, 1951, whereby the applicant, who carried on business as principal of a nursery school for children between the ages of three and five years, was conditionally registered under the Nurseries and Child-Minders Regulation Act, 1948, as a child-minder. The requirements imposed by the council were that the number of the children under the age of five received into the applicant's home for reward together with any other children in her home should not at any time exceed fifteen and that precautions should be taken against the exposure of the children to infectious disease. The court of summary jurisdiction found as a fact (a) that the room in which the children were received was not part of the applicant's home, and (b) that the children were received for educational purposes and not for the purpose of being "looked after," and, accordingly, the justices held that the Act did not apply to the applicant in respect of her home or the activities she carried on there and that the council had no power to make the order against which the applicant appealed. The justices then ordered the council to pay to the applicant £15 15s. costs. On the hearing of the council's appeal at quarter sessions the applicant contended that the appeal committee had no jurisdiction to hear the appeal, but that objection was overruled and the appeal committee heard and allowed the appeal. The determination of the court of summary jurisdiction was quashed, and it was ordered that the applicant should be registered subject to the requirements imposed by the council. The present report is confined to the question whether or not the council's appeal to quarter sessions was competent.

Garfitt for the applicant.

I. C. Baillieu for the council.

LORD GODDARD, C.J.: Counsel for the applicant moves for an order of *certiorari* to bring up and quash an order made by the Surrey Quarter Sessions allowing an appeal by the council against an order of a court of summary jurisdiction sitting at Kingston-on-Thames which entertained an appeal by the applicant, Miss Sadie Lilley, against an order which had been made by the

council under the Nurseries and Child-Minders Regulation Act, 1948, registering her as a child-minder but with certain conditions attached to which she objected.

In my opinion, this application must fail. Under the Nurseries and Child-Minders Regulation Act, 1948, s. 1 (1), it is provided that:

A “Every local health authority shall keep registers . . . (b) of persons in their area who for reward receive into their homes children under the age of five to be looked after as aforesaid.”

Section 2 provides that the authority can impose conditions when they register. Section 8 (2) provides:

B “Nothing in this Act shall apply to the reception of children in any school, notwithstanding that they are received to be looked after and not for the purpose of education.”

By s. 6 (4) an appeal is given in these terms:

“A person aggrieved by an order under this Act refusing an application for registration or cancelling any registration, or imposing any requirement under s. 2 of this Act, may appeal to a court of summary jurisdiction . . .”

C It is also provided by s. 6 (5) that for the purposes of the Act s. 300 to s. 302 of the Public Health Act, 1936, shall apply. Those sections deal with appeals to courts of summary jurisdiction against decisions of local authorities and give a further appeal to quarter sessions. Under s. 300 (1) it is provided:

D “Where any enactment in this Act provides—(a) for an appeal to a court of summary jurisdiction against a requirement, refusal or other decision of a council; or (b) for any matter to be determined by, or an application in respect of any matter to be made to, a court of summary jurisdiction, the procedure shall be by way of complaint for an order, and the Summary Jurisdiction Acts shall apply to the proceedings.”

E I emphasise that because that is the section which, by incorporating the Summary Jurisdiction Acts and providing that the proceedings by way of appeal shall be by way of complaint for an order, empowers a court, if they make an order or refuse an order, to award costs. By s. 300 (2) it is provided:

F “The time within which any such appeal may be brought shall be twenty-one days from the date on which notice of the council’s requirement, refusal or other decision was served upon the person desiring to appeal, and for the purposes of this sub-section the making of the complaint shall be deemed to be the bringing of the appeal.”

There the word “council” appears, and the time is limited from the date on which notice of the council’s requirement is served. Therefore, there is a very good reason there for using the word “council” and not the word “person,” because it is the council’s requirement against which the appeal is to be brought.

G Section 301 provides:

“Subject as hereinafter provided, where a person aggrieved by any order, determination or other decision of a court of summary jurisdiction under this Act is not by any other enactment authorised to appeal to a court of quarter sessions, he may appeal to such a court . . .”

H The proviso has some importance as indicating the mind of the legislature. It is:

“Provided that nothing in this section shall be construed as conferring a right of appeal from the decision of a court of summary jurisdiction in any case if each of the parties concerned might under this Act have required that the dispute should be determined by arbitration instead of by such a court.”

That seems to indicate that it was in the mind of the legislature that, unless this provision had been put in, either one of the parties might have appealed.

In the present case, the council having made this order refusing to register the applicant except subject to conditions, she appealed to a court of summary jurisdiction. That court found that the children were received in a room which was not part of the applicant's home and that they were received for educational purposes and not for the purpose of being "looked after." It was, therefore, held that the Act did not apply in respect of the applicant's home or her activities therein and that the council had no power to make the order. Costs were awarded against the council. I doubt whether there was power to make such an order, but we have not heard any argument on the point. Against that order the council appealed. At first sight we were of opinion that the case appeared to be governed by the decision of this court in *R. v. London Sessions Appeal Committee. Ex p. Westminster City Council* (1), but our attention was called, at a somewhat late stage, to the fact that the council had been ordered to pay the costs. The first point is whether the council were "persons aggrieved" within s. 301 of the Act of 1936. The decision of the House of Lords in *Jennings v. Kelly* (2) seems to show that if a court, in the exercise of its discretion, awards costs against a person, that person at once becomes an aggrieved party and can appeal. His grievance is that he has been ordered to pay costs, and when he appeals against an order to pay costs it follows that the appellate court must be able to go into the merits, because it is only on a decision on the merits that it could determine whether or not the party ought to have been ordered to pay costs. If the court of summary jurisdiction in the present case had had no power to order costs, different considerations might have arisen, but on this point the case is distinguishable from *R. v. London Sessions Appeal Committee. Ex p. Westminster City Council* (1), because there no order for costs was made. The Westminster City Council, having refused to grant a street-trader's licence, the street trader appealed to a metropolitan magistrate who reversed the order of the council and granted him a licence. This court held that the mere fact that the council's decision had been reversed did not give them a right to appeal as a party aggrieved. We founded ourselves largely on *Ex p. Sidebotham. Re Sidebotham* (3) and *R. v. London County Keepers of the Peace & JJ.* (4), which showed that the expression "person aggrieved" in a statute does not mean a person who is disappointed at an order being made or a person who is annoyed at an order being made. A person aggrieved, as JAMES, L.J., said in *Ex p. Sidebotham. Re Sidebotham* (3) (14 Ch.D. 465), "must be a man who has suffered a legal grievance." LORD COLERIDGE, C.J., said in *R. v. London County Keepers of the Peace & JJ.* (4) (25 Q.B.D. 361):

"The section does not give an appeal to anybody but a person who is by the direct act of the magistrate, 'aggrieved'—that is, who has had something done or determined against him by the magistrate."

In the present case something was determined against the council by the justices, because they were ordered to pay costs. Therefore, they would appear to be "persons aggrieved," but I must not omit one other argument that has been addressed to us. It is said that "person" in s. 301 of the Public Health Act, 1936, does not include the local authority. The Interpretation Act, 1889, s. 2 (1), provides that the word "person" in certain Acts of Parliament includes a body corporate unless an intention appears to the contrary. We held in *R. v. London Sessions Appeal Committee. Ex p. Westminster City Council* (1) that an intention did appear to the contrary. We were there construing the London County Council (General Powers) Act, 1947, and we pointed out that in that Act wherever a reference was intended to the borough council the words "borough council" were used and whenever a reference was intended to a person in respect of whom the borough council was acting the word "person" was used. In those circumstances, the appeal being given to a "person aggrieved," the court thought that the borough council were not included in the word "person." That was not the only ground of the decision, because

certainly the point on which I intended principally to found my judgment was that the council were not aggrieved, since the fact that their decision was reversed did not make them "aggrieved."

A It is impossible to hold that a person ordered to pay costs is not a person aggrieved, because that has been the subject of direct decision in *Jennings v. Kelly* (2). Moreover, in *R. v. London Sessions Appeal Committee. Ex p. Westminster City Council* (1) we had not to consider, as we have here, the sections in the Public Health Act, 1936, which are incorporated in the Nurseries and Child-Minders Regulation Act, 1948. They were not incorporated into the London County Council (General Powers) Act, 1947, and I think in this case the same considerations do not apply because all sorts of people are affected under the Public Health Act, 1936. For instance, a local authority can sue for expenses before a court of summary jurisdiction, and, if they fail to get judgment, they are aggrieved by that decision, and, obviously, s. 301 gives them an appeal. Whether the court was right or wrong in *R. v. London Sessions Appeal Committee. Ex p. Westminster City Council* (1) in refusing to apply the word "person" to include borough council—I think they were right—I am certain that the same considerations do not apply here, and for the above reasons I think a borough council are "persons." The council here, therefore, are persons against whom an order for costs has been made and so are "persons aggrieved" and this application must be refused.

D HILBERY, J.: I am of the same opinion. The applicant based her application for an order of *certiorari* on the submission that this court was bound by its decision in *R. v. London Sessions Appeal Committee. Ex p. Westminster City Council* (1). That case, however, depended entirely on the construction of s. 64 of the London County Council (General Powers) Act, 1947, which provided:

"Any person deeming himself aggrieved by any conviction or order by a court of summary jurisdiction under any provision of this Act may appeal to the next practicable court of quarter sessions under and according to the provisions of the Summary Jurisdiction Acts."

E The court held that in the circumstances of that case the Westminster City Council was not, within the meaning of s. 64, a "person aggrieved." The council had had no order made against it which cast any burden on it. It was only dissatisfied with the decision which had been given against it, or, as it is sometimes expressed, annoyed by that decision. In my view, it is of the utmost importance to note that no order had been made against the council for costs. The judgment of the court proceeded on the ground that in those circumstances the council was not "aggrieved." My Lord also observed that when the London County Council (General Powers) Act was examined there were reasons for saying that the Act was so framed as to draw a distinction between any council that might come within the purview of that Act and a person where in that Act the word "person" was used. Sections 300 to 302 of the Public Health Act, 1936, governing matters of appeal, were not embodied in the Act which the court was considering in that case.

G On examining ss. 300 to 302 it is observable that, though the different expressions "council" and "person" are indeed used, they are not used comparatively. They are not used as if to draw a distinction when it comes to the question of appeal from the court of summary jurisdiction. Section 300 begins:

H "Where any enactment in this Act provides—(a) for an appeal to a court of summary jurisdiction against a requirement, refusal or other decision of a council; or (b) for any matter to be determined by, or an application in respect of any matter to be made to, a court of summary jurisdiction, the procedure shall be by way of complaint . . ."

What is being dealt with there is how a requirement, refusal, or other decision of a council is to be taken before a court of summary jurisdiction. What is

under contemplation is only the taking before the court of some act or thing done by the council. Section 300 (2) deals with the time within which any such appeal may be brought—twenty-one days from the date on which notice of the council's requirement, refusal, or other decision was served on the person. There it is necessary to draw the distinction between the council making the requirement and the person on whom it is being served. In s. 301 there are the words:

"Subject as hereinafter provided, where a person aggrieved by any order, determination or other decision of a court of summary jurisdiction under this Act is not by any other enactment authorised to appeal to a court of quarter sessions, he may appeal to such a court . . ."

On a fair construction of those two sections there is nothing in the employment of the terms "council" and "person" in s. 300 which can be said to lead to the conclusion that there is some intention in the Act to limit the word "person," when it is used in s. 301, so as to make it exclude a body corporate or incorporate. It follows that the council here is a "person" within s. 301.

As to whether the council was a person aggrieved, it appears to me that the judgment of LORD WRIGHT in *Jennings v. Kelly* (2) is conclusive and binding on this court. If the person under consideration in *Jennings v. Kelly* (2) was a person who was rightly to be considered a "person aggrieved," I should have thought it is almost *a fortiori* in this case to hold that the council, who were really a party to the proceedings in the court of summary jurisdiction, must be regarded as "persons aggrieved" when mulcted in costs by an order of that court. I agree that this application must be dismissed.

ORMEROD, J.: I agree.

Application refused.

Solicitors: *Rising & Ravenscroft*, agents for *Sherwood Cobbing & Williams*, Kingston-on-Thames (for the applicant); *Wyatt & Co.*, agents for *T. W. W. Gooderidge*, clerk to Surrey County Council (for the council).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re HAVANT AND WATERLOO URBAN DISTRICT COUNCIL COMPULSORY PURCHASE ORDER (NO. 4), 1950. APPLICATION OF WATSON.

[KING'S BENCH DIVISION (Devlin, J.), July 24, 1951.]

Housing—Compulsory purchase order—Land for housing purposes—"Needs of the district"—Inclusion of residents outside district—Housing Act, 1936 (c. 51), s. 71.

An urban district council made a compulsory purchase order under the Housing Act, 1936, s. 74 (1) (which was confirmed by the Minister), in respect of land in their area which they required to house persons in immediate need of housing accommodation some of whom were living in the urban district and others in the adjoining county borough.

HELD: the words "needs of the district" in s. 71 of the Act did not relate only to residents in the urban district at the time of making the order, but they extended to residents in adjacent areas who might require to reside, or who might be more conveniently housed, in the district in the future, and, therefore, the order was valid.

FOR THE HOUSING ACT, 1936, s. 71 and s. 72 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 11, pp. 513 and 514.

MOTION to quash a compulsory purchase order made under the Housing Act, 1936, Part V.

A The applicant was the owner of land in the urban district of Havant and Waterloo in respect of which a compulsory purchase order under the Act of 1936 had been made on Aug. 25, 1950, and confirmed by the Minister of Local Government and Planning on Feb. 16, 1951. The applicant contended that the order was invalid in that the land was not required for housing accommodation for "the needs of the district" within the meaning of s. 71 and s. 72 (1) of the Act, because under the terms of the confirmatory order of the Minister the needs for which provision was to be made included the needs of persons living in the adjoining county borough.

Kerrigan for the applicant.

The Solicitor-General (Sir Lynn Ungood-Thomas, K.C.) and J. P. Ashworth for the council.

B **DEVLIN, J.:** This is a motion by counsel for the applicant, Mr. Arthur Charles Watson, who challenges the validity of a compulsory purchase order made by the Havant and Waterloo Urban District Council and confirmed by the Minister of Local Government and Planning whereby the council have obtained authority to acquire land owned by the applicant in the urban district of Havant and Waterloo to build houses thereon in pursuance, they say, of the powers and duties given to them by Part V of the Housing Act, 1936. The objections to the order were made the subject of an inquiry, as a result of which the Minister reached a conclusion in the following terms:

D " . . . that the land comprised in the order was required immediately by the Havant and Waterloo Urban District Council for the purposes of Part V of the Housing Act, 1936, in order to house persons in immediate need of housing accommodation. Some of these persons are now living in the urban district of Havant and Waterloo, while others are now living in the county borough of Portsmouth. It was considered that the available accommodation in the county borough of Portsmouth is insufficient for the needs of persons now living in the county borough, and immediate development for re-housing such persons outside the county borough is urgent and necessary."

E Havant and Waterloo is outside the county borough of Portsmouth. The ground on which the validity of the order is challenged is that the council have no power under Part V of the Housing Act, 1936, to acquire land except for the needs of their own district, and the statement I have read shows that they are seeking, in part at any rate, to provide housing accommodation for people who are now living in the county borough of Portsmouth.

F The Housing Act, 1936, s. 74 (1), as amended by the Acquisition of Land (Authorisation Procedure) Act, 1946, s. 6 and sched. IV, provides:

G "Land for the purposes of this Part of this Act may be acquired by a local authority by agreement, or they may be authorised to purchase land compulsorily for those purposes by the Minister."

Section 72 (1), as amended by the Housing Act, 1949, s. 1 and sched. I, provides:

"A local authority may provide housing accommodation (a) by the erection of houses on any land acquired or appropriated by them."

H The words of the statute, therefore, so far as I have read them, are wide, and the local authority might, if the matter stopped there, acquire land for the provision of housing accommodation for anybody, no matter in what district they lived. Section 71, which begins Part V of the Act, puts on local authorities the duty of reviewing housing conditions in their areas, and of framing proposals. As amended by the Act of 1949 the section reads:

"It shall be the duty of every local authority to consider the housing conditions in their district and the needs of the district with respect to the provision of further housing accommodation . . ."

It is conceded by the Minister that land cannot properly be acquired under this Part of the Act unless it is required for housing accommodation for the needs of the district, whatever that phrase may properly mean, and it is on the construction of that phrase that this case turns.

If the applicant's contention be right, then, in so far as the land was required for the purposes of housing accommodation for people in Portsmouth, the Portsmouth County Borough Council could, undoubtedly, have acquired it, and, if they had done so, no objection could have been made, so it is purely a technical question whether the right local authority have come forward to acquire the land and provide the housing accommodation. It is important that powers of this sort should be exercised in accordance with the proper construction of the Act, and the applicant has, therefore, a perfect right to challenge the matter as he has done in this court, but it is equally important that a reasonable interpretation should be given to the provisions of an Act of this sort, so that its scheme and object may not be defeated by mere technical considerations.

The case for the applicant is that "the needs of the district" means, and must be confined to, persons living in the district at the time of the order. That appears to me to be too narrow an interpretation reasonably to be put on the phrase as used in s. 71. A local authority, when they are considering what are the needs of their district with regard to housing accommodation, must look to rather wider horizons than the people living there at any particular moment. Indeed, s. 74 (2) seems in terms to contemplate that, because it gives power to a local authority to acquire land notwithstanding that it is not immediately required for the purpose of housing accommodation, so long as it is likely to be required within ten years. Moreover, I do not think that it is reasonable for any local authority, when dealing with the question of housing accommodation, to regard their area as a watertight district with boundaries like those of sovereign States or to look on any person resident in their district as owing some sort of allegiance to them, and having no concern with anybody outside that allegiance. Plainly, in many cases the boundaries have been artificially drawn, and it cannot be right that, in considering the needs of their district, a local authority should stop short at a street immediately beyond the district which is badly overcrowded and where the people might more conveniently be re-housed on the other side of the boundary. When the needs of a district are being considered, the districts immediately adjacent must be looked at. The words used in the Act are not the needs of the people in the district, but the needs of the district, and I think that is a deliberate and sensible distinction. A local authority for a suburban area outside a big central town, might properly say: "People are wanting to come and live in our district. We have a long and growing waiting list of people who want to come and live in our district, and, therefore, our district needs more houses." That is a sensible and reasonable interpretation to put on the phrase "the needs of the district," and I think it is the sort of interpretation to be put on the phrase as it is used in s. 71.

Accordingly, it is not, in my judgment, outside the proper purview of Havant and Waterloo Urban District Council, in providing housing accommodation, to have regard to the fact that in part they would be providing for people who at present live in Portsmouth, but who desire to find, or will more easily find, housing accommodation in the district of Havant itself. I think that the motion should be refused with costs.

Motion refused.

Solicitors: *Gordon Gardiner, Carpenter & Co.*, agents for *J. R. C. Miller*, Portsmouth (for the applicant); *Solicitor, Minister of Health* (for the council).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

BENTLEYS STOKES AND LOWLESS v. BEESON

Affirmed. C.A. [1952] 2 All E.R. 82.

M. INSPECTOR OF TAXES).

[CHANCERY DIVISION (Roxburgh, J.), July 26, 27, 1951.]

Income Tax—Profits of trade—Deductions—Entertainment of clients—Income Tax Act, 1918 (c. 40), sched. D, cases I and II, r. 3 (a).

A The partners in a firm of solicitors were accustomed to entertain existing clients of the firm to luncheon at a social club and at various restaurants. During luncheon, business was discussed. The legal advice given to clients at luncheon was charged to them in the normal way, but the fees charged did not include the expenses of the meals, which were paid by the firm. This practice was adopted by the partners both for their own convenience, so that they could devote the remainder of the day to other work in their offices, and for the convenience of clients. The partners claimed to deduct the cost of these entertainments (which included the cost of their own meals) in computing the profits of the firm for assessment to income tax. The Income Tax Act, 1918, sched. D, cases I and II, r. 3 (a), forbids the deduction of "any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation."

B
C
D HELD: it was not essential, in order that deduction of the cost of the meals and refreshment should be allowed, to prove that the expenditure was "necessary" (in the strict sense of the word) for the purposes of transacting the business, and, notwithstanding the fact that the partner concerned obtained gratuitous sustenance, the giving of the hospitality was, on the facts, in each case a single transaction embarked on solely for business or professional purposes, and, therefore, the deduction ought to be allowed.

AS TO DEDUCTION FOR EXPENSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 149-156, paras. 309-320; and FOR CASES, see DIGEST, Vol. 28, pp. 42-45, Nos. 215-226.

Cases referred to:

- (1) *Union Cold Storage Co., Ltd. v. Jones*, (1923), 129 L.T. 512; 8 Tax Cas. 725; 28 Digest 53, 270.
- (2) *Atherton v. British Insulated & Helsby Cables, Ltd.*, [1925] 1 K.B. 421; 94 L.J.K.B. 319; 132 L.T. 288; 10 Tax Cas. 155; *affd.* H.L. *sub nom.* *British Insulated & Helsby Cables v. Atherton*, [1926] A.C. 205; 95 L.J.K.B. 336; 134 L.T. 289; 28 Digest 52, 264.
- (3) *Usher's Wiltshire Brewery, Ltd. v. Bruce*, [1915] A.C. 433; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399; 28 Digest 56, 287.
- (4) *Smith v. Incorporated Council of Law Reporting for England and Wales*, [1914] 3 K.B. 674; 83 L.J.K.B. 1721; 111 L.T. 848; 6 Tax Cas. 477; 28 Digest 52, 262.

CASE STATED by the Special Commissioners of Income Tax.

H The taxpayers appealed against a decision of an inspector of taxes to disallow as a deduction for the purposes of their assessment to income tax expenses incurred in entertaining clients to luncheon and dinner over which business was conducted and advice given. The commissioners confirmed the inspector's decision.

Millard Tucker, K.C., and *J. W. P. Clements* for the taxpayer.*The Attorney-General (Sir Frank Soskice, K.C.)*, and *R. P. Hills* for the Crown.

ROXBURGH, J.: At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on Oct. 9, 1950, Bentleys, Stokes and Lowless, to whom I will refer as "the firm," appealed against an assessment to income tax made on it for the year ended Apr. 5, 1950, under the provisions of the Income Tax Act, 1918, sched. D, case II.

According to the Case,

"the sole question raised by this appeal is whether the appellant firm is entitled to a deduction, in computing its profits and gains for the purposes of income tax for the said year, in respect of entertainment expenses by reason of the matters "

set out in the Case. The question whether, if the firm is entitled to a deduction, it is entitled to the full amount claimed or not, does not seem to have been one of the questions raised by this appeal. A

The facts, and the evidence of the two partners of the firm, as accepted by the Special Commissioners, are set out in the Case as follows:—

"The appellant firm carries on the profession of solicitors in partnership and at all material times was comprised of two partners, B. H. Dulanty and R. L. Williams. Its office is situated at 32, Bishopsgate, London, E.C.2. It had been the custom for some years past for the partners, acting on behalf of the appellant firm, to incur expenses in entertaining existing clients. For the years 1943-44 to 1948-49 inclusive, the appellant firm had been allowed as a deduction each year a fixed sum of £495 in respect of entertainment expenses in computing its profits and gains for income tax purposes. For the year of assessment 1949-50, based on the firm's account for the year ended Dec. 31, 1948, the amount claimed as a deduction was £539, being apportioned as to £430 expended by B. H. Dulanty and £109 by R. L. Williams. As a result of an interview between B. H. Dulanty, the auditor of the firm, and the inspector of taxes, the latter had requested that weekly totals of the expenditure in respect of entertainment expenses incurred by the partners should be recorded. Weekly totals of such expenses were accordingly kept as from Oct. 4, 1947. In August, 1949, a further interview at which the same parties were present took place, as a result of which the appellant firm was informed by the inspector that the said expenditure incurred in the year ended Dec. 31, 1948, would be disallowed. The nature of the entertainment was all in connection with lunches to existing clients apart from one or two dinners. These took place at the Thatched House Club, an ordinary social club, in St. James's Street, of which B. H. Dulanty was a member, or at restaurants. The appellant firm had a number of clients in the west end of London and in the country and it was more convenient for business interviews to be held in the west end. By giving these clients lunches, during which the business in hand was discussed, the remainder of the day could be devoted to the appellant firm's routine work by the partners at the office. B. H. Dulanty attended to the commercial work and R. L. Williams to the Admiralty side of the appellant firm's business. If the partners had decided to hold interviews solely in the office in Bishopsgate, certain clients might have been lost. The entertainment was confined to existing clients who alone were present. The appellant firm's three largest clients were three companies whose total fees brought in more than £3,000 of profit costs in a year. Directors of those three companies, whose offices were in the west end, were entertained at lunch from time to time in the west end for the sake of convenience. The amounts claimed included the cost of the partner's entertainment while entertaining clients. Some of the persons entertained were professional clients from the country for whom the appellant firm acted. In all cases the legal advice given to clients at lunch was charged to them in the normal way, but the cost never included the expenses in question, which were charged as an expense in the firm's profit and loss account under the heading: 'Expenses incurred not directly chargeable to clients.' Clients were sometimes entertained at the Palmerston Restaurant which was close to the office in Bishopsgate. The expenses claimed were primarily and principally, but not purely, for business purposes. R. L. Williams, B C D E F G H

A who dealt exclusively with the Admiralty side and also with some general clients, had to meet in London foreign marine underwriters, mainly from Scandinavia, Germany, Holland and France. They were only in London for a short period and telephoned their arrival. They were usually only free at lunch time or night time. Meetings were usually fixed for lunch time. The same underwriters would visit London on several occasions. Foreign underwriters often had agents in London and these agents would bring their foreign employers with them to lunch. R. L. Williams entertained at various restaurants, not at any club. Mr. H. Horsfall Turner gave evidence at the hearing, which we accepted, as follows:—He was an under-secretary of the Law Society. One of the latter's committees—the Professional Purposes Committee—had recently considered the question of entertainment expenses. This committee considered that the entertainment of existing clients, whether with a view to retaining them as clients or of obtaining new business, was not unprofessional. It was not uncommon for a solicitor to entertain a client at lunch and discuss business with him, as many solicitors were pressed for time. Copies of entertainment expenses incurred by each of the partners for 1947 onwards, marked 'A' and 'B' respectively, are annexed to and form part of this Case. In the case of B. H. Dulanty, C detailed records of this expenditure were kept as from Aug. 8, 1949. In the case of R. L. Williams detailed records were kept as from Jan. 7, 1949. Prior to these dates, only weekly totals are shown. The period material to this appeal is the year ended Dec. 31, 1948. The records of expenses after this date were exhibited at the hearing as examples of the nature of the expenditure previously incurred. D A copy of the appellant firm's accounts for the year ended Dec. 31, 1948, marked 'C,' is annexed to and forms part of this Case."

E The question whether the taxpayers are entitled to a deduction in respect of the expenses in question depends on whether they are expenses which are not excluded by r. 3 (a) of the Rules Applicable to Cases I and II of sched. D, which is as follows:

"In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation."

F I will adopt as my starting point the analysis of that rule which was commended to me by the Attorney-General and was made by SIR ERNEST POLLOCK, M.R., in *Union Cold Storage Co., Ltd. v. Jones* (1). The Master of the Rolls said (8 Tax Cas. 741):

G "... you would have to scrutinise the expenditure very narrowly to find out whether it was laid out for the purpose of the subject's trade, and then ask the second question—was it laid out not wholly for the subject's trade and exclusively for his trade?"

H It will be noticed that the word "necessary" does not appear either in the rule or in that analysis of the rule; and, indeed, the word "necessary" is an elusive word in this context, as VISCOUNT CAVE, L.C., pointed out in *British Insulated & Helsby Cables v. Atherton* (2). LORD CAVE said ([1926] A.C. 211):

"It was made clear in the above cited cases of *Usher's Wiltshire Brewery, Ltd. v. Bruce* (3) and *Smith v. Incorporated Council of Law Reporting for England and Wales* (4) that a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade . . ."

and it is clear, therefore, that it is not essential for the subject to prove that the particular expenditure is necessary unless the word "necessary" is used in some sense other than its strict sense. No argument to the contrary on this point has been addressed to me.

The Special Commissioners have reached the conclusion that:

"For the above reasons we hold that the sum claimed was not money wholly and exclusively laid out or expended for the purposes of the profession."

That, be it noted, is a positive conclusion. They have not found that the subject had not satisfied them that it had been wholly and exclusively laid out or expended for the purposes of the profession; they found as a fact affirmatively that it was not money wholly and exclusively laid out or expended for the purposes of the profession. That is, I think, a point of no little importance. I think this case might have been more difficult for the subject if they had found merely that he had not sufficiently proved his case, but they did not. Their reasons appear to be two, and the first is:

"The provision of meals or other refreshment on these occasions was, no doubt, customary and a matter of good policy, but we are unable to say that it was necessary for the purposes of transacting the business in hand or for the profession generally."

In the light of that finding, I feel bound to recall some of their earlier findings. They found that:

"In all cases the legal advice given to clients at lunch was charged to them in the normal way, but the cost never included the expenses in question, which were charged as an expense in the firm's profit and loss account under the heading: 'Expenses incurred not directly chargeable to clients'."

Previously it had been stated that the entertainment was confined to existing clients who alone were present, and, earlier still:

"The appellant firm had a number of clients in the west end of London and in the country and it was more convenient for business interviews to be held in the west end. By giving these clients lunches, during which the business in hand was discussed, the remainder of the day could be devoted to the appellant firm's routine work by the partners at the office. B. H. Dulanty attended to the commercial work and R. L. Williams to the Admiralty side of the appellant firm's business. If the partners had decided to hold interviews solely in the office in Bishopsgate, certain clients might have been lost . . . The appellant firm's three largest clients were three companies whose total fees brought in more than £3,000 of profit costs in a year. Directors of those three companies, whose offices were in the west end, were entertained at lunch from time to time in the west end for the sake of convenience."

Speaking of other clients the commissioners found:

"R. L. Williams, who dealt exclusively with the Admiralty side and also with some general clients, had to meet in London foreign marine underwriters, mainly from Scandinavia, Germany, Holland and France. They were only in London for a short period and telephoned their arrival. They were usually only free at lunch time or night time. Meetings were usually fixed for lunch time. The same underwriters would visit London on several occasions. Foreign underwriters often had agents in London and these agents would bring their foreign employers with them to lunch."

Bearing in mind those findings of fact, and bearing in mind the comment which the commissioners themselves made on those (their own) findings of fact, namely that

"we have no doubt that meeting clients elsewhere than at the office might well be a matter of convenience,"

(that is putting it, I think, very mildly), and further that

“the provision of meals or other refreshment on these occasions was, no doubt, customary and a matter of good policy,”

it seems to me clear that, when they use the word “necessary,” they must be using it in the strict sense, and the citations of authority which I have already made show quite plainly that that is an erroneous test. It seems to me, therefore, that, so far as their first reason is concerned, the Special Commissioners were wrong, because they applied a test which was erroneous in law.

The second reason appears to be this:

“We cannot come to the conclusion that the moneys expended on entertainment were expended solely for the purposes of the profession and were entirely divorced from the element of hospitality and the relationship of host and guest.”

If they could not come to the conclusion that the moneys expended on entertainment were expended solely for the purposes of the profession, that would undoubtedly be a good reason, which I could not disturb if there were any evidence to support it. The question is whether there was any evidence to support it.

I cannot myself see much difference between entertainment and hospitality.

If once hospitality arises, then the relationship of host and guest follows as a matter of course. It seems to me that the commissioners have said that these entertainment expenses were not incurred solely for the purposes of the profession because they were in some sense entertainment expenses. Thus stated,

it would show that their argument moves in a circle, but, of course, I am not going to leave the matter there. As nobody attended these lunches except a client and a member of the firm, for whose advice, given during the actual lunch, the firm received payment, there would appear to be little scope for any purpose in the disbursement other than a professional purpose. What other purpose could there be ? The only other purpose which has been suggested is hospitality

(if one has regard to the Case Stated or to the arguments which have been submitted to me on behalf of the Crown), but surely that is begging the question. Expenditure on hospitality, coupled with advice for which a fee is charged, looks to me like expenditure for a professional purpose. It seems to me that it is no less a professional purpose merely because it involves an element of hospitality. That element does not necessarily vitiate the exclusive business purpose.

It is necessary to go further and consider what was the nature of the hospitality, and it seems to me that the evidence is really all one way. I have done my best, with the assistance of counsel for the Crown, to pick out any shadow of evidence referred to in the Case which would appear to point to hospitality of a character which was not consistent with an exclusively business or professional purpose. It seems to me that, on the evidence as included in the Case Stated, this transaction was one single transaction embarked on for business or professional purposes

solely and exclusively. The partner who attended and lunched was an essential element in the transaction. The advice could not have been given and the fee could not have been earned if the partner had not attended, and, obviously, if the partner has to attend and the client is to be given a lunch, business would not be promoted if the partner should sit by eating and drinking nothing.

It is true that, while the firm (which for purposes of assessment to income tax is a separate entity) gets the benefit of the fee, which is, of course, subsequently divided in agreed proportions between the members of the firm, the partner who actually attends the lunch gets a separate and personal benefit to the extent (and only to the extent) that he gets his mid-day sustenance without the obligation to pay for it. The mere circumstance that the partner gets that degree of gratuitous sustenance cannot, in my judgment, be a sufficient reason for holding that a transaction, which is from every other point of view a business transaction, lacks that characteristic in any degree whatever. I derive some

comfort in this view (I cannot put it higher) from the well-known case of *Usher's Wiltshire Brewery, Ltd. v. Bruce* (3). In that case LORD SUMNER said ([1915] A.C. 469):

"Where the whole and exclusive purpose of the expenditure is the purpose of the expender's trade, and the object which the expenditure serves is the same, the mere fact that to some extent the expenditure enures to a third party's benefit, say that of the publican, or that the brewer incidentally obtains some advantage, say in his character of landlord, cannot in law defeat the effect of the finding as to the whole and exclusive purpose."

I feel that this is the most difficult point in the case. Therefore, I wish to emphasise that that is not the ground on which the commissioners based their finding, whether it would or would not be a good ground.

Appeal allowed.

Solicitors: *Bentleys, Stokes & Lowless* (for the taxpayer); *Solicitor of Inland Revenue*.

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

SHIMMELL v. FISHER AND OTHERS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., and Ormerod, J.), July 25, 1951.]

Street Traffic—Taking motor vehicle without owner's consent—"Takes and drives away"—Motor vehicle pushed a few yards by two defendants, while a third steered—Road Traffic Act, 1930 (c. 43), s. 28 (1).

The respondents, without the consent of the owner or other lawful authority, released the handbrake of a stationary motor vehicle, and, while one of them held the steering wheel, the other two pushed it a few yards. On a charge of taking and driving away the vehicle, contrary to s. 28 (1) of the Road Traffic Act, 1930,

HELD: "driving away" within the meaning of s. 28 (1) must be construed as causing a vehicle to move from the place where it was standing, and, therefore, the respondents had committed an offence under the sub-section.

FOR THE ROAD TRAFFIC ACT, 1930, s. 28 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 598.

CASE STATED by Stockport justices.

On Apr. 6, 1951, at a court of summary jurisdiction an information was preferred by the appellant, a police officer, that the three respondents did take and drive away a motor lorry without the consent of the owner or other lawful authority, contrary to s. 28 (1) of the Road Traffic Act, 1930. At about 11.30 p.m. on Mar. 9, 1951, a motor lorry was stationary and unattended on a recreation ground. The respondents released the handbrake, and two of them, by pushing and with the help of a slope of the ground, moved it a few yards. The third respondent held the steering wheel while the lorry was in motion. The respondents had attempted to start the engine, but failed to do so. None of the respondents had the consent of the owner or other lawful authority for his action. For the appellant it was contended that the words "takes and drives away" in s. 28 (1) of the Act of 1930 should be construed in the same way as the words "takes and carries away" in s. 1 (1) of the Larceny Act, 1916, and that the slightest movement of the lorry must constitute the offence of "taking and driving away." The justices were of the opinion that that construction would not attach the proper meaning to the words "take" and "away," and, having regard to the limited motion of the lorry and the limited degree of control exercised over it by the respondents, they dismissed the information.

H. A. P. Fisher for the appellant.

The respondents did not appear.

LORD GODDARD, C.J.: This is a Case stated by justices for the county borough of Stockport at the instance of the police, who prosecuted the three respondents under s. 28 (1) of the Road Traffic Act, 1930, for taking and driving away a motor vehicle. [His LORDSHIP stated the facts and continued:] The point involved is: What is the true meaning of the words "takes and drives away" in this sub-section? The justices were not prepared to give the same construction to them as to the words "takes and carries away" in s. 1 (1) of the Larceny Act, 1916. They thought that, having regard to the limited motion of the lorry and the limited degree of control exercised over it by the respondents, no offence had been committed. I think the justices were wrong. "Driving away" in s. 28 (1) must be construed as causing the vehicle to move, and so a motor vehicle can be said to be driven if somebody pushes and somebody steers and thus it is made to move from the place where it has been standing. That satisfies the word "away," but there is a proviso to s. 28 (1) as follows:

"... if . . . the court, or . . . jury, are satisfied that the accused acted in the reasonable belief that he had lawful authority, or in the reasonable belief that the owner would, in the circumstances of the case, have given his consent, if he had been asked therefor, the accused shall not be liable to be convicted of the offence."

That shows that the statute is not meant to deal with the case where a person is moving a vehicle simply for his convenience, because, for example, it is blocking his doorway. That is not an offence, but the very fact that the legislature has put in that proviso shows that any other form of moving a vehicle is an offence. Therefore, I think the justices came to a wrong construction and that they must find that the respondents did commit the offence.

ORMEROD, J.: I agree, and for the same reasons.

Appeal allowed. Case remitted with direction to convict.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *J. H. W. Glen*, town clerk, Stockport (for the appellants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

TRAVIS v. MINISTER OF LOCAL GOVERNMENT AND PLANNING AND ANOTHER.

F [KING'S BENCH DIVISION (Devlin, J.), July 23, 1951.]

Compulsory Purchase—Building land—Compulsory purchase by Central Land Board—Power of board to acquire land for disposal for permitted development—Owner unwilling to sell at existing use value—Planning permission granted by local authority after compulsory purchase order and before confirmation order—Withdrawal of offer to sell before compulsory purchase order—Town and Country Planning Act, 1947 (c. 51), s. 43 (1), (2).

The owner of a plot of land, the existing use value of which was estimated at £30, offered to sell it for £192 to L., who applied to the local authority for permission to build a house on it. On a request by L. to the Central Land Board to claim a reduction in the purchase price or to make a compulsory purchase order for his benefit, the board wrote to the owner, on Apr. 1, 1950, saying that development of the land would be hindered if it were not made available at a price which had regard to the developer's liability for development charge, and that they had asked the district valuer to negotiate with him for the immediate purchase of the land under s. 51 of the Town and Country Planning Act, 1947. On Apr. 18, 1950, in reply to a letter from the district valuer asking the owner if he would be prepared to sell the land by agreement, the owner said that he had withdrawn the land from sale. On June 9 the board resolved that, as they were unable

to acquire the land by agreement on reasonable terms, an order be made to acquire it compulsorily, and on July 17 an order to that effect was made under s. 43 (2) of the Act of 1947. On Sept. 25 the local authority granted permission for the development of the land, and on Jan. 24, 1951, after an inquiry, the Minister of Town and Country Planning confirmed the compulsory purchase order. On an application to the court by the owner for an order that the compulsory purchase order and the confirmation order be quashed,

HELD: (i) assuming that the words in s. 43 (1) of the Act of 1947 empowering the board to "acquire any land for the purpose of disposing of it for development for which permission has been granted" referred to the time of acquisition and not to the purpose for which the board could acquire land, land was "acquired" within the meaning of the sub-section, neither when the compulsory purchase order was made by the board nor when the confirmation order was made by the Minister, but only when it was actually acquired, in the ordinary sense of the word "acquire," after notice to treat, and, therefore, the applicant had failed to show that the compulsory purchase order was premature because planning permission had not been given before it was made.

(ii) the land having been offered for sale, the board could use their powers under s. 43 (1) and (2) to intervene to prevent the sale at a price above the existing use value of the land, and their jurisdiction to intervene was not precluded by the subsequent withdrawal of the offer for sale, particularly as there was material on which they might conclude that the land might again be offered for sale at a price above its existing use value; the withdrawal of the offer for sale was merely a factor to be considered by the board in the exercise of their discretion under s. 43 (1); and, therefore, the compulsory purchase order was valid.

Earl Fitzwilliam's Wentworth Estates Co. v. Minister of Town and Country Planning ([1951] 1 All E.R. 982), applied.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 43, see HALSBURY'S STATUTES, Second Edn., Vol. 25, p. 551.

Case referred to:

(1) *Earl Fitzwilliam's Wentworth Estates Co. v. Minister of Town and Country Planning*, [1951] 1 All E.R. 982; [1951] 2 K.B. 284; 115 J.P. 309.

MOTION for an order that a compulsory purchase order, made by the Central Land Board on July 17, 1950, and a confirmation order, made by the Minister of Town and Country Planning (now the Minister of Local Government and Planning*) on Jan. 24, 1951, be quashed.

The applicant was the owner of a plot of land which he offered to sell to a prospective purchaser for £192. Thinking the price excessive, the prospective purchaser, who had already applied to the local authority for permission to build a house on the land, asked the Central Land Board to claim a reduction in the purchase price or to make a compulsory purchase order for his benefit. After correspondence with the applicant, the board decided to acquire the land by compulsory purchase, but on Apr. 18, 1950, the applicant withdrew the land from sale. On July 17 the board made a compulsory purchase order in respect of the land, on Sept. 25 planning permission was granted by the local authority, and on Jan. 24, 1951, the compulsory purchase order was confirmed by the Minister of Town and Country Planning. The applicant contended that the order was not within the powers conferred on the board by the Town and Country

* By art. 2 (1) of the Transfer of Functions (Minister of Health and Minister of Local Government and Planning) (No. 1) Order, 1951 (S.I., 1951, No. 142), which came into operation on Jan. 30, 1951, the style and title of the Minister of Town and Country Planning was changed to the "Minister of Local Government and Planning".

Planning Act, 1947, s. 43 (1) and (2), as (a) planning permission had not been granted before it was made, and (b) the offer for sale was withdrawn before the order was made.

C. N. Glidewell for the applicant.

The Attorney-General (Sir Frank Soskice, K.C.) and J. P. Ashworth for the respondents.

A **DEVLIN, J.:** The applicant is the owner of a considerable area of land in Romiley Park Estate, Romiley, Cheshire, some of which has already been developed, some is ripe for development, and the rest has not been developed. At the extreme north end of the applicant's land there is a plot of some 770 square yards which a Mr. Lomax thought suitable for the erection of a house.

B In August, 1949, expecting (apparently with justification) to be granted the necessary planning permission and the necessary licence to build the house, Mr. Lomax approached Commercial Estates, Ltd., the agents of the applicant, who offered the land to him at a price of 5s. per square yard which worked out at about £192 for the plot, a price which he thought excessive. After being informed by the regional town planning authority, in September, 1949, that, although

C planning consent had not then been granted, there were no reasons why it should not be granted, he asked the Central Land Board to intervene and make a compulsory purchase order for the purchase of the land or otherwise claim a considerable reduction in its price.

The Central Land Board was constituted by the Town and Country Planning Act, 1947, s. 2. Their main function is to collect development charges which

D s. 69 (1) of the Act imposes on the development of land, but it is part of their policy to use their power to acquire land under s. 43 of the Act to prevent sales of land at more than the existing use value. A purchaser who wishes to develop land which he has purchased will have to pay a development charge, and the Central Land Board consider that their collection of that charge will be impeded if the purchaser is, in effect, required to pay twice for the right to develop, *i.e.*, if he has to pay a purchase price which is more than the existing

E use value, the latter being enhanced by the land's suitability for development, and then to pay the development charge for the right to develop.

After correspondence between the Central Land Board and Commercial Estates, Ltd., in regard to the plot of land required by Mr. Lomax, the board decided to exercise their powers under s. 43 of the Act of 1947. On Apr. 1, 1950, they wrote to Commercial Estates, Ltd.:

F "The board understand that planning permission for the erection of a dwelling-house will be granted and also that a building licence has been promised to enable the work to be carried out. It appears, therefore, that development may be hindered, if not prevented, unless the land is made

G available at a price which has regard to the fact that the developer will have to pay a development charge to the board in addition to the amount which he pays for the land."

The board considered that the existing use value of the land was £30 as compared with the £192 which the applicant was asking for it.* The letter goes on:

H "The board have, therefore, requested the district valuer to negotiate with you for the immediate purchase of this land on the basis provided in s. 51 of the Town and Country Planning Act, 1947."

On Apr. 6 the district valuer wrote to Commercial Estates, Ltd., inquiring whether the applicant would be prepared to sell the land by agreement and asking for certain information. On Apr. 18 Commercial Estates, Ltd., replied to the district valuer:

"We have taken instructions of our client who has decided to withdraw the whole estate from sale."

Being unable to acquire the land by agreement, the board then took steps to purchase it compulsorily under s. 43 (2) of the Act of 1947. On June 9, 1950, they passed a resolution that it was desirable to acquire the land for the purpose of disposing of it for development for which planning permission had been granted, and that, as they were unable to acquire it by agreement on reasonable terms, an order be made to acquire it compulsorily. On July 17, 1950, acting under s. 43 (2) of the Act of 1947 and the Acquisition of Land (Authorisation Procedure) Act, 1946, sched. I, the board made a compulsory purchase order and submitted it to the Minister for confirmation. On Sept. 25 the local authority granted permission for the development of the land. In January, 1951, the Minister of Town and Country Planning caused an inquiry to be held, as a result of which he confirmed the compulsory purchase order on Jan. 24, 1951. By cl. 1 of his confirming order he provided:

"Subject to the provisions of this order the board are, under s. 43 of the Town and Country Planning Act, 1947, hereby authorised to purchase compulsorily for the purpose of disposing of it for development for which permission has been granted . . ."

the land in question in this case.

The court is now asked to quash the compulsory purchase order and the confirmation order under the Acquisition of Land (Authorisation Procedure) Act, 1946, sched. I, para. 15 (1), which provides:

"If any person aggrieved by a compulsory purchase order desires to question the validity thereof, or of any provision contained therein, on the ground that the authorisation of a compulsory purchase thereby granted is not empowered to be granted under this Act . . . he may, within six weeks from the date on which notice of the confirmation or making of the order . . . is first published in accordance with the provisions of this schedule in that behalf, make an application to the High Court, and on any such application the court"

shall have powers which include the quashing of the order.

The first ground on which it is submitted that the board had no power to make the order and the Minister no power to confirm it is that planning permission had not been granted when the board made the order on July 17, 1950. It is, therefore, necessary to see what are the powers of the board under s. 43 (1) and (2) of the Act of 1947, which provide:

"(1) The Central Land Board may, with the approval of the Minister, by agreement acquire land for any purpose connected with the performance of their functions under the following provisions of this Act, and in particular may so acquire any land for the purpose of disposing of it for development for which permission has been granted under Part III of this Act on terms inclusive of any development charge payable under those provisions in respect of that development. (2) If the Minister is satisfied that it is expedient in the public interest that the board should acquire any land for any such purpose as aforesaid, and that the board are unable to acquire the land by agreement on reasonable terms, he may authorise the board to acquire the land compulsorily in accordance with the provisions of this section."

Those sub-sections have already been construed by the Court of Appeal in *Earl Fitzwilliam's Wentworth Estates Co. v. Minister of Town and Country Planning* (1). To reserve their rights in the event of this case going to a higher court where the decision in *Earl Fitzwilliam's Wentworth Estates Co. v. Minister of Town and Country Planning* (1) can be questioned, the parties, in their argument before me, have taken various points which, by reason of that decision, they are precluded from taking in this court. As the decision in the *Fitzwilliam* case (1) is

binding on me, I propose to deal only with the arguments which arise directly for consideration in the light of the principles laid down in that case.

The first point taken by the applicant was dealt with only very indirectly in the *Fitzwilliam* case (1). In that case planning permission had at all relevant times been granted. In the case now before me planning permission was not granted until after the compulsory purchase order had been made, and the applicant contends that the permission was granted too late, and that, in the circumstances, neither the board nor the Minister had jurisdiction under s. 43 (1) and (2) to make the order. The relevant words of s. 43 (1) are:

“ . . . in particular may so acquire any land for the purpose of disposing of it for development for which permission has been granted . . . ”

B The applicant contends that the board and the Minister are prohibited from doing anything not authorised by the Act, that under s. 43 (1) they may not acquire the land until the permission has been granted, and, therefore, the compulsory purchase order was premature and should be set aside.

The Attorney-General's first answer to this contention is that the phrase “ for which permission has been granted ” relates, not to the time of acquisition but to the purpose to which the sub-section makes earlier reference:

“ in particular may so acquire any land for the purpose of disposing of it for development for which permission has been granted.”

D According to that construction the board may acquire the land irrespective of whether or not planning permission has been granted, so long as the purpose which they have in mind at the time of acquisition is that of disposing of it for development for which permission will by that time have been granted. It is agreed that that construction is contrary to the opinion expressed by DENNING, L.J., in several places in his judgment in the *Fitzwilliam* case (1), although the point did not arise, directly or indirectly, in that case. In reviewing the machinery of the Act, however, DENNING, L.J., expressed his view, as the other lords justices did, on what he thought was the meaning of these provisions, which were merely incidental to the question in the *Fitzwilliam* case (1). I think, however, that there is a simple ground on which the applicant's case fails, and, therefore, I shall not decide the point on the first ground submitted by the Minister, particularly having regard to the *dicta* of DENNING, L.J., which, even though they may be *obiter*, are entitled to the highest respect.

F Assuming that the Attorney-General's first contention is wrong and that planning permission should have been granted at the time of acquisition, it appears to me that the applicant fails as he has not shown that planning permission was not granted at the time of acquisition. The order made by the board is not the acquisition of the land. Although it is called an order, it is really no more than a draft submitted for the Minister's consideration and confirmation, and, until confirmed, it is of no legal effect whatsoever. When the order is confirmed, the board, by virtue of the confirmation, do not automatically acquire the land. The board are given authority to acquire the land, and in pursuance of that authority they have to serve a notice to treat and so forth, and ultimately they may acquire the land in pursuance of the notice to treat. Reading s. 43 (1) in the sense that permission has to be granted at the time of acquisition, the sub-section, in my judgment, merely says that the board may not at that time (*i.e.*, at the time of acquisition) acquire the land unless permission has by that time been granted. The motion to quash the orders of the Central Land Board and of the Minister is, therefore, in my view, on this point misconceived.

H That that is the right reading of the section is confirmed by this consideration. Section 43 (1) is not necessarily dealing with compulsory acquisition. It is an enabling sub-section, conferring on the board the right to acquire land, a right

which they would not otherwise have. Section 43 (1) contemplates that the land will be acquired by agreement. Its opening words are:

"The Central Land Board may, with the approval of the Minister, by agreement acquire land for any purpose connected with the performance of their functions under the following provisions of this Act, and in particular may so acquire any land for the purpose of disposing of it for development for which permission has been granted . . ."

If the matter stopped there, the board would merely have the power to acquire land by agreement. It is only if agreement fails that s. 43 (2) comes into force with its provision for compulsory acquisition. It is clear, however, that the words "for which permission has been granted" must be given a meaning appropriate to the acquisition of land by agreement, which, of course, would not involve any compulsory purchase order, and it is difficult to see what meaning the words could be given with reference to the acquisition of land by agreement except in relation to the act of acquisition itself, as it is ordinarily understood. Accordingly, counsel for the applicant has found it necessary to contend that, whether the land be acquired by agreement or by compulsory purchase, s. 43 (1) must be read as if the word "acquire" meant "first start the process of acquisition." In relation to acquisition by agreement, he contends that it would mean when the board first made the offer to acquire the applicant's land. In relation to acquisition by compulsory purchase in the present case, he contends that it must mean the order of July 17, 1950, though I confess that I did not follow why, on his argument, it did not mean the letter of Apr. 1, 1950, offering to acquire by agreement. In my judgment, however, one cannot read that meaning into the word "acquire." It means, I think, what it plainly says, and what it says is that, when the time comes for acquisition in the ordinary sense of the word, the board may not acquire the land until permission has been granted. As I have already said, I am dealing with the construction of s. 43 (1) on the assumption that the provisions about granting permission refer to the time of acquisition and not to the purpose. That, therefore, disposes of the first point on which the validity of the orders is challenged.

The other ground set out in the notice of motion is:

"That the said orders are bad in law and *ultra vires* in that they and each of them were made to secure an object which it was not within the defendant Central Land Board's powers to achieve, namely, to enforce their policy that land, and, in particular, the land comprised in the said orders, should only be sold at a price based on existing use value and/or to encourage or assist or promote its development."

That argument comes directly into the sphere considered by the Court of Appeal in the *Fitzwilliam* case (1), and, accordingly, counsel for the applicant has in this court been somewhat circumscribed in his presentation of it. He has to distinguish the decision in the *Fitzwilliam* case (1), and he relies on two points as distinguishing factors—(i) that in this case, though not in the *Fitzwilliam* case (1), the land was withdrawn from the market by the letter of Apr. 18, 1950; and (ii) that the motive or object of the order in the present case was the encouraging, assisting or promoting of the development of the land. The two points, I think, make, between them, a ground of distinction which it is necessary to consider.

Counsel for the applicant concedes that the effect of the decision in the *Fitzwilliam* case (1) is that the board may properly exercise their powers under s. 43 (1) and (2) of the Act of 1947 to prevent sales of land at more than the existing use value. His contention is that that object is a negative one, that the board have no right to use their powers for the positive purpose of promoting the development of land, and that in the present case they were using them for that positive purpose, as they were acquiring land which had been withdrawn

A from the market and about which, therefore, there was no question that it would be sold. Once one concedes that the board may exercise their powers to prevent sales at more than the existing use value, it must, I think, follow that they may intervene before the sale is completed, as it would be idle to attempt to prevent a sale after it had been completed. Presumably, therefore, the board may intervene when there has been an offer for sale or when they have some other reason to think that a sale at more than the existing use value may go through unless it is prevented. In the *Fitzwilliam* case (1) there was an offer for sale at a price which the offeree was not willing to accept. There was no evidence, as I understand it—and if there was, it was not essential to the decision—that there was any offer for sale at a higher price outside that particular transaction. It follows, therefore, that, when there has been an offer for sale, the board may use their powers to intervene to prevent the sale at more than the existing use value.

B In the present case there had been an offer for sale, but the offer had been withdrawn. The fact of the withdrawal does not seem to me to touch the board's jurisdiction. It may be a good reason for the board to decide that there is no longer any serious danger of a sale at more than the existing use value, but that is a factor for the board to consider in the exercise of their discretion, once it is clear what the power is that has been granted to them under s. 43 (1), and it is not a factor which, in my judgment, determines the nature of the power. It is obvious that a landowner who wishes to sell, if he can, at more than the existing use value may think it wise to retreat temporarily from the market when he receives letters from the district valuer and from the board showing that the board are threatening to exercise their powers of purchase. I am not saying that that was done in this case. It is not for me to judge, but it is a possible view. If the board have power to intervene in the first instance, it would, in my judgment, be unreasonable to say that their power is automatically taken away merely because the offer to sell is withdrawn. Whether or not to intervene is a matter of which the board must be the judge. If, in all the circumstances of the case, they think it necessary to intervene to prevent a sale at more than the existing use value, then it seems to me that, on the authority of the *Fitzwilliam* case (1), they have power under s. 43 (1) of the Act to do so even if the offer to sell is withdrawn. I do not think that that means that there is the slightest danger of the board going round the countryside acquiring land which has never been offered for sale merely on the ground that they want to prevent sales at more than the existing use value. If a situation of that kind arose, it might well be argued that the board in good faith could not suppose that any sale at more than the existing use value was contemplated. That might be the case, for example, if the board were trying to acquire from a farmer land which he had farmed for many years and which he had never tried to sell. In the present case, however, there is material on which the board might conclude—it is a matter for the board—that after a suitable interval the land might again be offered for sale at a price above its existing use value, and that, in my judgment, brings the matter within their powers under s. 43 (1) and (2) of the Act.

G I do not, therefore, need to consider whether, if the only object, or one of the objects, of the board had been merely to encourage, assist or promote the development of land, the order would be bad. There are *dicta* in the *Fitzwilliam* case (1) which state that that would not be a proper object, but I do not find it necessary to go into the matter, because I see no reason to doubt the statement made in the affidavit of the deputy chairman of the board:

H “In considering the performance of their functions under the aforesaid Act the board are and have at all material times been of opinion that the determination and collection of development charge would be rendered more difficult if intending developers were unable to buy land except at prices substantially higher than the existing use value . . .”

and that, in making the order, they were giving effect to that opinion and were taking into consideration the fact that the applicant had been willing to sell the land and then later had withdrawn it from sale. For the reasons which I have given, the mere fact that the applicant had withdrawn the land from sale does not take the case out of the purview of the reasons which the deputy chairman expressed in his affidavit and make it necessarily a case where the only object of the acquisition could have been the assisting or promoting of the development of land. The facts are consistent with my accepting the statement of motive or object which is made in the deputy chairman's affidavit and which is sufficient, for the reasons which I have given, to bring this matter within the principle of the *Fitzwilliam* case (1). Accordingly, the motion must be dismissed.

Motion dismissed.

Solicitors: *Pritchard, Englefield & Co.*, agents for *Lloyd & Davies*, Manchester (for the applicant); *Treasury Solicitor* (for the respondents).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

PUGH v. PUGH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pearce, J.), July 9, 10, 11, 12, 1951.]

Nullity—Party to marriage under sixteen—Marriage celebrated abroad—Wife domiciled abroad—Husband domiciled in England—Marriage legal under lex celebrationis and law of wife's domicil—Marriage illegal under Age of Marriage Act, 1929 (c. 36), s. 1 (1).

In October, 1946, the parties went through forms of marriage in Austria, the wife, who was then fifteen years of age, being domiciled in Hungary, and the husband being a British subject domiciled in England. By both Hungarian and Austrian law the marriage was valid.

HELD: (i) the Age of Marriage Act, 1929, s. 1 (1), which provided that a marriage between persons either of whom was under the age of sixteen should be void, had extra-territorial effect and applied to a British subject wherever he married;

(ii) the validity of the marriage must be tested by the law of the country of the husband's domicil; and, therefore,

(iii) the marriage was void, and the wife was entitled to a decree of nullity.

EDITORIAL NOTE. The Age of Marriage Act, 1929, s. 1 (1), has been repealed by the Marriage Act, 1949, s. 79 (1) and sched. V, Part I, and has been re-enacted by s. 2 of the latter Act.

AS TO THE LAW GOVERNING THE VALIDITY OF MARRIAGE, see HALSBURY, Hailsham Edn., Vol. 6, pp. 285-288, paras. 341, 342; and FOR CASES, see DIGEST, Vol. 11, pp. 413-420, Nos. 800-864 and Digest Supp.

Cases referred to:

- (1) *De Reneville v. De Reneville*, [1948] 1 All E.R. 56; [1948] P. 100; [1948] L.J.R. 1761; 2nd Digest Supp.
- (2) *Rhondda's (Viscountess) Case*, [1922] 2 A.C. 339; 92 L.J.P.C. 81; 128 L.T. 155; 37 Digest 36, 69.
- (3) *Stradling v. Morgan*, (1560), 1 Plowd. 201; 75 E.R. 308; 42 Digest 634, 376.
- (4) *Re Priest*, [1944] 1 All E.R. 51; [1944] Ch. 58; 113 L.J.Ch. 145; 170 L.T. 159; 2nd Digest Supp.
- (5) *Sussex Peerage Case*, (1844), 11 Cl. & Fin. 85; 3 L.T.O.S. 277; 8 E.R. 1034; 11 Digest 419, 853.
- (6) *Brook v. Brook*, (1858), 3 Sm. & G. 481; 65 E.R. 746; *affd.* H.L., (1861), 9 H.L. Cas. 193; 4 L.T. 93; 25 J.P. 259; 11 E.R. 703; 11 Digest 414, 806.

(7) *Mette v. Mette*, (1859), 1 Sw. & Tr. 416; 28 L.J.P. & M. 117; 33 L.T.O.S. 139; 164 E.R. 792; 11 Digest 414, 805.

(8) *Heydon's Case*, (1584), 3 Co. Rep. 7a; 76 E.R. 637; 42 Digest 614, 143.

(9) *Conway v. Beazley*, (1831), 3 Hag. Ecc. 639; 162 E.R. 1292; 11 Digest 416, 818.

(10) *Sottomayer v. De Barros*, (1877), 3 P.D. 1; 47 L.J.P. 23; 37 L.T. 415; *revsd.*, (1879), 5 P.D. 94; 49 L.J.P. 1; 41 L.T. 281; 11 Digest 416, 829.

(11) *Re De Wilton*, [1900] 2 Ch. 481; 69 L.J.Ch. 717; 83 L.T. 70; 11 Digest 416, 822.

(12) *Re Paine*, [1940] Ch. 46; 108 L.J.Ch. 427; 161 L.T. 266; 2nd Digest Supp.

PETITION for nullity by the wife on the ground that she was under the age of sixteen when she married the husband. Alternatively, she petitioned for divorce on the ground of her husband's cruelty. The husband cross-petitioned for divorce on the ground of the wife's adultery. The present report is confined to the decision on the issue of nullity.

Simon, K.C., and *B. Garland* for the wife.

Tyndale, K.C., and *H. E. Park* for the husband.

PEARCE, J.: This is an issue of nullity on a wife's petition in which she seeks in the alternative a decree of divorce on the ground of her husband's cruelty. The husband has cross-prayed for a divorce and damages against the co-respondent on the ground of the wife's adultery. Those matters stand over until the issue on the question of nullity is decided.

The wife had a Hungarian domicile of origin, being born in Hungary of Hungarian parents. In 1945 she left Hungary with her parents to escape from the Russian advance and went to Austria. She there met her husband who was a serving British officer. On Oct. 19, 1946, they went through a Roman Catholic ceremony of marriage at Mariawort in Austria. On Oct. 21, 1946, they went through a civil ceremony of marriage at the equivalent of a register office in the same town. The wife was then fifteen years of age. They lived together in Austria and Germany at places where the husband was stationed. At all material times it was the husband's intention after his service abroad to settle down with his wife in England. On Oct. 10, 1948, a child was born. In June, 1950, they paid a short visit to England, and in October, 1950, they came to England to stay permanently. In October, 1950, owing to their differences, they ceased to live together and since that time they have lived apart in England.

There is little, if any, dispute as to the effect of Hungarian and Austrian law on the admitted facts. If Hungarian law alone is applicable without reference to English law, the marriage was voidable owing to the fact of the wife then being under sixteen years of age, but, as she did not avoid it before her seventeenth birthday, it became a valid marriage. If Austrian law alone is applicable without reference to English law, the marriage was valid. If English

law is applicable, the marriage was void by the Age of Marriage Act, 1929, s. 1, which provides:

"A marriage between persons either of whom is under the age of sixteen shall be void."

Counsel for the wife made two submissions. The first was that the Age of Marriage Act, 1929, applies to the husband as a British subject with an English domicile, wherever he may marry. Its effect is extra-territorial and is not merely confined to marriages in the United Kingdom. Therefore, it makes this marriage void. His second submission was that the validity of such a marriage as this has to be tested as to its essentials by the law of the country of the husband's domicile, or, alternatively: see *De Reneville v. De Reneville* (1); by the law of the country of the proposed matrimonial home. On either alternative that is English law, and by English law the Age of Marriage Act, 1929, makes such a

marriage void. If either of those submissions is correct the wife is entitled to a decree of nullity. Counsel for the husband contended that both submissions are incorrect and that the marriage is valid.

The first point depends on an interpretation of the statute itself. In MAXWELL ON INTERPRETATION OF STATUTES, 9th ed., p. 148, the law is conveniently summarised in these words:

"Another general presumption is that the legislature does not intend to exceed its jurisdiction . . . Primarily, the legislation of a country is territorial. The general rule is, that *extra territorium jus dicenti impune non paretur*. The laws of a nation apply to all its subjects and to all things and acts within its territories . . . They apply also to all foreigners within its territories (not privileged like sovereigns and ambassadors) as regards criminal, police, and, indeed, all other matters except some questions of personal status or capacity, in which, by the comity of nations, the law of their own country or the *lex loci actus* or *contractus* applies. This does not, indeed, comprise the whole of the legitimate jurisdiction of a State, for it has a right to impose its legislation on its subjects, natural or naturalised, in every part of the world; and on such matters as personal status or capacity it is understood always to do so, but, with that exception, in the absence of an intention clearly expressed or to be inferred either from its language, or from the object, subject-matter, or history of the enactment, the presumption is that Parliament does not design its statutes to operate on its subjects beyond the territorial limits of the United Kingdom. They are, therefore, to be read, usually, as if words to that effect had been inserted in them."

In *Viscountess Rhondda's Case* (2) VISCOUNT BIRKENHEAD, L.C., said ([1922] A.C. 369):

" . . . a long stream of cases has established that general words are to be construed so as, in an old phrase, 'to pursue the intent of the makers of statutes': *Stradling v. Morgan* (3), and so as to import all those implied exceptions which arise from a close consideration of the mischiefs sought to be remedied and of the state of the law at the moment, when the statute was passed."

The Age of Marriage Act, 1929, contains no provision that its operation is or is not to extend to marriages beyond the sea. Section 3 (2) provides that it is not to apply to Northern Ireland. It was urged by counsel for the husband that that points to its not being intended to apply elsewhere than in Great Britain. In *Re Priest* (4) BENNETT, J., held that s. 35 of the Wills Act, 1837, which provides that that Act shall not extend to Scotland, did not preclude the Act from applying to a will made in Scotland by a testator domiciled in England. Section 3 (2) of the Age of Marriage Act, 1929, in my view, affords no guide to the present problem.

The Royal Marriages Act, 1772, does not expressly say whether or not it is intended to apply beyond the seas. It was held in the *Sussex Peerage Case* (5) that that Act extended to annul any marriage contracted in violation of its provisions wherever it may have been solemnised, either within the realm of England or without. TINDAL, C.J., giving the judgment of the judges, said (11 Cl. & Fin. 144):

"The statute does not enact an incapacity to contract matrimony within one particular country and district or another, but to contract matrimony generally, and in the abstract. It is an incapacity attaching itself to the person of A B, which he carries with him wherever he goes. But as a marriage once duly contracted in any country will be a valid marriage all the world over, the incapacity to contract a marriage at Rome is as clearly within the prohibitory words of the statute as the incapacity to contract in England. So again, as to the second or annulling branch of the enactment,

‘that every marriage without such consent shall be null and void’; the words employed are general, or, more properly, universal; and cannot be satisfied in their plain, literal, ordinary meaning, unless they are held to extend to all marriages, in whatever part of the world they may have been contracted or celebrated.”

Later, he said (*ibid.*, 146):

- A “It was contended in the course of the argument at your Lordships’ Bar, that an Act of the English legislature can have no binding force beyond, or out of, the realm of England; and if by this is meant only, that it can have no obligatory force upon the subjects of another State, the position is no doubt correct in its full extent; but it is equally certain that an Act of the legislature will bind the subjects of this realm, both within the kingdom and without, if such was its intention.”

B The intention of the Royal Marriages Act, 1772, was wholly different from that of the Age of Marriage Act, 1929. The former Act dealt with designated persons; the Age of Marriage Act, 1929, deals with the community. The difference is one of degree, but it is so great that I do not think that much help can be obtained from a consideration of that Act.

- C The Marriage Act, 1835, provided that marriages between persons within prohibited degrees of consanguinity shall be absolutely null and void for all purposes whatsoever. It does not expressly say whether or not it applies to marriages beyond the seas. It contains a proviso that nothing in the Act shall be construed to extend to Scotland. In *Brook v. Brook* (6) and *Mette v. Mette* (7) that Act was held to apply to marriages celebrated in Denmark and Germany respectively.

D Those cases are also relevant to the second submission of counsel for the wife, which is closely related to his first, but distinct from it. In *Brook v. Brook* (6) it was held that the law of the country in which a marriage is solemnised cannot give validity to a marriage prohibited by the laws of the country of the domicile and allegiance of the contracting parties. Therefore, a marriage celebrated during a temporary residence in Denmark between an English widower and the sister of his deceased wife, being null and void by the Marriage Act, 1835, was not valid, although by the law of Denmark such marriages were permitted. CRESSWELL, J., said (3 Sm. & G. 522):

- F “I have therefore come to the conclusion that a marriage, contracted by the subjects of a country in which they are domiciled, in another country is not to be held valid, if by contracting it the laws of their own country are violated. Another question remains to be considered, *viz.*, whether s. 2 of the Marriage Act, 1835, taken by itself, is so framed as to be binding on all English subjects wherever they may be; or, in other words, whether it is personal and accompanies the person of an English subject into foreign lands. It is in these words: ‘Be it further enacted that all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever.’ The words in their common and ordinary sense would extend to marriages wherever celebrated; otherwise some only and not all would be rendered void. It is a statute affecting persons, and may be read as if it had been:—‘If hereafter any persons (that is British subjects) within the prohibited degrees contract marriages, all such marriages shall be void.’ A law framed in such terms would attach upon the persons of British subjects, and accompany them to all parts of the world.”

Again, he says (*ibid.*, 523):

“This statute does not enact an incapacity to contract matrimony within the prohibited degrees within one particular country and district or another, but to contract such marriages generally. The object of the statute was to

put an end to all such marriages between English subjects for the future, and cannot be satisfied by any narrower construction."

SIR JOHN STUART, V.-C., in the same case said (*ibid.*, 525):

"The purpose of the legislature was to annul for the future all marriages between persons within the prohibited degrees . . . These words, clear and unambiguous, prevent the relation of husband and wife from subsisting between any subjects of the realm of England within the prohibited degrees. Scotland is expressly excepted from the operation of the Act. But the words 'all marriages' are not in any other respect qualified or restricted by anything in the context. LORD COKE says '*Generale dictum generaliter est intelligendum.*' Unless the words mean all marriages wheresoever celebrated, the ordinary sense and meaning of the word 'all' is not given to it; for if marriages elsewhere celebrated are not included, the words 'all marriages' must be read as meaning that some marriages are not included in the words 'all marriages,' which would be absurd. The object of the Act is to prevent the relation of husband and wife from subsisting between certain persons who are subjects of the Crown of England and domiciled in England. But that object would be defeated if, by any marriage celebrated anywhere between two subjects of the Crown of England and domiciled in England, this prohibited relation were allowed to subsist. As part of the municipal law of England this statute has its operation within the territory of England upon all English subjects, and upon all marriages between English subjects who are within the prohibited degrees."

Again, he said (*ibid.*, 527):

"This incapacity is personal and, being impressed upon the persons by the law of their own country, cannot be cast off or removed by mere change of place. It is a personal quality which, according to Huber and other jurists, travels round everywhere with the persons; inseparable from them as their shadows."

The judgment in that case was upheld by the House of Lords. LORD CAMPBELL, L.C., said (9 H.L. Cas. 207):

"There can be no doubt of the general rule, that 'a foreign marriage, valid according to the law of a country where it is celebrated is good everywhere.' But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated."

Later, he said (*ibid.*, 212):

"It is quite obvious that no civilised State can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract, to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions."

Dealing with an American case he said (*ibid.*, 219):

". . . and he [the judge] took the distinction between cases where the absolute prohibition of the marriage is forbidden on mere motives of policy,

and where the marriage is prohibited as being contrary to religion on the ground of incest. I myself must deny the distinction. If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another State in which this marriage is not prohibited, to celebrate a marriage forbidden by their own State, and immediately returning to their own State, to insist on their marriage being recognised as lawful."

That passage is of some importance since a distinction was sought to be drawn before me between the Marriage Act, 1835, which is founded on Christian doctrine, and the Age of Marriage Act, 1929, which is founded on social and moral grounds. LORD CRANWORTH said (*ibid.*, 223):

"The conclusion at which I have arrived is the same as that which my noble and learned friend on the Woolsack has come to, namely, that though in the case of marriages celebrated abroad the *lex loci contractus* must *quoad solemnitates* determine the validity of the contract, yet no law but our own can decide whether the contract is or is not one which the parties to it, being subjects of Her Majesty domiciled in this country, might lawfully make. There can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects, to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying . . . The rule in this country, and I believe generally in all countries is, that the marriage, if good in the country where it was contracted, is good everywhere, subject, however, to some qualifications, one of them being that the marriage is not a marriage prohibited by the laws of the country to which the parties contracting matrimony belong. The real question therefore is, whether the law of this country, by which the marriage now under consideration would certainly have been void if celebrated in England, extends to English subjects casually being in Denmark? I think it does; of the power of the legislature to determine what shall be the legal consequences of the acts of its own subjects done abroad, there can be no doubt, and whether the operation of any particular enactment is intended to be confined to acts done within the limits of this country, or to be of universal application, must be matter of construction, looking to the language used and the nature and objects of the law."

LORD ST. LEONARDS said (*ibid.*, 234):

"This case, then, is reduced to the simple question, Is the marriage valid in this country because it was contracted in Denmark, where a marriage with a deceased wife's sister is valid? This depends upon two questions, either of which, if adverse to the appellants, would be fatal to the validity of the marriage, namely, first, will our courts admit the validity of a marriage abroad by an English subject domiciled here with his deceased wife's sister, because the marriage is valid in the country where it was contracted? Secondly, is such a marriage struck at by the Marriage Act, 1835? I think that the marriage has no validity in this country on the first ground, for by our law such a marriage is forbidden, as contrary, in our view, to God's law. The objection that Parliament gave validity to such marriages already had, in cases of affinity, is no reason why, when we have in future carefully made all such marriages absolutely void, we should admit their validity in favour of the law of a foreign country. The learned judge who assisted the learned Vice-Chancellor in the court below, came to the conclusion, after an elaborate review of the authorities, that a marriage contracted by the subjects of one country, in which they are domiciled, in another country, is not to be held valid, if, by contracting it, the laws of their own country are violated. This proposition is more extensive than the case before us

requires us to act upon, but I do not dissent from it. I shall not, however, dwell upon this point, because I think that upon the second point the marriage is clearly invalid."

LORD WENSLEYDALE said (*ibid.*, 240):

"I think the construction put upon this as a personal Act is wrong. I do not think the purpose of the statute was to put an end to such marriages by British subjects in any part of the world. Its object was only to make absolutely void thereafter all marriages in this realm between persons within the prohibited degrees of consanguinity or affinity which were previously voidable . . ."

That passage is of importance for this reason. Counsel for the husband argued that there is only one point here, namely, whether the Age of Marriage Act, 1929, was intended to affect marriages outside the realm, and that, if he is right on that one point, the marriage is valid. LORD WENSLEYDALE clearly admits the existence of two points since, though he held that the Marriage Act, 1835, was not extra-territorial, he came to the conclusion that the marriage was void on the grounds put forward in this case by counsel for the wife on his second submission.

In *Mette v. Mette* (7) a native of Germany came to England, was married in this country, and obtained naturalisation. His wife died. He then married at Frankfurt his deceased wife's sister who was domiciled in Frankfurt. It was held that the principle laid down in *Brook v. Brook* (6) as to the disabilities of a native-born English subject to contract such a marriage applied equally to a naturalised subject, and that, though, by the law of Frankfurt, such a marriage would have been valid, yet the disability of either party to the contract would invalidate the marriage. SIR CRESSWELL CRESSWELL said (1 Sw. & Tr. 423):

"There could be no valid contract unless each was competent to contract with the other. The question rests upon the effect of domicile and naturalisation . . . It appears to me, therefore, that at the time of the second marriage he, as a natural liege subject, owed obedience to the Marriage Act, 1835, and could not contract a marriage in contravention of it."

It was sought to distinguish the cases under the Marriage Act, 1835, from the case now before me by the fact that where the Act of 1835 refers to "all marriages" and provides that they shall be "absolutely null and void for all purposes whatever," the Age of Marriage Act, 1929, in less forceful language merely refers to "a marriage" and says simply that it shall be "void." In my view, the language of the latter Act in its context is just as effective.

In an article in the BRITISH YEAR BOOK OF INTERNATIONAL LAW, 1934, p. 64 (of which both sides made use in arguments), SIR ERIC BECKETT canvasses the question whether the Act of 1929 is (i) purely territorial in application, making any marriage celebrated in the United Kingdom void if one of the parties is under sixteen, irrespective of the personal law of the parties; or (ii) purely personal in application, that is to say, not applying to such a marriage celebrated in the United Kingdom if the personal law of the parties allows it, but laying down a rule as to the personal status and capacity of any subject whose personal law is English or Scottish and applying to any marriage of such persons wherever celebrated; or (iii) both personal and territorial in its application. It was urged on me that the statute is ambiguous, and also (rightly, in my opinion) that, if I am in doubt as to its meaning, the marriage is to be deemed valid so that the wife has failed to make out her case.

Is the statute ambiguous? The words are clear and general. It must be remembered that personal status and capacity to marry are considered to be the concern of the country of domicile. It is right and reasonable that the country of domicile should (as it did by the Marriage Act, 1835) from time to time vary and affect the personal status of its subjects and their capacity to marry as

changing religious, moral, and social conditions may demand. I see no reason to put on the words any other limitation than the obvious one that they are not intended to apply to marriages abroad of persons who are not domiciled here and are not the concern of or subject to the laws of Parliament.

In *Heydon's Case* (8) the barons of the Exchequer resolved (3 Co. Rep. 7b):

“ . . . that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:—(1) What was the common law before the making of the Act. (2) What was the mischief and defect for which the common law did not provide. (3) What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And (4) The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.”

It is helpful to consider the present case in the light of those resolutions. By the canon law, which continued after and in spite of the Reformation, a boy of fourteen years could marry a girl of twelve. The “ mischief and defect for which the common law did not provide ” was, according to modern thought, that it is socially and morally wrong that persons of an age at which we now believe them to be immature and provide for their education should have the stresses, responsibilities and sexual freedom of marriage and the physical strain of child-birth. Child marriages, by common consent, are believed to be bad for the participants and bad for the institution of marriage. Acts making carnal knowledge of young girls an offence are an indication of modern views on this subject. The remedy “ the Parliament has resolved ” for this mischief and defect is to make marriages void where either of the parties is under sixteen years of age. To curtail the general words of the Act so that a person can evade its provisions by merely going abroad, entering into a marriage where one of the parties is under sixteen in some country like Northern Ireland where canon law still prevails, and then returning to live in this country after the marriage seems to me to be encouraging rather than suppressing “ subtle inventions and evasions for the continuance of the mischief.” Parliament must be deemed to have known the effect of *Brook v. Brook* (6). In my view, by the Age of Marriage Act, 1929, it deliberately legislated on a matter that is its own peculiar concern, namely, the personal status of His Majesty's subjects and their capacity to contract marriage. (This Act was intended, as was the Marriage Act, 1835, to affect that capacity in all persons domiciled in the United Kingdom wherever the marriage might be celebrated.)

I come now to the second submission. So far as the form of marriage is concerned it is clearly established that the law of the place of the marriage is the effective law, but, so far as concerns the essential validity of a marriage, the position is different. In *Conway v. Beazley* (9), as early as 1831, DR. LUSHINGTON held that

“ The *lex loci contractus* as to marriage will not prevail when either of the contracting parties is under a legal incapacity by the law of the domicile; and therefore a second marriage, had in Scotland on a Scotch divorce . . . from an English marriage between parties domiciled in England at the times of such marriages and divorce is null.”

He said (3 Hag. Ecc. 652):

“ . . . undoubtedly, questions of marriage are *prima facie* to be judged of by the law of the country where they are solemnised; but I am of opinion

that, before considering the second marriage, I must ascertain the capability of the parties to contract. If both the parties, being at the respective times of the first marriage and of the divorce domiciled English subjects, were by the law of England prohibited by a personal incapacity from entering into such a contract, I must apply the rule of that law."

I have already dealt with *Brook v. Brook* (6) and *Mette v. Mette* (7), which show that the law of domicile is the law which regulates the essentials of the marriage and that the Marriage Act, 1835, as part of that law, in those cases avoided the marriages. (In *Sottomayer v. De Barros* (10) it was held that, the parties being by the law of the country of their domicile under a personal disability to contract marriage, their marriage ought to be declared null and void. (Delivering the judgment of the court, COTTON, L.J., said (3 P.D. 5):

"But it is a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnised is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile."

In *Re De Wilton* (11) it was decided that the capacity of persons professing the Jewish religion who were also domiciled British subjects to contract marriage is regulated by the law of England. Therefore, where a marriage was solemnised abroad according to Jewish rites between a niece and her maternal uncle, both the contracting parties being at the time of the solemnisation domiciled British subjects and adherents of the Jewish faith, although the marriage was valid both by Jewish law and by the law of Wiesbaden where the marriage took place, it was held that the marriage was invalid. In *Re Paine* (12) a woman, while domiciled in England, married her deceased sister's husband who was a German subject. The marriage took place in Germany and was in accordance with the laws of Germany, by which such a marriage was valid. BENNETT, J., held that, according to English law, the marriage was invalid because by English law the woman had not the capacity to contract it. (In view of those authorities it is clear that the marriage under consideration here was not valid, since, by the law of the husband's domicile it was a marriage into which he could not lawfully enter. On both submissions put forward by counsel for the wife she is entitled to succeed, and there will be a decree of nullity on her petition.

Decree of nullity.

Solicitors: *Gordon, Dadds & Co.* (for the wife); *Ernest W. Long & Co.* (for the husband).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

ROSS v. BLAKES MOTORS, LTD.

[COURT OF APPEAL (Jenkins and Birkett, L.JJ.), July 24, 25, 1951.]

Practice—Particulars—Particulars of claim before defence—Matters within knowledge of defendant—Action for breach of contract—Breach of term as to time for delivery of motor car—R.S.C., Ord. 19, r. 7.

A The plaintiff issued a writ claiming damages for the breach of a contract for the sale to him by the defendants, motor car dealers, of a motor car. In his statement of claim he alleged that it was a term of the agreement that the defendants should deliver the car to customers in strict sequence and rotation in relation to the dates of orders for cars placed with them, and that, in breach of their agreement, the defendants had delivered cars to persons who had placed their orders after the plaintiff had placed his order. Before delivering their defence the defendants asked for particulars of this allegation. The plaintiff gave particulars of one such order for a new car, and reserved the right to add to the particulars after discovery. The defendants applied to the master under R.S.C., Ord. 19, r. 7, for an order for particulars of all the persons (other than the person of whom particulars had been given) to whom the plaintiff alleged cars had been delivered otherwise than in strict rotation, or, alternatively, for an order that the allegation in the plaintiff's statement of claim should be struck out or limited to the single case of which the plaintiff had given particulars.

D HELD: the practice of refusing particulars until after discovery was not limited to cases in which a fiduciary relationship existed between the parties, but was a matter of discretion to be exercised in all the circumstances of the case; having regard especially to the circumstance that the defendants knew the facts, whereas the plaintiff did not, and to the evidence, which indicated that deliveries had been made otherwise than in accordance with the chronological rotation of the orders, it would not be proper to order particulars to be given before the delivery of the defence; and the discretion of the court might properly be exercised by refusing to order particulars until after discovery.

E *Millar v. Harper* (1888) (38 Ch.D. 110) and *Waynes Merthyr Co. v. Radford & Co.* ([1896] 1 Ch. 29), applied.

F AS TO PARTICULARS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 275-282, paras. 465-467; and FOR CASES, see DIGEST, Pleading, pp. 184-193, Nos. 1561-1631.

Cases referred to:

- G (1) *Whyte v. Ahrens*, (1884), 26 Ch.D. 717; 54 L.J.Ch. 145; 50 L.T. 344; 18 Digest 65, 239.
- (2) *Leitch v. Abbott*, (1886), 31 Ch.D. 374; 55 L.J.Ch. 460; 54 L.T. 258; 50 J.P. 441; 18 Digest 70, 275.
- (3) *Sachs v. Spielmann*, (1889), 5 T.L.R. 487; 42 Digest 817, 271.
- (4) *Millar v. Harper*, (1888), 38 Ch.D. 110; 57 L.J.Ch. 1091; 58 L.T. 698; 18 Digest 66, 240.
- H (5) *Zierenberg v. Labouchere*, [1893] 2 Q.B. 183; 63 L.J.Q.B. 89; 69 L.T. 172; 57 J.P. 711; 18 Digest 66, 242.
- (6) *Waynes Merthyr Co. v. Radford & Co.*, [1896] 1 Ch. 29; 65 L.J.Ch. 140; 73 L.T. 624; 18 Digest 65, 238.
- (7) *Monk v. Redwing Aircraft Co., Ltd.*, [1942] 1 All E.R. 133; [1942] 1 K.B. 182; 111 L.J.K.B. 277; 166 L.T. 42; 2nd Digest Supp.

APPEAL by the defendants from an order of ORMEROD, J., dated July 3, 1951, dismissing an appeal from an order of Master GRUNDY, refusing an application

by the defendants for further and better particulars of an allegation contained in the statement of claim.

Pritt, K.C., and *Aldous* for the defendants.

A. D. Karmel and *Boydell* for the plaintiff.

JENKINS, L.J.: This is an appeal from an order of ORMEROD, J., dismissing an appeal from Master GRUNDY, who refused an application by Blakes Motors, Ltd., defendants in the action, for certain further and better particulars of the plaintiff's statement of claim, the plaintiff being a Mr. Harry Ross. The defendants are a firm of motor car dealers in Manchester. The action was brought against them by Mr. Ross in the comprehensive form, appearing on the writ, of "damages for breach of contract." The issue was somewhat clarified by the statement of claim, from which it appears that the contract sued on was a contract for the sale by the defendants to the plaintiff of a Vauxhall motor car. The material allegations in the statement of claim are these:

"On June 27, 1946, it was agreed between the plaintiff and the defendants that the plaintiff should buy and the defendants sell a Vauxhall motor car, and it was a term or condition of the said agreement to be implied from the nature thereof that the said motor car should be delivered within a reasonable time. A reasonable time was on or before Mar. 23, 1950. It was further a term and/or condition of the said agreement that the defendants should deliver the said car to the plaintiff in strict sequence and rotation in relation to the dates of orders placed with them for Vauxhall cars. The defendants, however, in breach of their said agreement, have not delivered the said motor car to the plaintiff within such reasonable time or at all and have further delivered Vauxhall cars to persons who placed their orders with the defendants after the plaintiff and the plaintiff in consequence has suffered damage and loss. The plaintiff claims (a) delivery to him of a Vauxhall car; (b) damages for breach of contract."

A request was made on behalf of the defendants, dated Feb. 27, 1951, for certain further and better particulars. The particulars asked for included:

"Under para. 2 . . . (b) 'of the reasonable time' stating on what fact or facts it is to be implied that a reasonable time was on or before Mar. 23, 1950."

The particulars given in response to that were:

"(b) The facts from which it is to be implied that a reasonable time was on or before Mar. 23, 1950, are already set out under para. 3 of the statement of claim, *viz.*, that, inasmuch as certain orders of the said cars have been delivered to persons who placed their orders after the plaintiff, the plaintiff contends that delivery to himself could have been expedited and that such a reasonable time would be delivery before delivery to the said other persons. Further, the plaintiff will rely in this regard on the custom of the trade."

Under para. 3 the particulars asked for were:

"(a) of the allegation that the defendants have delivered Vauxhall cars to persons who placed their orders after the plaintiff, giving the name or names of persons to whom cars have so been delivered with the date or dates of their orders and the date or dates on which the cars were delivered to them."

The answer to that was:

"(a) In or about December, 1946, one Mr. Ralph Henry ordered a Vauxhall car from the defendants and obtained delivery of the said car

approximately three years after placing the said order. (b) The plaintiff reserves the right to add to these particulars after discovery herein."

Then there was a request for particulars of damage claimed. The reply to that was:

A "Damages for breach of contract as claimed in the plaintiff's statement of claim delivered Jan. 31, 1951."

There was some correspondence about the pleading, and I do not think I need go into the details of that, except to mention that the defendants' solicitors, in a letter dated May 22, 1951, said, with regard to the particulars under para. 3 (a):

B "It is not possible to identify 'Mr. Ralph Henry' with certainty. Further particulars are required, giving his address."

C There was also in the same letter a request for particulars of any special damage. There was also some correspondence about the form of the agreement sued on, which is not material now. Apparently, the actual form which was filled up at the time has been lost, and there was a question how it might be reconstructed by use of a new or substitute blank or specimen form. The effective reply to the letter of May 22 was dated June 5, 1951. It gave this information under para. 3 (a): "Mr. Ralph Henry's address is believed by the plaintiff to be 26, York Avenue, Prestwich, Lancashire." Then there was a statement as to the basis on which the plaintiff claimed special damages.

D The defendants were not satisfied with those particulars, and in due course they made an application to the master for further and better particulars as follows (as stated in the order under appeal):

E "Particulars of all persons other than Ralph Henry of 26, York Avenue, Prestwich, Lancashire, to whom he [the plaintiff] alleges in para. 3 of the statement of claim that the defendants have delivered Vauxhall cars, or alternatively that the said para. 3 may be struck out or amended so as to limit the allegation therein to delivery of a Vauxhall car to the said Ralph Henry, or for such further or other order as to the court shall seem fit."

F That application for particulars was supported by an affidavit by a Mr. Mayall, who is managing director of the defendants. In para. 2 of that affidavit Mr. Mayall said:

"The car referred to in para. 3 of the statement of claim as being delivered to one Ralph Henry was delivered pursuant to an order in writing now produced and shown to me marked 'A'."

G The exhibit "A" purported to be a contract with this gentleman, Mr. Ralph Henry, about whose first name there appears to have been some doubt, for the sale to him of a Vauxhall car, entered into before the date on which the plaintiff placed his order, so that, *prima facie*, if that document was a genuine document and the Mr. Henry referred to therein was the individual meant by the plaintiff, this, as an instance of delivery out of chronological rotation, would appear to have been a somewhat unfortunate one, which the defendants would have no difficulty in refuting. Then followed these two paragraphs:

H "3. The defendants, like all other dealers in new motor cars, receive directions from the manufacturers concerned to give priority of delivery to certain classes of persons. If the defendants refused to comply with these directions then they would be unable to obtain any new motor cars from the manufacturers. 4. The defendants are ready and willing to justify any delivery of any particular new motor car which the plaintiff complains has

been delivered by them in breach of their alleged agreement with him and to give full discovery in this action in relation thereto. In the statement of claim the plaintiff has given particulars of only one alleged breach, which in fact could not on his own case as set out in the statement of claim be a breach, as the car in question was ordered before the date of the plaintiff's alleged order. But para. 3 of the statement of claim alleges delivery by the defendants to 'persons' and no doubt such allegation is made for the purpose of obtaining at a later stage a general discovery of the defendants' books and records. The names of the defendants' customers and details of the defendants' transactions with them are confidential matters, and I submit that it would not be just or reasonable that they should have to disclose their books generally to the plaintiff in the above circumstances. If the plaintiff is only able to give particulars of one alleged breach, then, in my submission, the statement of claim ought to be amended so as to be limited to the one breach alleged and not to allege delivery to 'persons' generally."

The alteration of the word "persons" to "person" in the statement of claim, in default of other instances besides Mr. Henry, was a point which had already been taken by the defendants' solicitors in the correspondence. On that evidence, the matter came before the learned master and afterwards on appeal to the learned judge, and both the master and the judge rejected the application. The defendants now appeal to this court.

The first thing to notice about this application is that it is an application for particulars of the statement of claim before delivery of defence. That, of course, does not conclude the matter, because an order will be made for particulars of a statement of claim before delivery of defence in a proper case, but it is only right to bear in mind that special provision is made for such cases in R.S.C., Ord. 19, r. 7B, which provides:

"Particulars of a claim shall not be ordered under r. 7 to be delivered before defence unless the court or judge shall be of opinion that they are necessary or desirable to enable the defendant to plead or ought for any other special reason to be so delivered."

We are, therefore, asked to make an order which is, under the rules, recognised as an exceptional order which the court ought not to make unless the particulars are necessary or desirable to enable the defendants to plead or ought for any other special reason to be delivered. Next, it is right to observe, as it is always right to remember in such cases, that the jurisdiction here exercised by the master and the learned judge is a matter of discretion and an appellate court should not lightly interfere with the discretion of the court below unless satisfied that some wrong principle has been applied or some manifest injustice has resulted. The mere fact that the appellate court might, if dealing with the matter itself at first instance, have possibly been disposed to take a different view—I do not say that is so in this case—would not be sufficient justification for interfering with an exercise of the learned judge's discretion in a matter such as this.

Counsel for the defendants said that the allegation that cars have been delivered to persons other than the plaintiff who ordered their cars after the plaintiff ordered his car is a mere fishing allegation which the plaintiff cannot substantiate, as he has himself shown by his unfortunate selection of Mr. Ralph Henry as an instance of such a preferred or favoured customer. Counsel says, that being so, the plaintiff should be ordered at once to state his case with sufficient particularity, otherwise he will have gained an advantage by making his fishing allegation. If he can postpone the date when particulars are ordered against him until after he has had discovery, he may be able, if he is lucky, to construct

some sort of case he has not got now by means of a roving examination of the defendants' books. Counsel also says that, until they have particulars, the defendants do not know what case they have to meet and are so much in the dark about it that they will not be able to put in a proper defence. He does not say that the statement of claim is impossible to plead to, but he says it is a difficult matter to do justice to the defence with the statement of claim as it stands.

- A Counsel for the defendants referred us to *Whyte v. Ahrens* (1), *Leitch v. Abbott* (2), and *Sachs v. Spielmann* (3). I do not propose to take up time in referring to those three cases. They were all, I think I am right in saying, cases where there was some fiduciary relationship or relationship of principal and agent between the plaintiff and the defendant. The plaintiff was alleging some fraud or breach of duty against the agent or the person standing in a fiduciary relationship to him. These cases show that, at all events, where there is such a relationship, the plaintiff will not as a rule be ordered to give particulars of matters which are not within his knowledge, but are within the knowledge of the defendant, until he has had discovery. That, broadly, is the principle laid down, and counsel for the defendants in the present case was clearly concerned to confine it to cases of that kind, *i.e.*, cases where there was an agency or some fiduciary relationship between the parties. In the present case, as counsel points out, there is no fiduciary relationship. It is simply a relationship of vendor and purchaser of a chattel, though I think it is right to say that one cannot regard the plaintiff and the defendants as complete strangers, because, on the plaintiff's case as pleaded, there is a contract between them, not yet performed, for the delivery of a Vauxhall motor car, and the terms of that contract were such as to place the defendants under a contractual duty to the plaintiff in regard to the manner in which they should arrange their deliveries.
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- E Counsel for the defendants also referred to *Millar v. Harper* (4), in which the executors of a deceased married woman sued her husband to establish their title to certain chattels in his hands as being separate estate of the wife. In that case there was no fiduciary relationship between the parties. It came before the court on an application by the husband for particulars of the executors' demand showing which chattels they claimed, and it was held that the application ought to stand over till the husband had made an affidavit stating which of the articles belonged to the wife. COTTON, L.J., said (38 Ch.D. 111):

- F "I am of opinion that this appeal is wrong. The defendant must know of his own knowledge what furniture his wife had, the plaintiffs, being only executors, cannot be supposed to have any such knowledge. The plaintiffs put forward by their statement of claim a right to a certain class of articles, but cannot identify them. It may be right that before trial they should give particulars, but I think that their giving them ought to be postponed till the defendant has given discovery. Where the plaintiffs are executors who do not know, and the defendant a person who does know, it is right that discovery should come first."
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LINDLEY, L.J., said (*ibid.*, 112):

- H "I think that the order appealed from is quite right. Any other order under the existing circumstances would make it impossible for the action to go on."

BOWEN, L.J., said (*ibid.*):

"I am of the same opinion. It is good practice and good sense that where the defendant knows the facts and the plaintiffs do not, the defendant should give discovery before the plaintiffs deliver particulars."

I think the observations of BOWEN, L.J., in that short judgment are particularly instructive.

Counsel for the defendants also referred us to *Zierenberg v. Labouchere* (5). The headnote to that case is:

"In an action of libel, where the charge made against the plaintiff in the alleged libel is general in its nature, a defendant who pleads a justification must state in his particulars the facts on which he relies in support of his justification."

That, of course, is a very special case. The defendant is charged with libel. He does not dispute that he published the libel complained of, but he justifies, *i.e.*, he says that the alleged libel is true in substance and in fact. If there is any foundation for that plea, it is obviously one of which the defendant, from the nature of things, must be able to give particulars. If he cannot give particulars, it is clear that his plea of justification must fail. So I think no guidance can be obtained from the actual matter dealt with in that case, but counsel used it for this observation in the judgment of LORD ESHER, M.R. ([1893] 2 Q.B. 188):

"This is not a case in which, before the action was brought, there was any relation between the parties, such for instance as that of principal and agent which would entitle the defendant to discovery. The only connection between them is that of plaintiffs and defendant in an action for libel, and the defendant is not entitled to discovery for the purpose of finding out whether he has a defence or not. Such discovery has never been allowed in the absence of some relationship between the parties to the action, except under exceptional circumstances, such as one party keeping back something which the other was entitled to know."

To that should be added the observation of KAY, L.J. (*ibid.*, 189):

"The case of a charge of fraud against an agent, or a breach of trust against a trustee, by pleading only, where no libel has been published otherwise, is essentially different. There the fiduciary relation, and the circumstance that the facts are generally known only to the defendant, or at least that he has means of knowledge not in the first instance equally accessible to the plaintiff, may justify the court in requiring the defendant to make discovery before the plaintiff is called on to give particulars, because the fiduciary relation of the defendant to the plaintiff entitles the plaintiff to all the knowledge which the defendant may have, and it is not uncommon, when a conflict arises between the right of the plaintiff to discovery, and the right of the defendant to particulars, in such cases to postpone the giving of particulars until the discovery has been made."

Then the learned lord justice referred to *Leitch v. Abbott* (2) and *Sachs v. Spielmann* (3).

Finally, counsel for the defendants referred to *Waynes Merthyr Co. v. Radford & Co.* (6). The headnote in that case says this:

"There is no hard and fast rule as to the class of cases in which particulars will be ordered to be delivered before discovery, or discovery to be given before particulars; the court will exercise its discretion upon all the circumstances in each case."

The headnote goes on to state the nature of the action. Briefly, it was an action by a colliery company against coal merchants, complaining that the merchants had sold coal not of the colliery company as the colliery company's product. In that action one specific instance of this passing-off or fraudulent substitution of other coal for the colliery company's coal was given, and divers other occasions were alleged. The defendants applied for particulars. The decision was that, as

the defendants had means of ascertaining from their books whether other frauds of the kind alleged had been committed, which the plaintiffs had not, the defendants were not entitled to particulars before giving discovery. In that case, CHITTY, J., said this about the observation of KAY, L.J., in *Zierenberg v. Labouchere* (5) ([1896] 1 Ch. 34):

- A "The argument for the defendants is founded chiefly on a *dictum* in the judgment of KAY, L.J., in *Zierenberg v. Labouchere* (5), from which the defendants' counsel extract this proposition, that except in cases where a fiduciary relationship exists between the parties, particulars always precede discovery. I am unable to deduce any such proposition from the lord justice's observations in that case; true he did explain the rights of a plaintiff charging fraud against an agent, or breach of trust against his trustee, and he put it on these grounds."
- B

Then he quoted the passage to which I have already referred, and went on to say (*ibid.*, 35):

- C "The lord justice did not lay down any such general proposition as that contended for by the defendants' counsel, and in my opinion there is no such general rule. There is no hard and fast rule as to the class of cases in which particulars should precede discovery, or discovery be ordered before particulars; but the judge must exercise a reasonable discretion in every case after carefully looking at all the facts, and taking into account any special circumstances. Now, on the facts alleged in the statement of claim, it cannot be said that the plaintiffs are presenting a fishing case: there has already been a motion for an interim injunction, when the defendants admitted the fraudulent use of two of the plaintiffs' permits, one of the specific charges made against them in the statement of claim."
- D

- E Taking those authorities together, in view of the *Waynes Merthyr Co.* case (6) and *Millar v. Harper* (4), it seems to me impossible to hold that the practice of refusing particulars until after discovery is limited to cases in which a fiduciary relationship exists between the parties. I think the law on this matter is as stated in the first paragraph of the headnote in the *Waynes Merthyr Co.* case (6): "the court will exercise its discretion upon all the circumstances in each case." A very material circumstance for the court to consider, in exercising its discretion, is the one referred to by BOWEN, L.J., in *Millar v. Harper* (4) (38 Ch.D. 112):

- F "It is good practice and good sense that where the defendant knows the facts and the plaintiffs do not, the defendant should give discovery before the plaintiffs deliver particulars."

- G How does the matter stand in the present case? The plaintiff ordered his motor car in 1946. It has not yet been delivered. He is naturally aggrieved and claims that it should have been delivered by now, and he alleges, as the explanation for such non-delivery, that the defendants have been delivering cars otherwise than in strict rotation. It is, of course, the keystone of his case that his contract with the defendants provides, by way of term express or implied, that Vauxhall cars would be delivered in strict rotation, but, assuming that to be right, he alleges that the principle of strict rotation has been departed from
- H by the defendants in his case to his detriment. In my view, that allegation cannot fairly be classed as a purely fishing allegation. There is the relation of vendor and purchaser between the parties. The plaintiff cannot have any knowledge of the internal management of the defendants' affairs. He assumes that, during the four years or more since he placed his order, they have been carrying on some degree of trade in Vauxhall motor cars, and, as in all that time they have failed to deliver his car, he alleges, not without some ground, as it seems to me, that they have not been delivering in strict chronological rotation.

The details of that allegation, if it be well-founded, are, of course, eminently matters within the knowledge of the defendants and of the defendants alone.

When the allegation was made, how did the defendants meet it? They did not meet it simply by a denial, saying: "We deny that we have ever delivered a Vauxhall motor car to a person who placed his order after the plaintiff placed his order." On the contrary, without pleading to the allegation, they filed Mr. Mayall's affidavit, to paras. 3 and 4 of which, perhaps, I might refer again. [His LORDSHIP re-read paras. 3 and 4 and continued:] That, as it seems to me, is not denying that cars have been delivered to persons who placed their orders after the plaintiff. On the contrary, it is saying that this has been done, but that where it has been done it has been done to comply with the directions as to priority given by the manufacturers, non-compliance with which would mean that the defendants would have their supply of new motor cars cut off. Therefore, they admit, as I understand it, departure from the chronological rotation system, but say that every departure from that system can be justified. That seems to me to be a perfectly reasonable attitude, but what follows seems to me to be less reasonable. In para. 4 the defendants say that they are willing to justify delivery of any particular new motor car which the plaintiff complains has been delivered by them in breach of their alleged agreement with him and to give full discovery in the action in relation thereto. In other words, they say: "We admit delivery out of rotation, but we say it can be justified in all cases in which it has occurred, and if the plaintiff can tell us which particular cars he says we delivered out of turn, then we will justify in every such case. In other words, if the plaintiff can tell us something which quite palpably is not within his knowledge, then we will prove the case we have stated in para. 3 of this affidavit." In my view, that is not a reasonable attitude and the case cannot properly be judged on the footing on which one might have dealt with it if the defendants had denied that they had ever delivered any motor car out of chronological rotation at all.

Junior counsel for the defendants referred us to *Monk v. Redwing Aircraft Co., Ltd.* (7), in which particulars were ordered before defence in an action in which the plaintiff claimed damages for wrongful dismissal. The particulars ordered were as to what length of notice the plaintiff claimed as constituting a reasonable notice and also as to the employments and salary in which the plaintiff had been engaged and which he had received since his dismissal. These matters were, of course, matters entirely within the knowledge of the plaintiff himself, and, in particular, his view as to what was a reasonable notice was a matter which he alone could know. Therefore, in my view, that case in no way resembles the present case. Counsel said it resembles the present case to this extent, that the matters of which particulars are sought are matters which affect the amount of damages claimed by the plaintiff. He says, therefore, particulars ought to be ordered now, because, as was pointed out in *Monk v. Redwing Aircraft Co., Ltd.* (7), that would enable the defendants to know how much, if anything, they should pay into court. That, undoubtedly, was one of the factors that entered into the decision in the *Monk* case (7), but it was a case in which the defendants said they were going to pay into court and there is no suggestion here that the defendants have any intention of doing anything of the sort.

This case has been argued with much reference to the discovery which will ensue if the plaintiff's pleading is allowed to stand. About that I would only say that this is not an application for discovery. It is an application for particulars of the statement of claim before defence. The question of the amount of discovery which may ultimately ensue is not before us. If the matter is judiciously managed by those responsible for guiding the parties in this matter, I have no doubt that steps may well be taken at the proper time to keep discovery within reasonable bounds. I need only say that I am by no means satisfied that the discovery which may take place on this question of rotation of orders need necessarily be so onerous or so alarming as the defendants' counsel would have

us believe. At all events, we can make no assumptions in that matter. This is a point which must be dealt with on the pleadings. There is, of course, before us no evidence at all of the volume of business done by the defendants or of the number of Vauxhall motor cars they sell. For all that appears to the contrary, they might only have sold, during the whole period, some quite small number of cars. For the reasons I have endeavoured to state, it seems to me that this is not a case in which it would be proper to order particulars before defence, and I think it clearly is a case in which the learned judge, in the exercise of his discretion, might properly come to the conclusion that it was a case in which the particulars in question should not be ordered until after discovery. For these reasons, I am of opinion that the appeal fails and should be dismissed.

BIRKETT, L.J.: I agree.

Appeal dismissed.

Solicitors: *Osmond, Bard & Westbrook* (for the defendants); *Isadore Goldman & Son*, agents for *J. B. Levy*, Manchester (for the plaintiff).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

ABBOTT v. LONDON COUNTY COUNCIL.

[COURT OF APPEAL (Singleton and Morris, L.JJ., and Lloyd-Jacob, J.), July 26, 30, 1951.]

Pension—Increase—Pension “payable by local authority solely in respect of local government service”—Transfer of servant to transport board—Continuance as member of pension fund of local authority—“Enactment by which fund regulated”—London Passenger Transport Act, 1933 (c. 14), s. 80 (9), (10)—Pensions (Increase) Act, 1944 (c. 21), sched. I, Part II, para. 1.

An employee of the London County Council was transferred to and became a servant of the London Passenger Transport Board under the London Passenger Transport Act, 1933. Under s. 80 (9) of the Act, she continued to be a member of the council's superannuation fund until her retirement in 1938, when she became entitled to receive a superannuation allowance from the council. The superannuation fund was conducted under a scheme prepared by the council pursuant to the London Council (General Powers) Act, 1891, s. 62 (1), and the London County Council (General Powers) Acts, 1892, 1907, 1911 and 1912. By the Pensions (Increase) Act, 1944, s. 1, and sched. I, Part II, para. 1, an increased pension became payable in respect of “a pension payable by any local authority solely in respect of local government service,” and a further increase in the case of such a pension was authorised by the Pensions (Increase) Act, 1947. The employee claimed to be entitled to these increases under s. 80 (9) and s. 80 (10) of the Act of 1933. By s. 80 (9) the provisions of “any enactment . . . by which [a local authority's] pension or superannuation] fund is regulated” shall, so far as respects a transferred employee who continues to be a member of the fund, continue to apply to the local authority, and the transferred employee “shall be entitled to the same benefits, rights and privileges . . . as he would have been entitled . . . to if he had remained . . . [a] servant of the authority,” and, by s. 80 (10), when the transferred employee ceases to be a servant of the transport board, the provisions of “any such enactment . . . as aforesaid” which would have been applicable on his ceasing to be a servant of the local authority shall apply as if he had remained in the authority's service and had left it at the time at which his service with the transport board ceased.

HELD: the Pensions (Increase) Acts, 1944 and 1947, were not enactments by which the county council's superannuation fund was regulated within the meaning of s. 80 (9) and s. 80 (10) of the Act of 1933, and, therefore, the employee was not entitled to the increases claimed.

Per MORRIS, L.J.: Further, the employee's pension was not payable "solely in respect of local government service" within sched. I, Part II, para. 1, to the Act of 1944.

Decision of McNAIR, J. ([1951] 1 All E.R. 569), affirmed. A

FOR THE LONDON PASSENGER TRANSPORT ACT, 1933, s. 73 (3), s. 80 (9), s. 80 (10) and s. 80 (11), see HALSBURY'S STATUTES, Vol. 26, pp. 808, 816 and 817.

FOR THE PENSIONS (INCREASE) ACT, 1944, see *ibid.*, Second Edn., Vol. 17, p. 921. B

APPEAL by the plaintiff from an order of McNAIR, J., dated Feb. 8, 1951, and reported [1951] 1 All E.R. 569, in an action for a declaration that the plaintiff was entitled to receive an increase of pension under the Pensions (Increase) Acts, 1944 and 1947.

The plaintiff had been in the service of the defendants, the London County Council, until 1933 when she was transferred to the London Passenger Transport Board under the London Passenger Transport Act, 1933. She was employed by the board until 1938 when she retired on a pension under the defendants' superannuation scheme of which she had continued to be a contributory member under s. 80 (9) of the Act of 1933. The plaintiff contended that she would have been entitled to the increase under the Acts of 1944 and 1947 if she had continued in the service of the defendants, as in that case her pension would have been "a pension payable by [a] local authority solely in respect of local government service," within sched. I, Part II, para. 1, to the Act of 1944; that the Acts of 1944 and 1947 were enactments by which the defendants' superannuation fund was regulated within the meaning of s. 80 (9) of the Act of 1933; and that, therefore, she was entitled to the increase under the provisions of s. 80 (9), s. 80 (10) and s. 80 (11) of the Act of 1933. The defendants contended that they were not empowered to grant the increase. McNAIR, J., held that service with the London Passenger Transport Board was not local government service within sched. I, Part II, para. 1, to the Act of 1944, and that the Act of 1944 was not an enactment by which the county council's superannuation fund was regulated within the meaning of s. 80 (9) of the Act of 1933, and, therefore, the plaintiff's claim failed. C
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M. R. Nicholas (J. D. May with him) for the plaintiff.

H. E. Francis for the defendants.

Cur. adv. vult.

July 30. The following judgments were read.

MORRIS, L.J.: The plaintiff entered the service of the defendants, the London County Council, on Aug. 23, 1909. She was a woman checker in the tramways department, and contributed to the county council's superannuation and provident fund. It is provided by the London Council (General Powers) Act, 1891, s. 62 (1): G

"It shall be lawful for the council to establish . . . a superannuation and provident fund for the provision of payments . . . on death superannuation resignation retirement or discharge . . ."

There was produced to the court a copy, dated April, 1937, of the scheme prepared by the London County Council pursuant to the Act of 1891, and pursuant also to the London County Council (General Powers) Acts, 1892, 1907, 1911 and 1912. Clause 9 of that scheme relates to the contributions of persons employed at H

weekly wages and to methods of deduction from wages. The effect of cl. 10 is that contributions are paid into the fund. Clause 14 provides:

A "The rates of contribution payable by the council shall be such as in its opinion, having regard to the periodical actuarial valuation of the fund hereinafter referred to, are required from time to time to ensure the solvency of the fund. Payment of such contributions shall be made by the council as soon as possible after the end of every quarter of a year."

Clause 15 provides for the scale of the superannuation allowances which a contributor becomes entitled to receive from the fund. Clause 27 is as follows: "The council shall guarantee the solvency of the fund." Clause 28 provides for periodical actuarial valuation, and cl. 29 provides:

B "The fund shall be managed and administered by the council, or by such committee or committees of the council as shall have power of management or administration delegated to them."

Section 68 of the Act of 1891 provides:

C "It shall be lawful for the council from time to time on the recommendation of the committee but subject to the provisions of this Act to alter any portion of any scheme. But no contributor nor the representatives of any contributor shall by reason of any such alteration be placed in any worse position than if the alteration had not been made."

D On July 1, 1933, by virtue of the provisions of the London Passenger Transport Act, 1933, the plaintiff was transferred to and became a servant of the London Passenger Transport Board. Such transfer was by the Act compulsorily effected. Section 73 (3) of the Act provides:

E "No existing officer or servant so transferred shall, without his consent, be by reason of such transfer in any worse position in respect to the conditions of his service as a whole as compared with the conditions of service formerly obtaining with respect to him and, in determining whether an officer or servant is, or is not, in a worse position, regard shall be had to all relevant considerations, including tenure of office, remuneration, gratuities, pension, superannuation, sick fund and any other benefits or allowances, whether provided for himself or for his widow, family or representatives and whether obtaining legally or by customary practice of the authority,

F company or person under whom he held his office or employment."

It seems manifest that it was intended that an existing servant of the London County Council should not, by reason of compulsory transfer, be in any worse position than before in respect to the conditions of his service.

G Section 80 of the Act deals with superannuation funds. Section 80 (9) provides:

H "Any person who, being an officer or servant of any of the local authorities specified in Part III of sched. II to this Act [of which the London County Council is one], is transferred to and becomes an officer or servant of the board, and who immediately before the appointed day was a member of any pension, superannuation or other benefit fund set up by that authority (in this section referred to as 'a local authority's fund') may so long as he remains an officer or servant of the board continue to be a member of that fund and, subject to the provisions of the three next succeeding sub-sections, while he so continues to be a member, the provisions of any enactment or scheme or any rule or regulation by which that fund is regulated shall, so far as respects him, continue to apply to the local authority, and he shall be entitled to the same benefits, rights and privileges and subject to the same obligations, whether obtaining legally or by customary practice, as

he would have been entitled or subject to if he had remained an officer or servant of the authority."

It is necessary for the purposes of this appeal to consider also s. 80 (10) and s. 80 (11), which provide:

"(10) Where any person who continues to be a member of a local authority's fund ceases to be an officer or servant of the board, the provisions of any such enactment, scheme, rule or regulation as aforesaid which would have been applicable upon his ceasing to be an officer or servant of the authority shall apply as if he had remained an officer or servant of the authority, and had ceased to be such an officer or servant at the time at which, and in circumstances similar to those in which he ceased to be an officer or servant of the board. (11) Where any officer or servant of the board continues after the appointed day to be a member of a local authority's fund—(a) the authority may in respect of him grant benefits, and make payments into and out of the fund, as if his employment by the board were employment by the authority . . . "

The result was that the plaintiff continued to be a contributor to, or, if the language of s. 80 (9) is employed, "to be a member of", the London County Council superannuation and provident fund. She continued for some time to be employed by the London Passenger Transport Board. She was a traffic clerk, grade 2. She became ill, and, being certified as permanently unfit on medical grounds, she left the service of the board on Aug. 3, 1938. The board so informed the London County Council. She then became entitled to receive a superannuation allowance from the London County Council fund. Section 80 (10) of the Act of 1933 applied, and the calculation indicated by cl. 15 of the scheme had to be made. She became entitled to a pension of £86 16s. 8d. a year.

In 1944 there was enacted the Pensions (Increase) Act, 1944. Section 1 (1) provides:

"Subject to the provisions of this section, a pension specified in sched. I to this Act may, in respect of any period after Dec. 31, 1943, be increased by the pension authority by an amount calculated in accordance with the provisions of sched. II to this Act . . . "

There follows a proviso which I need not for present purposes read. Schedule I, Part II, para. 1, provides, under the heading: "Pensions which may be increased under this Act":

"A pension payable by any local authority solely in respect of local government service."

Section 1 (7) of the Act provides:

"Where any such pension as is specified in Part II of sched. I to this Act may be increased under the provisions of this section, it shall be the duty of the pension authority to increase the pension in accordance with those provisions."

Section 4 of the Act enables His Majesty by Order in Council to direct certain extensions of the provisions of s. 1. Section 5 (1) and (2) provide:

"(1) Any additional expenditure incurred by reason of the provisions of this Act in respect of the pensions specified in Part I of sched. I to this Act shall be defrayed out of moneys provided by Parliament. (2) Where any such pension as is specified in sched. I, Part II, para. 1, to this Act is increased under the provisions of this Act, the cost of the increase shall be defrayed by the pension authority: Provided that where the pension authority are not the last employing authority, the last employing authority shall reimburse the cost of the increase to the pension authority."

The expression "pension" is defined in s. 8 (1) as meaning "any pension payable by way of periodical payments," and as including

"(a) any allowance or other benefit payable . . . by virtue of any superannuation scheme . . ."

A If the London County Council had retained their tramway undertaking, and if as a result the plaintiff had continued in their service down to the date of her enforced retirement, it seems that the Act of 1944 would have operated so as to increase her pension. She would have become entitled to a yearly increase of £21 14s. 2d. So also would she have benefited from the Pensions (Increase) Act, 1947, and her increase in pension would as from Dec. 1, 1946, have been £30 a year. She has not received any increases and, accordingly, she has brought this action to have her rights determined.

B On the face of it, it seems that because of her compulsory transfer she is worse off in her superannuation allowance by the annual amount of £30. That seems to be contrary to the intention of the Act of 1933. Relying on the concluding words of s. 80 (9) of the Act of 1933, the plaintiff contends that Parliament has enacted that she shall be entitled to the same benefits, rights and privileges, C whether obtaining legally or by customary practice, as she would have been entitled to if she had remained a servant of the London County Council. Had she so remained she would now be receiving £30 a year more. Her case is that she would have had a legal right to that increase. It is claimed, therefore, that the Act of 1933 provides that she is entitled to this right. Paragraph 4 of the statement of claim was in the following terms:

D "By reason of the provisions of s. 80 of the London Passenger Transport Act, 1933, and, in particular, sub-s. (9), sub-s. (10) and sub-s. (11) thereof, the said pension is a pension payable by a local authority solely in respect of local government service within the meaning of sched. I, Part II, para. 1, E to the Pensions (Increase) Act, 1944, and upon the coming into force of the Pensions (Increase) Acts, 1944 and 1947, the defendants became empowered to make and the plaintiff became entitled to receive increases in her said pension to the extent therein provided for. But the defendants deny that they have any power to grant such increases, and have refused to grant the same or to consider her claim for such increases made in the manner provided for by s. 3 of the Pensions (Increase) Act, 1944."

F It was not contended before us that the plaintiff would be entitled to an increased pension if the provisions of the Pensions (Increase) Act, 1944, alone were looked at. On that basis she would clearly not be entitled to an increase for the reason that her pension is not one payable by a local authority "solely in respect of local government service." It is said on her behalf that her position is taken care of by the provisions of s. 80 of the Act of 1933. It, therefore, falls G to be considered whether the contentions made on her behalf are right and whether the Act of 1933 contains provisions which entitle the defendants to pay an increased pension and entitle the plaintiff to claim. In my judgment, when s. 80 (9) of the Act of 1933 is looked at, it appears that it relates to the time during which a person continues to be a member of the fund while remaining a servant of the board. As applicable to the facts of the present case, the provisions of s. 80 (9) relate to the position of the plaintiff down to Aug. 3, 1938, H and, in my judgment, the effect of s. 80 (9) is that during that period, on the one hand, the provisions of any enactment, scheme, rule or regulation regulating the fund continue to apply, as respects her, to the London County Council, and, on the other hand, she has the benefits, rights and privileges, and is also subject to the obligations, as though she had remained with the London County Council. Section 80 (10), in my judgment, relates to the time when a servant of the board ceases to be a servant of the board. Applying that sub-section to the facts of

this case, that sub-section relates to the position of the plaintiff on Aug. 3, 1938. On her so ceasing to be a servant of the board, she was to be treated as though she had remained with the London County Council and as though she had retired on Aug. 3, 1938, on account of ill-health. Any enactment, scheme, rule or regulation by which the fund is regulated applies to decide her rights, but they are to be decided on the basis postulated. Section 80 (11) is, in my judgment, really an administrative provision and deals with a servant of the board, *i.e.*, it is dealing with the time while someone remains a servant of the board. It does not deal with someone who has ceased to be a servant of the board. A

For those reasons, in my judgment, on a reading and construction of s. 80 (9), s. 80 (10) and s. 80 (11) of the Act of 1933, the plaintiff does not show that she is entitled to the increase which she claims. In addition, however, to the reasons which I have just assigned based on a consideration of those sub-sections, there are other reasons which, in my judgment, lead to the same conclusion. It has to be considered what is the meaning of the phrase "any enactment or scheme or any rule or regulation by which that fund is regulated," in s. 80 (9) of the Act of 1933. The Acts of 1944 and 1947 are not schemes or rules or regulations. They are enactments, but they are not, in my judgment, enactments by which the fund is regulated. The Acts define pensions in relation to funds and then provide for certain increases, but they are not statutes which regulate the fund. They are statutes which relate to certain recipients from the funds. B C

We made inquiry from the Bench and received from counsel for the defendants information as to the way in which administratively the Act of 1944 had been put into effect. Whatever may have been done for administrative purposes is immaterial. The increases resulting from the Acts of 1944 and 1947, if they applied in the present case, would be increases that would come out of the county rates and they would not be payments out of the fund. I made reference to s. 5 (2) of the Act of 1944, which provides: D

"Where any such pension as is specified in sched. I, Part II, para. 1, to this Act is increased under the provisions of this Act, the cost of the increase shall be defrayed by the pension authority" E

Those are not words which would cover the plaintiff. The plaintiff is not one who, within the wording of Part II of sched. I, was solely in local government service, or, stated otherwise, her pension was not payable solely in respect of local government service. For those reasons, the conclusion at which I have arrived is that the plaintiff has not brought herself within any statutory enactment entitling her to receive the increase, or empowering the defendants to pay the increase. I, therefore, consider that this appeal must be dismissed. F

LLOYD-JACOB, J.: I would respectfully adopt the statement of the circumstances of the present case which has fallen from MORRIS, L.J., and proceed direct to the relevant portions of the statute. In passing, I might, perhaps, say that, in addition to the provisions of s. 73 (3) of the Act of 1933, there is a provision in s. 73 (4) for compulsory arbitration. For my part, I desire it to be quite plain that in nothing I am about to say am I holding that the plaintiff is debarred from the reference to which that sub-section relates. G

The material question, in my judgment, falls to be determined according to the true construction of s. 80 of the Act of 1933, and, in particular, of s. 80 (9) and s. 80 (10). I myself find no difficulty in construing s. 80 (9) as being a representation to transferred persons that they are to regard their continued employment as having been deemed to be employment by the local authority. Section 80 (9) begins by stating that membership of a superannuation fund shall continue during the service with the authority to whom the servant is transferred. It then provides that any enactment, regulation and the like by which the local authority regulate their fund shall, notwithstanding the transfer of the servant, H

continue to apply to the local authority in respect of that servant, and it concludes by reciting that the servant shall be entitled to every benefit to which continued service with the local authority would have entitled him. It is perfectly true that s. 80 (9) is in terms related to the position while the servant continues to be a member of the fund and s. 80 (10) is concerned with the position when the servant ceases to be a servant of the authority. Section 80 (10) provides that, as and when that service is terminated, the provisions of any enactment or regulation or the like which would have been applicable on his leaving the service of the local authority shall apply as though he had never changed his employment and never ceased, in fact, to be solely in the employment of the local authority.

In my judgment, it was perfectly clear from the passing of that Act that these transferred persons were entitled to assume, in respect of their membership of the London County Council superannuation and provident fund (provided they continued their contributions and continued to perform their appropriate service during the period of their employment), that their rights and obligations in relation to the fund had, in no sense, changed. In terms, again, both s. 80 (9) and s. 80 (10) refer to an enactment or scheme or rule or regulation by which the fund is regulated. There could be an argument that on its true construction, that language requires the court to accept that, whatever be the enactment, rule or regulation in force at the date of the termination of the employment, those are the governing conditions with regard to the pension. For my part, I should hesitate a long time before I accepted that view. If at the cessation of employment an enactment in fact regulates the fund in the sense of determining the appropriate pension which will be payable, any amendment or modification of that enactment ought, in my judgment, to apply to persons who are already receiving payment as much as to those whose pension rights have not yet accrued.

If, therefore, I could find the Pensions (Increase) Acts, 1944 and 1947, to be within the language "any enactment or scheme or any rule or regulation by which that fund is regulated," for my part I should have no difficulty in holding that the plaintiff was entitled to succeed, but reference to both those Acts (and for this purpose I need refer only to the Act of 1944) indicates quite clearly that they are not enactments by which the fund is regulated. It is conceded that, as a matter of language, the plaintiff does not fall within the category of a person to whom sched. I, Part II to the Act of 1944 is particularly directed, but the argument was addressed to us that, having regard to the statutory provision in 1944 for an increase of pensions payable solely in respect of local government service, that alone covered those whose service with the transport board might, in fairness, be deemed to be local government service, and they ought properly to be regarded as entitled to the benefit which the Act confers on those who remain throughout their working life in local government service. The misfortune of that particular argument rests in this, that to enable the plaintiff to succeed any enactment which she prays in aid must, in fact, be an enactment by which the fund is regulated, and reference to s. 5 (2) of the Act of 1944 makes it quite plain that the enactment dealing with these increases is not, in fact, directed to the regulation of the fund at all. Section 5 (2) is in these terms:

"Where any such pension as is specified in sched. I, Part II, para. 1, to this Act is increased under the provisions of this Act, the cost of the increase shall be defrayed by the pension authority . . ."

Then there is a proviso as to contribution or reimbursement if the pension authority are not the last employing authority. The proviso is immaterial for the purposes of the particular argument to which these observations are directed, namely, that the statutory provision that the cost of the increase shall be a burden on the pension authority is, in itself, a clear indication that it does not arise from a regulation of this superannuation and provident fund which, of

course, is created not only by sums coming from the local authority, but also periodical payments by the intended beneficiary. For those reasons, in my judgment, this appeal fails.

SINGLETON, L.J.: I agree that the appeal fails, and that it must be dismissed.

Appeal dismissed.

Solicitors: *Rexworthy, Bonser & Wadkin* (for the plaintiff); *J. H. Pawlyn*, Solicitor to London County Council (for the defendants).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

R. v. LURIE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Ormerod, JJ.), July 30, 1951.]

Criminal Law—False pretences—Obtaining cheques for benefit of other person—Indictment—Particulars of offence—"Obtains"—Proof of obtaining possession of property alleged to have been obtained not sufficient—Larceny Act, 1916 (c. 50), s. 32 (1).

Criminal Law—Appeal—Practice—Transcript of shorthand note of trial—Supply of full transcripts and passages of the evidence.

The appellant, with two other persons who did not appeal, was convicted of conspiring to cheat and defraud "such persons as might be induced to part with money and goods" to a limited company by false pretences, and also of obtaining cheques by false pretences from one N. The three defendants represented that the company was financially sound and was carrying on a prosperous business although they knew it was on the verge of bankruptcy. The cheques obtained by the appellant as the result of these false representations were made out to the company.

HELD: (i) in s. 32 (1) of the Larceny Act, 1916, the word "obtained" by false pretences meant obtained the property and not merely the possession of the property; where a person made a false pretence and obtained property for some one else the indictment must allege that and must not allege that he obtained it for himself; the appellant had not personally obtained the cheques because they were made out to the company and could only be paid into the company's account; and, accordingly, the conviction of false pretences must be quashed.

(ii) although that conviction must be quashed because of the technical error in the indictment, the fact remained that the jury had found that false pretences had been made and the conviction for conspiracy must stand.

Per curiam: as a general rule a short transcript of the shorthand notes of the trial—i.e., the arraignment, summing up, and evidence given after the verdict, is to be prepared for the Court of Criminal Appeal. If any particular part of the evidence or cross-examination is relied on as a ground of appeal the registrar can order that to be included in the transcript, but, unless the single judge so directs, full transcripts are not to be supplied unless an application for them is granted by the court.

AS TO FALSE PRETENCES, see HALSBURY, Hailsham Edn., Vol. 9, pp. 564-575, paras. 955-965; and FOR CASES, see DIGEST, Vol. 15, pp. 980-1009, Nos. 10,975-11,335, and Digest Supps.

Cases referred to:

(1) *R. v. Ball*, [1951] 2 K.B. 109; 115 J.P. 210.

(2) *R. v. Smith*, *R. v. Pople*, *R. v. Dallimore*, *R. v. Lord*, *R. v. Mallon*, [1950] 2 All E.R. 679; 114 J.P. 477; 2nd Digest Supp.

- (3) *Underwood (A. L.) v. Bank of Liverpool. Same v. Barclays Bank*, [1924] 1 K.B. 775; 93 L.J.K.B. 690; 131 L.T. 271; Digest Supp.
 (4) *R. v. Morris*, [1950] 2 All E.R. 965; [1951] 1 K.B. 394; 115 J.P. 5; 2nd Digest Supp.
 (5) *R. v. Castro*, (1880), 5 Q.B.D. 490; 49 L.J.Q.B. 747; 43 L.T. 78; 44 J.P. 732; *affd.* H.L. *sub nom. Castro v. R.*, (1881), 6 App. Cas. 229; 50 L.J.Q.B. 497; 44 L.T. 350; 45 J.P. 452; 14 Digest 477, 5196.

A

APPEAL against conviction.

The appellant, Charles Lurie, was convicted at the Central Criminal Court of conspiracy to defraud and obtaining property by false pretences, and was sentenced to two concurrent periods of eighteen months' imprisonment.

C. N. Shawcross, K.C., and *Wingate-Saul* for the appellant.

B

J. M. G. Griffith-Jones for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court.

The appellant was convicted before the commissioner, Sir ERNEST GOODMAN ROBERTS, K.C., at the Central Criminal Court on a count charging him with conspiring with two other persons, who were convicted with him, but do not appeal, "to cheat and defraud such persons as might be induced to part with moneys and goods to the Donella (Wine) Co., Ltd., by false pretences." He was also convicted on two counts of obtaining cheques by false pretences. Those charges were, except for the particulars, in identical terms: "Obtaining property by false pretences contrary to s. 32 (1) of the Larceny Act, 1916." The particulars of the first offence were that the appellant and his two co-prisoners on Mar. 3

C

D

"with intent to defraud obtained from Leslie Collier Nicholls a cheque for £2,500 by falsely pretending that the Donella (Wine) Co., Ltd., was then a financially sound and prosperous business and that the Royal Automobile Club was a customer of the said company and that £2,500 was then required for the purchase by the said company of whisky and that they . . . then intended to apply the proceeds of the said cheque substantially for that purpose."

E

The other count charged the same persons with having obtained a further cheque for £4,300 from Mr. Nicholls by similar false representations.

So far as the charges of false pretences are concerned, the circumstances were that the appellant made representations which the jury by their verdict found were false to his knowledge. The cheques which were obtained in consequence of the representations were cheques made out by Mr. Nicholls to the order of the company, and, therefore, Mr. Nicholls intended that they should become the property of the company and that the company should receive the money from the bank. Section 32 of the Larceny Act, 1916, provides:

F

G

"Every person who by any false pretence—(1) with intent to defraud, obtains from any other person any chattel, money, or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person . . . shall be guilty of a misdemeanour . . ."

H

The objection which was taken by counsel for the appellant with regard to the conviction of false pretences was that, although the indictment alleged that the appellant obtained the cheques, he did not, in fact, do so. The company obtained the cheques, and, therefore, the charge should have been laid that he obtained the cheques for the use of the company, not that he himself obtained them. It is a technical point and, in one sense, has no merits, but it is a good point. *R. v. Ball* (1), decided by this court only on Feb. 19, 1951, had not been reported at the time when the commissioner summed up in this case. In *R. v. Ball* (1) and in *R. v. Smith* (2) the court said that "obtained" means obtained

the property and not merely the possession. If the cheque was made out, as it was in this case, to the company, the appellant and his co-prisoners might have been guilty of making false pretences with intent to defraud, but they did not do so with the intent of obtaining the cheques for themselves. They were obtaining them for the company, and, therefore, technically the indictment was wrong. Where a person makes a false pretence and obtains property for somebody else, the indictment must allege that, and not that he obtained it for himself. In this case the cheques were made out to the company and there is no doubt the company owned them. It was always intended that the company should be the owner. The only banking account into which the cheques could have gone was the banking account of the company. If, for instance, a director had endorsed them and paid them into his own account, he would have been guilty of a fraud on the company. Moreover, since *A. L. Underwood v. Bank of Liverpool* (3), no bank will now allow a cheque made out to a limited company to be paid into any account except that of the company. For these reasons, in the opinion of the court, the convictions of obtaining money by false pretences must be quashed, because the evidence did not support the charges.

That leaves the question of conspiracy untouched. The prosecution alleged that the company was in grave financial difficulties, and that the appellant and his co-prisoners induced people to lend them money by various representations—among others, that the company was very flourishing. The jury must be taken—as they convicted on the counts of false pretences—to have found that the false pretences that were alleged were made. The fact that we quash the convictions of obtaining the cheques by false pretences, because the person who obtained the cheque was wrongly stated in the count, has nothing to do with the question whether the false pretences were made. In our opinion, there is no fault to be found with the summing up and, therefore, the conviction on the charge of conspiracy must stand. We quash the conviction on the charge of false pretences. The sentence of eighteen months for conspiracy stands and the sentence of eighteen months passed on the other counts does not stand.

[His LORDSHIP called attention to the fact that the court had only been referred to the summing up, though in fact the appellant had requested from the registrar of the court a full transcript of the twelve days' hearing, and had paid £217 for his copy of the transcript, and continued:] The court gives this direction. Where anything in addition to what is known in this court as a short transcript—that is to say, the arraignment, the summing up, and the evidence after verdict—is required, the only transcript of evidence that is to be given without leave of the court is a transcript of any particular piece of evidence referred to in the notice of appeal if, in the opinion of the registrar, it is necessary. If an appeal is brought on the ground that some particular part of the evidence or cross-examination is admissible, the registrar can order it to be given. So far as other matters are concerned, unless the single judge allows a transcript, transcripts are not to be given except on an application made to the court, when the court will have to be satisfied that it is really necessary. What I have said does not apply in capital cases where a transcript has to be made for the information of the Secretary of State as well as for us.

Appeal allowed in part.

Solicitors: *Franks, Charlesly & Leighton* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

Re C. W. M.

[COURT OF APPEAL (Somervell, Denning and Hodson, L.JJ.), July 25, 26, 1951.]

Lunatic—Settlement of property—Direction by court—Reservation of power of revocation to patient—Law of Property Act, 1925 (c. 20), s. 171 (5).

A A person of unsound mind, aged seventy years, who, according to medical evidence had no prospect of recovering her capacity, possessed large free estate and was also the life tenant of two settled funds. A scheme was proposed under which the patient would purchase the reversionary interests of her children in one of the settled funds, the purchase being satisfied by the transfer out of the patient's free estate of certain shares in a private limited company which would be settled on the children and their issue, without any power of revocation or other interest being reserved to the patient. It was agreed that the scheme might properly be sanctioned by the court if there was jurisdiction so to do.

B HELD: the court had jurisdiction under the Law of Property Act, 1925, s. 171 (1) to order the settlement to be made, and was not precluded by s. 171 (5) from ordering the settlement to be made without the reservation of a power of revocation or other interest to the patient in case of her recovery.

C *Re Greene* ([1928] Ch. 528), applied.

AS TO SETTLEMENT OF PATIENT'S PROPERTY, see HALSBURY, Hailsham Edn., Vol. 21, pp. 335-338, paras. 582-585; and FOR CASES, see DIGEST, Vol. 33, pp. 166-169, Nos. 526-543.

D Case referred to:

(1) *Re Greene*, [1928] Ch. 528; 97 L.J.Ch. 378; 139 L.T. 152; Digest Supp.

APPLICATION in lunacy by the receiver of the estate of a person of unsound mind that a settlement might be directed of certain property belonging to that person.

E The application was heard *in camera* and is reported by permission of the court.

Cross, K.C., and *Wigglesworth* for the receiver.

T. A. C. Burgess for the patient's children.

J. F. Bowyer for the patient's grandchildren.

W. F. Waite for the patient.

F **SOMERVELL, L.J.:** This is a summons asking that under the Law of Property Act, 1925, s. 171, a settlement may be directed of certain property of a person of unsound mind. She is seventy years old, and the medical evidence is that there is no prospect of her recovering her capacity, but otherwise she is in good health. The applicant is the receiver, and the application is supported by six children and thirteen grandchildren. The patient is represented by the Official Solicitor. The dealings which it is suggested should be sanctioned are, G it is submitted, such as the patient would have carried out herself. They will result in an immediate benefit to the children and, as will be seen, some benefit to herself, and, if she lives for five years, there will be a very substantial saving of estate duty.

H The patient has free property worth £393,000. It includes a policy, the premium on which is £1,022 a year. The nominal value of the policy is £30,000, but substantial profits have accumulated and it could be converted into a paid-up policy of £44,000. There are also shares in a private or family company worth some £178,000, and loans, one to each of two of her children of about £15,000, which are charged on their reversionary interests in a fund of £80,000, in which the patient has a life interest and which passes to her six children equally on her death, subject to a power of appointment. She also has a life interest in a fund of £7,700 which, on her death, goes to her eldest son. The whole property

produces a gross income of £16,216 per annum, which is reduced by tax to a net income of £3,734. Out of this at present has to be paid the premium, £1,022; her maintenance, which comes, with incidental expenses, to about £2,000; there were gifts to children which were sanctioned and which amounted last year to £810; and some subscriptions to charities. The amount spent slightly exceeded her net income. She had made a will of her disposable property by which, subject to legacies for £6,000, the residue was left to her children, substituting issue, if any, of the children who pre-deceased her, and there was a hotch-pot clause.

The proposals are: (i) to convert the policy into a paid-up policy; (ii) that she, the patient, should purchase the reversionary interests of the children in the £80,000, and this can be done (and this is agreed) at a proper valuation for £14,500, which takes into account anticipated liability to death duties. This sum would be satisfied by the proper proportion of shares in the private company, the balance of the shares in that company to be distributed between the children, subject to hotch-pot, and settled in trust for them and their issue, without any power of revocation or the reservation of any interest to the patient. These arrangements, if the patient lives for five years or more, will bring about a very substantial saving in death duties. The children will receive the income of the settled property, and it is provided with regard to five children that after seven years their interest becomes absolute, in the proper proportion of the capital. The trusts with regard to the sixth child, the details of which do not matter, are different and in substance his interest is for his children. The proposals will leave the patient with a gross income of about £10,000 and a net income of £3,191, and free property of about £274,000. The premium, of course, is saved, and it seems to me that the arrangement should, unless some very special circumstances arise, avoid the necessity of further gifts to the children. On this basis—i.e., taking into account the saving of the premium and the disappearance of gifts to the children—she would, on the current figures, have a surplus of about £1,000 instead of the small deficit which she had last year or the year the figures for which were put before us.

Counsel for the patient agrees that the scheme is a scheme proper to be sanctioned, if there is jurisdiction to do so. The question turns on the construction of s. 171 of the Law of Property Act, 1925, which provides:

“(1) The court may direct a settlement to be made of the property of a lunatic or defective, or any part thereof or any interest therein, on such trusts and subject to such powers and provisions as the court may deem expedient, and in particular may give such directions . . . (b) where the property has been acquired under a settlement, a will or an intestacy, or represents property so acquired . . . (5) Subject to making due provision for the maintenance of the lunatic or defective in accordance with his station in life, whether out of the capital or income of the property settled or other property or partly in one way and partly in another, and to providing, by means of a power of appointment or revocation, or otherwise, for the possibility of the lunatic or defective recovering full capacity, the court may, in making any order under this section, have regard to [certain matters] . . . (7) At any time before the death of the lunatic or defective, the court may, as respects any property remaining subject to the trusts of a settlement made under this section, on being satisfied that any material fact was not disclosed to the court when the settlement was made, or on account of any substantial change in circumstances, by order vary the settlement in such manner as it thinks fit, and give any consequential directions.”

Sub-section (7) was relied on by counsel for the receiver, but I do not think that it assists. I think the issue turns on sub-s. (5). The question is: Do the latter

words of that sub-section preclude the sanctioning of a settlement of any property unless a power over it is preserved which would be exercisable by the lunatic if she recovered? It is not suggested that they preclude a settlement of income pending recovery, and indeed the earlier words of the sub-section which direct regard to be had (I use neutral words) to the maintenance of the lunatic, seem to me to assume that there may be at least a settlement which will cause income to be disposed of and spent during the period before the lunatic recovers.

A One could, of course, understand a provision that capital should not in any case be encroached on. If this had been the intention, one would have thought that different words would have been used. If capital can be encroached on, it might be exhausted if and when the lunatic recovered.

The words are, I think, capable of meaning (and counsel for the receiver

B did not really dispute this) that with regard to particular property settled there must be some power exercisable by the lunatic if he recovers. I suggested in the course of the argument the possibility of sanction being sought for a marriage settlement. Whatever might have been the powers before this section was passed (and I am not concerned with them), it would seem to me now to fall under this section. One may imagine the case of a man with three daughters

C who, before he had become of unsound mind, having ample resources, settled £50,000 on the first daughter to be married, with trusts for the education of children, and so on. One can imagine that a man might have told all his daughters that that is what he would do for them. He then becomes of unsound mind and the second daughter becomes engaged to be married. Under para. (i) of sub-s. (5), the court is to have regard to

D "the manner in which the property has been settled or dealt with on former occasions";

and I would have thought that there would be power to make a marriage settlement, on the facts as I have put them, in the form in which, quite plainly, the patient would have made it if he had remained of sound mind, *viz.*, without a

E power of revocation I am assuming there would be no such power of revocation in the original marriage settlement.

I have said that I think the words are capable of what I may call the narrower construction, but are they capable of the wider construction which would cover *inter alia* the above case? Before I come to the authority which is all-important, I will consider the words. Put generally, can these words mean that the court

F is to have regard to the possibility of the lunatic recovering and is to consider his reasonable needs should that happen? In the case that I have put of a marriage settlement, I am assuming that the marriage portions leave ample resources, not only for the maintenance of the lunatic, but also to leave him, should he recover, with the resources which the court is clear he would have left himself if he had been of sound mind when the second daughter married.

G Must the court, on the narrower construction, leave him with a power which they are satisfied he would not himself have sought to maintain? The section is curiously worded. In considering due provision for maintenance, the court is directed to have regard to the property not settled. That is plain enough and common sense, but that is treated as a provision made by the court—

H "Subject to making due provision for the maintenance of the lunatic or defective . . . whether out of the capital or income of the property settled or other property . . ."

The words "to making due provision" must, as it seems to me, therefore, be read as meaning "there being due provision." I can see no distinction between the meaning of "making due provision" and "providing," which is the word which initiates the second limb of the sub-section. One can, therefore, read the words of the latter half in this way: "Subject to there being due provision by

means of a power of appointment or revocation or otherwise for the possibility of the lunatic or defective recovering full capacity, the court may," etc.

Does the word "otherwise" entitle the court to consider the other property and proceed on the basis that the possibility of the lunatic recovering, having regard to what is left, makes the insertion of a power of appointment or revocation in respect of the property settled unnecessary as a matter of construction? I think that this latter is a possible construction and that the words are capable, having regard to the form of the section to which I have referred, of that meaning. Unaided by authority, I would have found the question a difficult one. I would have expected the court to have the wider power. There are obviously certain types of settlement which it might be clear the lunatic would wish to make if of sound mind where a power of revocation would plainly be inappropriate. The question, however, is not what does one expect, but what has Parliament said.

Counsel for the receiver relied on *Re Greene* (1), which concerned a mother and two sons. The sons had been certified as of unsound mind in 1902 and 1910 respectively. They had made no wills and they had no next of kin within the statute except their mother herself and an aunt who was well advanced in years. A marriage settlement had been made when the father and mother married in 1879, and under that settlement, into which further sums had been paid by the mother, there was a provision that she, the husband having pre-deceased her, should have a life interest and subject thereto the corpus should go absolutely to the children, subject to powers of appointment. The mother's father, the grandfather of the two patients, had died in 1885. He left very considerable property, and that also, subject to the mother's life interest, went to the two sons (they were, I should have stated, the only surviving sons) absolutely. If nothing was done, therefore, and the mother and aunt died before the sons, when they died the Crown would take on an intestacy, there being no next of kin. The mother sought a power of disposition herself over the marriage settlement funds and originally over part of what I will call the will property. There had been an arrangement with the Crown with regard to the application, although the Crown did not agree altogether to what was being asked. The court gave her no power over the will property, which was, according to the judgment, ample in amount for the two patients; but it gave her power to dispose of the marriage settlement property absolutely on her death. In other words, the patients were cut out altogether. There were very special circumstances in that case, which are referred to as such in the judgment, but the court clearly proceeded on the wider construction of s. 171 (5) which I have outlined. There was no power over the marriage settlement property reserved to the patients which they could have exercised if they had recovered, and, if the power was exercised and they survived their mother, the whole property would have disappeared. It would seem conclusive, therefore, in favour of what I may call the wider construction. In the minutes of the order submitted to the court there was a provision for preserving a right to maintenance during the lives of the patients, and that is summarised in the judgment of SARGANT, L.J., but the court thought that was unnecessary, and I rather doubt whether on any view (though we have not got to decide it) mere postponement would have been, or could have been, regarded as a power of revocation. One would have thought one would have had to go further than that and provide that, if the lunatics recovered, they could have overridden the powers given to the mother altogether, and the powers given to the mother, therefore, would have to be postponed, so far as their being executed was concerned, till both patients were respectively dead.

Counsel for the patient submitted that there might have been a power of revocation in the settlement, though I think it could only have been on the possibility of their recovering during their mother's lifetime. It was important to see, if possible, whether that was so, and we have now had a copy of the

settlement sanctioned, and there is no such power of revocation. SARGANT, L.J., said ([1928] Ch. 559):

A "In the minutes of order submitted to us an express provision was inserted for preserving the right of each patient to maintenance, if necessary, out of the income of his or her share of the marriage settlement funds in priority to the power of disposition over those funds to be given to the applicant. But this appears to be quite unnecessary and to introduce a needless complication into the proposed settlement. As matters stand, each patient will be entitled on the death of the applicant to one moiety in possession of the whole of the proceeds of the real and personal estate, subject to the will of the testator John Jones [the patients' maternal grandfather]; and it is obviously unnecessary to make or preserve any additional provision for either of them."

B Having dealt with the merits and decided that the proposal could be sanctioned, LAWRENCE, L.J., said (*ibid.*, 563):

C "Having arrived at this conclusion, I agree with the other members of this court that, as the patients are amply provided for otherwise, there is no need to make any provision in the proposed settlement for the maintenance of the patients out of the settlement funds, and that the power of appointment proposed to be conferred on the applicant can properly be made to operate both on the capital and on the income of the settled funds immediately on the death of the applicant. I further agree that in the circumstances there is no need to make any reservation in the settlement as regards any present or future disposition by the patients or as to the possible right of the patients' paternal aunt . . ."

D In that passage LAWRENCE, L.J., is expressly directing his mind to the question whether there need be any reservation in the settlement.

E Counsel for the patient in the present case relied on the fact that in that case there is no mention in the judgments, or, so far as one can see, in the arguments, of s. 171 (5). In the argument, Mr. Hurst said (*ibid.*, 534):

"Under s. 171 there is no jurisdiction to order capital to be handed over during the life of a lunatic, but it is submitted that Mrs. Greene should be given a general power of appointment . . ."

F That view was clearly not the view that was acted on by the court, but counsel for the patient submitted that we ought to come to the conclusion that the decision was *per incuriam*. It is, I think, somewhat strange that there is no express reference to sub-s. (5), but I do not think that we can treat the decision as one given *per incuriam*. It was a reserved judgment, with eminent counsel appearing and arguing on various sides familiar with this branch of the law, and the decision proceeds plainly on the basis of what I call the wider construction of sub-s. (5), *viz.*, that, in considering the possibility of the patient's recovering, the court is not compelled to insert in the settlement of the property settled either a power of revocation or some equivalent provision, but that it can, as in considering maintenance, have regard to the resources which will be left unaffected by the settlement, and, if those are considered to be adequate in case the patient should recover, there is no need to put any reservation into the settlement. For those reasons, it seems to me that we have jurisdiction to sanction these proposals. Some reference was made to the inherent jurisdiction of the court. In what I am about to say I am not dealing with the powers of the court other than in relation to the subject-matter which is dealt with in s. 171, but, in so far as the subject-matter of that section is concerned, I cannot think that, if in that section a particular limit is placed on the powers of the court, that limit with regard to that matter could be overridden by virtue of any inherent jurisdiction. I think these proposals should be sanctioned.

DENNING, L.J.: I agree.

HODSON, L.J.: I agree. I think the construction of the Law of Property Act, 1925, s. 171 (5), contended for by the receiver is a difficult one, and, for my part, I do not think that the language of s. 171 (1) is sufficient to avoid the difficulty. Sub-section (1) provides:

"The court may direct a settlement to be made of the property of a lunatic or defective, or any part thereof or any interest therein, on such trusts and subject to such powers and provisions as the court may deem expedient . . ."

The wording of sub-s. (5) has, however, to be examined to ascertain whether it is necessary in any particular case to reserve a power of appointment or revocation or otherwise provide for the possibility of the lunatic's recovering capacity. The construction contended for by the receiver seems to me to put *prima facie* an extended meaning on the word "otherwise," but, having read *Re Greene* (1), and having observed the admission by counsel for the applicant in that case that under s. 171 there was no jurisdiction to order capital to be handed over during the life of the lunatic, I cannot think that, because sub-s. (5) is not expressly mentioned, the decision of the court, which had express reference to s. 171, could be treated as *per incuriam*. Indeed, the language of LAWRENCE, L.J., appears to indicate that he had the actual words of sub-s. (5) in mind when he said (*ibid.*, 563):

". . . I agree . . . that, as the patients are amply provided for otherwise, there is no need to make any provision in the proposed settlement for the maintenance of the patients out of the settlement funds, and that the power of appointment proposed to be conferred on the applicant can properly be made to operate both on the capital and on the income of the settled funds immediately on the death of the applicant."

That was taking away from the patients the power of dealing with the property in the event of the patients recovering. In this case, the patient is amply provided for, and, indeed, as has been pointed out, by the effect of this scheme her income position will be very slightly altered, and in a sense altered to her advantage. I agree that the proposed order should be made under s. 171 and not under the inherent jurisdiction of the court.

Order accordingly.

Solicitors: *Eland, Nettleship & Butt* (for the receiver); *Bull & Bull* (for the children and grandchildren); *Official Solicitor* (for the patient).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

DRINKWATER AND ANOTHER v. KIMBER.

[KING'S BENCH DIVISION (Devlin, J.), July 25, 31, 1951.]

Husband and Wife—Action by husband and wife for injury to wife—Husband's contributory negligence—Liability to contribute towards damages awarded to wife—Law Reform (Contributory Negligence) Act, 1945 (c. 28), s. 1 (1).

A A married woman was injured in a collision between a van, in which she was being driven by her husband, and a motor car. In an action for damages brought by the husband and the wife against the defendant as the driver of the car, liability for the wife's injuries was admitted, but the husband was found partly to blame, and the defendant counterclaimed against him that he should contribute towards the sum payable as damages by the defendant to the wife.

B HELD: "damage" in s. 1 (1) of the Law Reform (Contributory Negligence) Act, 1945, meant physical injury, and not financial loss; accordingly, the defendant was not a person who had suffered damage as the result partly of his own fault and partly of the husband's fault and whose claim in respect of the damage was not to be defeated by reason of his fault by virtue of the sub-section; and, therefore, the husband was not liable to make a contribution towards the damages awarded to the wife.

C FOR THE LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT, 1945, s. 1 (1), (3), see HALSBURY'S STATUTES, Second Edn., Vol. 17, pp. 12, 13.

Cases referred to:

- D (1) *Merryweather v. Nixan*, (1799), 8 Term Rep. 186; 101 E.R. 1337; 42 Digest 979, 95.
 (2) *Smith v. Brown*, (1871), L.R. 6 Q.B. 729; 40 L.J.Q.B. 214; 24 L.T. 808; 36 J.P. 264; 1 Digest 145, 516.
 (3) *Mallett v. Dunn*, [1949] 1 All E.R. 973; [1949] 2 K.B. 180; [1949] L.J.R. 1650; 2nd Digest Supp.

E ACTION by a husband and wife for damages for negligence, and COUNTERCLAIM by the defendant for contribution in respect of contributory negligence.

The wife was injured in a collision between a van, in which she was being driven by the husband, and a motor car which was admitted to have been driven negligently by the defendant. The husband's claim for damages in the action was settled, and liability in respect of the wife's damage was admitted by the defendant, but not the amount of the damages, the defendant contending that the husband had been partly responsible for the collision and claiming contribution from him as a joint tortfeasor towards the damages due to the wife. The husband denied that he had been negligent and that he was liable as a tortfeasor.

Beresford, K.C., and *F. G. Paterson* for the plaintiffs.
P. M. O'Connor for the defendant.

G *Cur. adv. vult.*

July 31. **DEVLIN, J.**, read the following judgment. This is a claim by the plaintiff, Mrs. Drinkwater, for damages for personal injuries caused by the negligence of the defendant. Shortly after midnight on June 4, 1950, she was a passenger in a motor van driven by her husband, and there was a collision between it and a car driven by the defendant as a result of which the wife was injured. There is no defence to liability, and I have to assess the damages. [His LORDSHIP stated that the special damages were agreed at £155, assessed the general damages at £250, said there would be judgment for the wife against the defendant for £405 with costs, and continued:] The defendant counterclaims against the husband, Mr. Drinkwater, asking that he, as a joint tortfeasor and as partly responsible for the collision, should be made to contribute towards this sum. The husband answers, first, that he is not in law liable to contribute

as a joint tortfeasor, and, secondly, that he was not, in fact, in any way to blame. I shall deal first with the contention of fact. [HIS LORDSHIP dealt with the evidence of negligence and continued:] I think that the husband was partly to blame, and I assess the proportions at two-thirds on the defendant and one-third on the husband.

As is well known, until 1935 the rule in *Merryweather v. Nixan* (1) prevented contribution between joint tortfeasors. The Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1), provides:

"Where damage is suffered by any person as a result of a tort . . . (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage . . ."

The defendant, it is admitted, cannot avail himself of this section because a wife cannot sue a husband for negligence, and, therefore, the husband is not in this case a "tortfeasor who is, or would if sued have been, liable in respect of the same damage." There is not, therefore, any statutory provision on which the defendant can rely as giving him a cause of action. The way he puts his case is this. He says that he has (and always has had) what is in essence a good cause of action at common law. As the result of the husband's negligence, he has sustained financial loss in that he has had to pay damages to the wife. True, that was also the result of his own negligence, but the husband's negligence was one of the causes of his loss. He could, therefore, always have recovered for that loss were it not that, up to 1935, his action was barred by the defence *ex turpi causa non oritur actio*, on which the rule in *Merryweather v. Nixan* (1) is based: see SMITH'S LEADING CASES, 13th ed., vol. 1, p. 451. In 1935 that bar was partly lifted, though not in a way which assists the defendant. In 1945, however, the defendant contends, the bar was further lifted by the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1), which provides:

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage . . ."

The defendant claims that he is a person who has suffered damage as the result partly of his own fault and partly of the husband's fault, and that his claim in respect of that damage is not to be defeated by reason of his own fault. This lifting of the bar by s. 1 (1) is not affected by any words which bring in what I might call the husband and wife limitation, and so the defendant says that his claim for contribution is not impeded. The defendant has, however, also to reckon with s. 1 (3) which provides that s. 6 of the Act of 1935

" . . . shall apply in any case where two or more persons are liable or would, if they had all been sued, be liable by virtue of sub-s. (1) of this section in respect of the damage suffered by any person."

He contends that sub-s. (3) is superfluous since he is already covered by the terms of sub-s. (1).

I shall take all this to be sound up to the point of the Act of 1945. In my judgment, the defendant's construction of s. 1 (1) is not permissible. As well as the literal meaning of the words, the scope of the Act must be considered. The Act is not, I think, intended to alter any substantive defence to a cause of action. It is not dealing with liability at all except in the restricted sense that there is no liability for negligence without proof of damage. It is dealing with the situation which arises when the plaintiff has proved the wrongful act and is seeking to show that the damage he sustained was caused by that act. He is no longer to fail on the point of causation, but, although he may not be able to prove that the wrongful act was the cause, or the sole cause, of the damage, he is to get some relief. I am not disposed to construe an Act dealing with this

subject-matter as modifying, unless it says so in clear words, the law regulating the liabilities of joint tortfeasors as laid down in the Act of 1935. If the defendant's construction of s. 1 (1) is correct, the Act of 1945, in effect, eliminates from the Act of 1935 the limitation created by the phrase "who is, or who would if sued have been, liable in respect of the same damage." Counsel for the defendant contended that it does so only in respect of the particular class of case to which the Act of 1945 applies. I presume that he had in mind that the title of the Act is to amend the law relating to contributory negligence, but the words I have quoted from s. 1 (1) are wide enough to cover every sort of tort.

I should have reached this conclusion on the terms of s. 1 (1) itself without considering s. 1 (3), on which counsel for the plaintiffs strongly relies. Section 1 (3) clinches the point that it cannot have been intended by s. 1 (1) to alter the law as laid down in 1935. On the defendant's construction, there is a clash between s. 1 (1) and s. 1 (3). The former is impliedly saying that a joint tortfeasor can recover without the limitation in s. 6 of the Act of 1935. The latter is expressly saying that s. 6 shall apply with that limitation. In such a clash, the express words must prevail. In truth, however, I do not think that there is any clash between sub-s. (1), even if literally construed, and sub-s. (3), or that sub-s. (3) is superfluous. The defendant's construction of sub-s. (1) depends on reading the word "damage" as meaning more than physical damage and as wide enough to include the sort of financial loss which arises when, as the result of a wrongful act, a man has to make a payment to a third party. It might, perhaps, be read that way if there were nothing to point to the contrary, but here there are two clear indications to the contrary. First, that reading makes sub-s. (3) at best superfluous and at worst contradictory. If contribution between joint tortfeasors is, among other cases, already covered by sub-s. (1), it is superfluous, and, indeed, almost incomprehensible, to provide that s. 6 shall apply to persons who would be liable by virtue of sub-s. (1). If, however, the meaning of "damage" is restricted to physical damage, the two sub-sections fall into place and are complementary. Sub-section (1) gives relief only to a man who has suffered physical damage—he who is, as it were, the initial plaintiff who starts proceedings. It is necessary, therefore, to provide for the case where such a plaintiff has claimed, or could claim, against two defendants who seek contribution between themselves, and sub-s. (3) is designed to cover that. The other indication is that damage is defined in s. 4 of the Act of 1945 as including "loss of life and personal injury." If the word "damage" was thought capable without any exegesis of including financial loss, I find it difficult to see the necessity for providing expressly that it should include loss of life and personal injury. This suggests strongly that the word "damage" by itself is used in the limited sense of damage to property: see *Smith v. Brown* (2), per COCKBURN, C.J. (L.R. 6 Q.B. 732). By this construction the relevant provisions of the two Acts fall into place and leave no room for the argument for the defendant.

In my judgment, therefore, the counterclaim fails and is dismissed with costs. It seems that in this branch of the law, husbands and wives can both have their cake and eat it. If a third party injures the wife, the husband may recover all the expense to which he is put even though his wife is partly to blame: *Mallett v. Dunn* (3). Under the decision that I have just given, if a third party injures his wife, even though the husband is partly to blame, the wife may recover the whole of her damages without her husband being made to contribute. This latter result, however, follows logically, if a little unexpectedly, from the general rule that husbands and wives may not sue each other in tort, which is an established principle of our law. *Judgment for the plaintiffs on the claim and counterclaim.*

Solicitors: *R. I. Lewis & Co.* (for the plaintiffs); *Hewitt, Woollacott & Chown* (for the defendant). [Reported by F. A. AMIES, Esq., Barrister-at-Law.]

DELLENTY *v.* PELLOW.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Birkett, L.JJ.), July 26, 1951.]

Rent Restriction—Possession—Non-payment of rent—Arrears paid into court before hearing—Jurisdiction to make order—Reasonableness—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1) (a), sched. I, para. (a). A

A landlord claimed possession, on the ground of non-payment of rent, of certain premises to which the Rent Restrictions Acts applied. On the day of the hearing the tenant paid the arrears into court. There was evidence that the tenant had frequently been in arrears with his rent and that on a number of occasions it had been necessary to issue summonses against him, and also that on the present occasion he owed more than a year's rent. The tenant contended that the principle of s. 212 of the Common Law Procedure Act, 1852, should be applied to a statutory tenant so as to relieve him from forfeiture on the payment of the arrears into court. B

HELD: the provision that a tenant under a contractual tenancy should have a right to relief from forfeiture on the payment of the arrears of rent into court did not avail the tenant of premises within the Rent Restrictions Acts on a claim by his landlord for possession of the premises on the ground of non-payment of rent; once the landlord showed in proceedings under the Rent Acts that at the commencement of those proceedings rent was in arrear, the court had jurisdiction to make an order for possession, the only effect of the payment of rent into court being that, *prima facie*, it would not then be reasonable to make an order; in the circumstances of the present case, however, it was reasonable to make an order; and, therefore, the landlord was entitled to possession. C D

FOR THE COMMON LAW PROCEDURE ACT, 1852, s. 212, see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 416; and FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS (AMENDMENT) ACT, 1933, s. 3 (1) (a), and sched. I, para. (a), see *ibid.*, Vol. 13, pp. 1048 and 1059. E

APPEAL by the tenant from an order of His Honour JUDGE CLARK, K.C., made at Ilford County Court on May 31, 1951, whereby he granted possession of a dwelling-house to which the Rent Restrictions Acts applied on the ground of non-payment of rent. The tenant contended, first, that it was not reasonable to make the order because the arrears had been paid into court before judgment, and, secondly, that the proceedings were misconceived as the contractual tenancy had not been validly determined by notice to quit. The report is confined to the first point. F

Caulfield for the tenant.

J. D. May for the landlord. G

JENKINS, L.J.: This is an appeal from a decision of His Honour JUDGE CLARK, K.C., at Ilford County Court, whereby he made an order for possession of certain premises which are admittedly within the protection of the Rent Restrictions Acts. The order is challenged in this court on two grounds. First, it is said that it could not be reasonable to make the order inasmuch as the ground on which possession was sought was that rent was in arrear, and, admittedly, the whole of the arrears had been paid into court before judgment. Secondly, it is said that the proceedings were misconceived inasmuch as the contractual tenancy had not been validly determined by notice to quit. H

I would agree that, *prima facie*, where possession is sought on the ground of non-payment of rent in the ordinary case and the tenant pays the rent into court or tenders the rent before judgment, it would not be reasonable to make an order for possession if there was no more in the case than that. In the present

case, however, the evidence showed that there had been a long history of default on the part of the tenant, and time after time it had been necessary to issue a summons against him before the rent could be extracted from him. This time again he allowed his rent to fall into arrear for more than a year and did not pay until the summons was issued and the case was about to be heard. Accordingly, in my view, in the particular circumstances of this case there was evidence on which the learned judge could come to the conclusion that, although the rent was actually paid into court before his judgment, nevertheless, it was a case in which it would be reasonable to make an order.

An argument was raised by counsel for the tenant based on the Common Law Procedure Act, 1852, s. 212. He pointed out (and he is, no doubt, right in this) that, if an ordinary contractual tenancy had been here in question, the tenant would have been entitled as of right to relief from forfeiture on paying into court or tendering to the landlord the full amount of the arrears of rent and costs. Having done that, he would have been restored in his position as tenant, the forfeiture brought about by the commencement of the proceedings being remedied by force of the statute. Counsel submits that the principle of the Common Law Procedure Act, 1852, should be applied (as it were by analogy) to the case of a statutory tenant. In that I am unable to follow him, for the effect of the Rent Restrictions Acts is to suspend or restrict the landlord's right to possession of premises after the contractual relationship by landlord and tenant has ceased. Therefore, there is no ground for holding that the landlord is to be denied possession of premises comprised in a statutory tenancy in any of the cases in which those Acts allow an order for possession to be made and the court thinks it reasonable to make such an order, because in similar circumstances a tenant under a contractual tenancy would have had a statutory right to relief from forfeiture. There is no doubt that under the provisions of s. 3 (1) (a) of, and sched. I to, the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, there is power to make an order for possession if the court thinks it reasonable to do so where "any rent lawfully due from the tenant has not been paid." Where the landlord shows that at the commencement of the proceedings there was rent in arrear then jurisdiction arises under that provision. The only effect in such a case of payment of rent into court before judgment is that in the ordinary case it would not then be reasonable for the judge to make the order. In the circumstances of the present case, however, there were grounds on which the judge could properly hold that it was reasonable to make an order for possession although the rent had been paid into court before judgment.

[His LORDSHIP held that the contractual tenancy had been validly determined by notice to quit with the result that the tenant was a statutory tenant at the time of action brought, and continued:] For these reasons I am of opinion that this is not a case in which this court should interfere with the decision of the learned judge, and I would dismiss the appeal.

BIRKETT, L.J.: I agree.

SIR RAYMOND EVERSHED, M.R.: I am of the same opinion.

Appeal dismissed.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Hatten, Asplin, Jewers & Glenny*, Barking (for the tenant); *Gibson & Weldon* (for the landlord).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

ROGERS v. LEWISHAM BOROUGH COUNCIL AND ANOTHER.

[COURT OF APPEAL (Jenkins and Birkett, L.JJ.), July 6, 30, 1951.]

Rates—Exemption—Place “exclusively appropriated to public religious worship”
—Rooms adjoining gospel hall and used for children’s educational, recreational
and religious activities—Sunday school—Poor Rate Exemption Act, 1833
(c. 30), s. 1, s. 2—Sunday and Ragged Schools (Exemption from Rating)
Act, 1869 (c. 40), s. 2.

A building consisting of a hall and four rooms was vested in trustees. The hall was used as a gospel hall and was exempt from rating, as being exclusively appropriated to public religious worship. The rooms, called class rooms, were never let, and no fees were charged in respect of their use. They were, together with the hall, certified for the observance of public religious worship, and were used on Sundays for children’s services. On four evenings in each week the rooms were used during an hour and a half for children’s recreational and educational activities, such as draughts, table tennis, “monopoly,” model aeroplane construction, the making of soft toys, embroidery and knitting, these secular activities being followed by half an hour of religious study, devotional talk, and prayers. On an objection by the trustees to a proposal by the local valuation officer for the inclusion of the four rooms in the valuation list as rooms used for non-religious purposes,

HELD: (i) the four rooms were not “exclusively appropriated to public religious worship” within the meaning of the Poor Rate Exemption Act, 1833, s. 1, because the secular uses to which they were put were not incidental or essentially ancillary to their use for public religious worship, nor was exemption afforded by the proviso to s. 1.

Stradling v. Higgins ([1932] 1 Ch. 143), distinguished.

Dictum of Lord President BALFOUR in *Smith v. Parish Council of Edinburgh* (1901) (3 F. (Ct. of Sess.) 418), applied.

(ii) having regard to the definition of a “Sunday school” in the Sunday and Ragged Schools (Exemption from Rating) Act, 1869, s. 2, and to the fact that the object of the secular activities was the furtherance of the religious education of the children and so satisfied the requirements of that definition, the rooms were entitled to exemption under s. 2 of the Act of 1833 as premises used for a Sunday school within the meaning of that section.

AS TO EXEMPTION FROM RATING OF CHURCHES AND SUNDAY SCHOOLS, see HALSBURY, Hailsham Edn., Vol. 27, p. 377, para. 808; and FOR CASES, see DIGEST, Vol. 38, p. 432, Nos. 58-60.

Cases referred to:

- (1) *Cardiff Archdiocese Trustees v. Pontypridd Area Assessment Committee & Mountain Ash Rating Authority*, (1930), 144 L.T. 207; 94 J.P. 246; Digest Supp.
- (2) *Stradling v. Higgins*, [1932] 1 Ch. 143; 101 L.J.Ch. 119; 146 L.T. 383; Digest Supp.
- (3) *Smith v. Parish Council of Edinburgh*, (1901), 3 F. (Ct. of Sess.) 414.
- (4) *R. v. Woodward*, (1792), 5 Term Rep. 79; 101 E.R. 45; 38 Digest 432, 59.
- (5) *R. v. Agar*, (1811), 14 East 256; 104 E.R. 599; 38 Digest 432, 60.

CASE STATED by the Lands Tribunal.

The appellant was the chairman of the trustees of a building comprising a gospel hall and four adjoining rooms. On Oct. 19, 1950, a local valuation court for south-east London, directed that the four rooms should be entered in the

valuation list at £10 gross value, and £6 rateable value. On Mar. 5, 1951, the Lands Tribunal dismissed the appellant's appeal on the ground that the rooms were not exclusively appropriated to public religious worship and so were not exempt from liability for rates under the Poor Rate Exemption Act, 1833, s. 1 or s. 2. The respondent to the present appeal was the valuation officer authorised under the Local Government Act, 1948, s. 33 (3), to act in relation to the valuation list. Lewisham Borough Council appeared before the Lands Tribunal, but did not appear as respondents to the present appeal.

Rowe, K.C., and Coningsby for the appellant.

Scott Henderson, K.C., and Maurice Lyell for the respondent.

Cur. adv. vult.

July 30. **BIRKETT, L.J.**, read the following judgment of the court. This is an appeal by way of Case Stated from a decision of the Lands Tribunal set up under the provisions of the Lands Tribunal Act, 1949. The appeal raises important questions on the construction of the Poor Rate Exemption Act, 1833. It would, perhaps, be convenient if we first set out the procedure that has been followed and the relevant facts of the case, before considering the provisions of the Act of 1833 and the authorities that were cited to us.

The Lee Gospel Hall is situated at 17-23 Lampmead Road in the metropolitan borough of Lewisham. It is a newly constructed building, and was first occupied some time in 1950. It is a one-storey building, and consists of a hall and four class rooms. The council of the metropolitan borough of Lewisham is the rating authority, and Edmund James Parsons, the respondent, is the valuation officer authorised by the Inland Revenue Commissioners under the Local Government Act, 1948, s. 33 (3), to act in relation to the valuation list. The gospel hall building is owned by the trustees, and the appellant, James William Paul Rogers, is the chairman of the trustees and is acting on their behalf. The occupiers of the building are the gospel hall assembly, and they occupy subject to the terms of the trust deed of Feb. 9, 1950. The members of the society or fellowship who worship at the gospel hall are known as "the Brethren." No question of any kind arises on this appeal in connection with the gospel hall itself; the appeal is solely concerned with the four class rooms. On Aug. 4, 1950, when the Lee gospel building was completed and first occupied, the respondent made a proposal to alter the valuation list by including the newly erected gospel hall itself as exempt from rating under the provisions of the Act of 1933, but including the four class rooms as "rooms used for non-religious purposes" at £17 gross value and £10 rateable value. The gospel hall was not rateable because it was conceded that it was exclusively appropriated to public religious worship, and was so registered. On Aug. 19, 1950, Mr. Gordon Rimmel, as one of the trustees acting for all the trustees, made objection to the proposal on the ground that the class rooms were not used for non-religious purposes. On Oct. 19, 1950, a properly constituted local valuation court, after hearing the parties, directed that the class rooms should be entered in the valuation list at the gross value of £10 and the net annual and rateable value of £6. On Nov. 7, 1950, the appellant gave notice of appeal to the Lands Tribunal against the decision of the local valuation court, and relied on the Poor Rate Exemption Act, 1833, s. 1, and on Feb. 1, 1951, he gave a further notice relying on the provisions of the Sunday and Ragged Schools (Exemption from Rating) Act, 1869. The appeal was heard by the Lands Tribunal on Feb. 20, 1951, the council of the metropolitan borough of Lewisham being then a respondent as well as the present respondent. The appeal was dismissed, and the appellant was ordered to pay three guineas costs to each of the respondents. On Apr. 13, 1951, the appellant served a notice in writing on the lands tribunal requiring them to state

a Case for the opinion of the Court of Appeal in accordance with the provisions of the Lands Tribunal Act, 1949, s. 3 (4).

The agreed facts relating to the four class rooms are set out in the Case Stated, and for the purposes of the present appeal may be summarised in this way:—

(i) The four class rooms are within the same outer walls as the gospel hall, there being two class rooms at each end of the hall. (ii) If the four class rooms are rateable in law, the figure of £10 gross is acknowledged to be correct. (iii) The four class rooms are never let, and no entrance fees are ever charged. (iv) The whole of the Lee gospel building, which includes the four class rooms, has been duly certified for the observance of public religious worship in accordance with the provisions of the Places of Worship Registration Act, 1855. (v) The premises are occupied subject to the terms of a trust deed dated Feb. 9, 1950, the declared purposes of which are that, when assembling as a church, believers shall observe practices mentioned in the schedule thereto. The practices are specified as follows:—

“The customary observance of the ordinance of believer’s baptism by immersion on personal confession of faith and the commemoration of the Lord’s death in the breaking of bread on the first day of the week in so far as circumstances allow. The reception at the Lord’s table of all believers known to be sound in faith and godly in life.” In addition to their use on Sunday mornings and afternoons for children’s services, the four class rooms were at the date of the proposal occupied for the following purposes on four evenings in every week. On Monday evenings boys aged twelve to fourteen played draughts, “monopoly,” table tennis and other games for one and a half hours, and they then devoted half an hour to the study of the scriptures and to prayers. On Tuesday evenings boys under nine constructed such things as model aeroplanes, and girls of the same age group knitted small articles for one hour followed by a devotional talk for half an hour. On Wednesday evenings girls over nine spent an hour and a half on handicrafts, knitting, embroidery and making soft toys, and then spent half an hour in hymn singing and in listening to a talk from the scriptures. On Thursday evenings, boys aged nine to twelve played various games (not including table tennis) for an hour and then had a suitable service for half an hour. (vi) The practice of the brethren is set out in the schedule to the trust deed and includes (a) the conducting of meetings for worship under the guidance of the Holy Spirit with opportunity for the exercise in the assembly of all true gifts for edification, subject to the Lordship of Christ; and (b) the ordinary activities of the assembly such as gospel work, Sunday school, young people’s meetings, and such other purposes approved by the trustees.

The provisions of the Poor Rate Exemption Act, 1833, are as follows:

“Whereas it is expedient that churches, chapels, and other places exclusively appropriated to public religious worship should be exempt from the payment of poor and church rates: Be it therefore enacted by the King’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after Oct. 1, 1833, [1] no person or persons shall be rated or shall be liable to be rated, or to pay to any church or poor rates or cesses, for or in respect of any churches, district churches, chapels, meeting houses, or premises, or such part thereof as shall be exclusively appropriated to public religious worship, and which (other than churches, district churches, and episcopal chapels of the established church) shall be duly certified for the performance of such religious worship according to the provision of any Act or Acts now in force: Provided always, that no person or persons shall be hereby exempted from any such rates or cesses for or in respect of any parts of such churches,

district churches, chapels, meeting houses, or other premises which are not so exclusively appropriated, and from which parts not so exclusively appropriated such person or persons shall receive any rent or rents, or shall derive profit or advantage. 2. Provided always, and be it enacted, that no person or persons shall be liable to any such rates or cesses because the said churches, district churches, chapels, meeting houses, or other premises, or any vestry rooms belonging thereto, or any part thereof, may be used for Sunday or infant schools, or for the charitable education of the poor."

On the facts found in the Special Case, and on the true construction of the Act of 1833, it was submitted on behalf of the appellant:—(i) That the provisions of the Act of 1833 applied to the four class rooms in that they were exclusively appropriated to public religious worship. (ii) That if it were held that the four class rooms were not exclusively appropriated to public religious worship, then under the proviso to s. 1 of the Act of 1833 it must be shown that rents were recovered or some profit or advantage was derived before the exemption from rating could be lost, and it was not suggested that any rents were recovered or any profit or advantage was derived on the facts as found in this case. (iii) That the four class rooms were exempt from rating because they were used as a Sunday school and the provisions of s. 2 of the Act of 1833 applied. It was submitted on behalf of the respondent that:—(i) The Act of 1833 had no application to the four class rooms inasmuch as they were not exclusively appropriated to public religious worship. (ii) The proviso to s. 1 of the Act of 1833 had no application for the same reason, and, if the four class rooms were not exclusively appropriated to public religious worship, the words relating to rents, profit or advantage must be regarded as being immaterial. (iii) Section 2 of the Act of 1833 did not apply, for on the facts found the use of the four class rooms did not constitute a Sunday school within the meaning of the section.

Section 1 of the Act of 1833 with the proviso is, admittedly, very difficult to construe. In *RYDE ON RATING*, 8th ed., p. 160, it is suggested that the difficulties arise in part from the supposition that the original draft of the section became dislocated in some way so that the whole section became ungrammatical and obscure. Whether or not this is so, on its true construction the section would appear to relate to "churches, district churches, chapels, meeting houses, or premises which shall be exclusively appropriated to public religious worship, or such parts thereof as shall be so appropriated." In *Cardiff Archdiocese Trustees v. Pontypridd Area Assessment Committee & Mountain Ash Rating Authority* (1) it was held that the whole of a building might be duly certified for the performance of public religious worship, yet, nevertheless, a part of the building might not be exclusively appropriated for public religious worship. The first question to be determined on this appeal is whether the use made of these four class rooms on weekday evenings as set out in the Case Stated is such that it can still be said that they are exclusively appropriated to public religious worship. We appreciate the argument of counsel for the appellant that all the activities of the brethren, whether carried out on Sundays or on weekdays, have one supreme religious purpose. We have no doubt that this is so, but that does not conclude the matter. The singing of hymns, the reading of the scriptures, the prayers and the devotional addresses, however laudable and desirable they may be in themselves, cannot be considered in isolation when deciding the issue in this case. The other activities which have been called for convenience "secular activities"—table tennis, draughts, "monopoly," the building of model aeroplanes, the knitting and embroidery and toy making—must be considered too. Counsel urged on us that these other activities, when considered in the light of the religious setting in which they were carried on, were to be regarded as mere elements in the larger purpose, and did not, therefore, detract

from the use of the class rooms as being exclusively appropriated for public religious worship. We fully appreciate the argument. We can well understand how desirable it is to use modern methods to attract and interest the young and so bring them into a religious atmosphere where they will be surrounded by good influences, but the use of attractive games or attractive employments as a means to that great end, cannot, we think, justify us in holding that these activities are such that it is still possible to say that the class rooms are exclusively appropriated to public religious worship. A

Counsel for the appellant argued and counsel for the respondent agreed that, although s. 1 of the Act in terms only exempts premises or parts of premises exclusively appropriated to public religious worship, it cannot reasonably be construed so strictly as to make the use for purposes incidental to such appropriation a disqualifying factor. Examples were given, such as the boiler rooms, vestries, cloak rooms, and store rooms for cleaning materials and so forth, commonly included in the premises of a church or chapel; and it was agreed on both sides that the exemption would not be lost merely on account of the use of such ancillary conveniences for purposes in themselves secular. This, indeed, is no more than is demanded by common sense in order to give practical effect to the section. But the appellant's argument went much further as we understood it. He claimed that in the present case the uses to which the four class rooms are put on weekdays, if not in themselves "public religious worship," are at all events incidental to the use of the premises as a whole for public religious worship, and, accordingly, should not be regarded as taking them out of the category of premises exclusively appropriated to that purpose. We cannot agree with this argument. The incidental purposes which we have used by way of illustration are, broadly speaking, purposes of a kind which must be served in connection with any building to whatever use it is put, and may properly be described as essentially ancillary purposes. The secular uses to which the class rooms in the present case are put on weekdays are of an entirely different order. They are activities such as one would expect to find carried on in any young people's club, capable of being regarded as ends in themselves, and not in their nature essentially ancillary to the use of the premises for public religious worship. In what sense, then, can they be said to be incidental to such use? It seems to us only in the indirect sense that such social activities (apart from such ethical value as they may under proper supervision possess in themselves) tend to encourage attendance at public religious worship held on the premises. In our view, this is too remote. The position might be different if the condition of exemption were the use of premises for the promotion of religion. It might then conceivably be said that social activities such as these were incidental or conducive to the one object of promoting religion. But the exemption, being confined, as it is, to premises exclusively appropriated to public religious worship, seems to us to postulate use for a particular purpose (that is, public religious worship) as distinct from the attainment of a particular object such as the promotion of religion. The range of uses which can properly be regarded as incidental is thus much narrower, and, generally speaking, we do not think any use (not in itself public religious worship) can properly be so regarded unless it is either reasonably necessary to enable the premises to be used for public religious worship or an activity of a kind customarily regarded as appropriate to be carried on in a place of public religious worship, though not in itself a religious service. The question whether a particular activity passes the second of these tests is necessarily one of fact and degree, but we hardly think that (for instance) an occasional oratorio, organ recital, carol concert, or mystery play could be regarded as disqualifying a church or chapel from the exemption. We are, however, satisfied that the secular purposes to which the class rooms are put in the present case do not satisfy either test. B C D E F G H

We were referred to a number of authorities from which little assistance can be derived, each having been decided on its own particular facts. We think their effect can fairly be summarised by saying that with the exception of *Stradling v. Higgins* (2), to which we make further reference below, none of them affords any support at all for the extremely broad interpretation which counsel for the appellant invites us to place on the expression "exclusively appropriated to public religious worship," though it is right to add that (with the same exception) there were in all of them circumstances adverse to his contention (such as the sale of tickets for admission to particular functions) which have no counterpart in the present case.

Stradling v. Higgins (2), on which some reliance was placed by counsel for the appellant, was a case under the Places of Worship (Enfranchisement) Act, 1920, which applies to

"premises . . . held upon trust to be used for the purposes of a place of worship, and . . . used in accordance with the trust."

The expression "place of worship" is defined as

"any church, chapel, or other building used for public religious worship, and includes a burial ground, Sunday or Sabbath school, caretaker's house or Minister's house attached to or used in connection with and held upon the same trust as a place of worship."

MAUGHAM, J., held that certain premises of the Salvation Army comprising a "Salvation Army hall" used for religious worship, and a "young people's hall" used as to some rooms in its upper part for teaching, came within this definition, and he said ([1932] 1 Ch. 151):

"But with regard to the adjoining building, Carlton House, or the young people's hall, there are a number of rooms upstairs which are not *prima facie* rooms used for the purposes of hymns or religious services or addresses, but are used for the purposes of instruction. A good deal of reliance has been placed upon that, but it is to be remembered, that in the Act the expression 'place of worship' includes a 'Sunday or Sabbath school . . . used in connection with and held upon the same trusts as a place of worship.' I should therefore imagine that these rooms, so far as they are used for the purposes of anything in the nature of a Sunday school, are clearly within the definition. I wish to add this, that I do not consider in a case of this sort that the premises are the less held upon trust for the purposes of a place of worship because there are included in the premises certain rooms which may be used for secular objects. I do not suppose that any living human being would doubt that St. Paul's Cathedral was a place used for the purposes of a place of public worship, but those who know it know that it includes, amongst a number of other rooms to which the public are not generally admitted, an excellent and interesting library in which prayers do not take place, and I doubt whether there is any big cathedral in England of which the same might not be said. There might also be rooms for caretakers. In the old days in connection with many churches there was a priest's room, and I could suggest other rooms to which visitors to buildings of this kind are often admitted which are not used for the purposes of public worship. It occurs to me to mention as examples chapter-houses, places where vestments are kept, and places where books are kept. In other words, to put it another way, I have come to the conclusion that premises are held upon trust to be used for the purpose of public religious worship none the less because some of the minor or less important parts of those premises are not used for public worship."

We cannot regard that decision as affording any real support for the argument of counsel for the appellant in the present case. "Used for the purposes of a place of public religious worship" is clearly a description which admits of more latitude of interpretation than "exclusively appropriated to public religious worship" which is the description to be construed in this case.

The Scottish case of *Smith v. Parish Council of Edinburgh* (3) was under the Rating Exemption (Scotland) Act, 1874, where exemption was claimed for certain church halls under a provision similar to s. 1 of the Act of 1833. With respect to the secular uses to which one of these halls was put, the Lord President (LORD BALFOUR) said (3 F. (Ct. of Sess.) 418):

"It is true that the purposes mentioned are excellent, and I have no doubt that such halls are built in pursuance of the larger views as to the duties of the Christian church which now prevail, and of the advantages resulting from bringing the members of a congregation together otherwise than merely once or twice a week for religious worship. Doubtless the halls are aids to the religious life and work of the church, but they are certainly not exclusively appropriated to public religious worship, and, if that be so, they do not come within the leading enactment."

This passage *mutatis mutandis*, seems to us to be applicable to the present case.

We now turn to consider the second argument of counsel for the appellant relating to the proviso to s. 1 of the Act. The proviso presents great difficulty in its construction, and it is not easy to give any meaning, or any sensible meaning, to it, when the purpose of the section itself is kept in mind. Counsel contended that, if these class rooms were not exclusively appropriated to public religious worship, nevertheless exemption from rating was not lost unless rent or rents were received, or profit or advantage was derived. That, he said, was the meaning of the proviso because of the use of the word "and" in the proviso, and, as it was admitted that no rents were received and no profit or advantage was derived, the four class rooms should be exempt. Counsel for the respondent sought to explain the difficulties of construing the proviso on historical grounds, and cited two cases [*R. v. Woodward* (4) and *R. v. Agar* (5)] in support of his explanation. He submitted that the meaning of the proviso was obscure because of the contradiction between the proviso and the first part of the section, but we ought to construe it in the light of the first part and hold that no part of a building could be exempted unless it was first shown that it was exclusively appropriated to public religious worship, and, if it were shown that it was not so exclusively appropriated, then the question of rents, profit, or advantage was immaterial. We are acutely conscious of the difficulties of construing the proviso when the first part of the section is kept in mind, and it is, perhaps, enough for us to say that, having regard to our conclusion on the first part of the section, we do not think that the proviso affords to the appellant the exemption from rating which he claims.

Finally, s. 2 of the Act of 1833 must be considered. [HIS LORDSHIP read s. 2, and continued:] It is to be observed that the words "or any vestry rooms belonging thereto" have been added to "churches, district churches, chapels, meeting houses, or other premises." The purpose of the section, it seems, was to give exemption from rates to rooms used for a Sunday school, or, rather, that no building should lose its character of being exclusively appropriated to public religious worship by reason of the fact that the building or any part of it was used as a Sunday school. No definition is given of a Sunday school in the Act of 1833, but it is not unimportant to remember that in 1833 Sunday schools gave more than religious instruction. In the Sunday and Ragged Schools (Exemption from Rating) Act, 1869, s. 2, a definition of Sunday school is given.

It reads:

“A ‘Sunday school’ shall mean any school used for giving religious education gratuitously to children and young persons on Sunday, and on weekdays for the holding of classes and meetings in furtherance of the same object, and without pecuniary profit being derived therefrom.”

- A The Act of 1869 gave a discretion to the rating authority to exempt buildings which came within the definition contained in the Act, but it expressly provided that nothing in the Act should affect the right of exemption given by s. 2 of the Act of 1833. Without the assistance of the definition of Sunday school given by the Act of 1869, it is right to remember that the Sunday school of 1833 was more than a school meeting on Sundays. Children had to be taught to read
- B so that they could more readily profit from the religious instruction given on Sundays by learning to read the catechism and the scriptures or the hymn books for themselves. The Act of 1869 would seem to have defined in s. 2 the characteristics of a Sunday school as they were known to exist. This included the holding of classes and meetings during the week in furtherance of the objects of the Sunday school, but in the present case rooms are used on Monday evenings by
- C boys from twelve to fourteen for the playing of games for an hour and a half followed by the study of the scriptures and prayers for half an hour. On Tuesdays, Wednesdays, and Thursdays the rooms are used for similar purposes, but on each night there is half an hour devoted to religious exercises of one kind or another. Children of the appropriate age group are welcomed to all the meetings, whether they take part in any of the other activities of the Lee Gospel Hall or
- D not, and no other activities of a secular nature are at any time carried on at the premises. The question is whether this use of the class rooms can be held to be a use of the rooms for the purpose of a Sunday school.

We are, we think, entitled to look for guidance on this question to the definition already quoted from the Act of 1869. These class rooms are found in the Case to be used on Sunday mornings and afternoons for children's services. We take

- E this as equivalent to finding that they are used for giving religious education to children and young persons on Sundays. There is no doubt that they are so used gratuitously. The first limb of the section is thus satisfied. The weekday use, so far as it consists of scripture study, prayers, or other devotional exercises, seems to us clearly to be use for classes or meetings in furtherance of the same object. So far as secular activities are pursued at these weekday meetings, it
- F seems to us to be plain on the facts found that these activities, though not devotional in themselves, are organised with the single purpose of furthering the religious education of the young people who attend by putting them in a frame of mind receptive of religious instruction (or, as one of the appellant's witnesses put it, breaking down their resistance to religion) and also by encouraging the attendance of children of the appropriate ages. No doubt, the secular activities
- G would give pleasure to the children in developing skill in the use of their hands and eyes and under the supervision of the teachers would inculcate standards of behaviour and make them the more ready to attend the meetings because they were interesting and attractive. But it is important here to remember that every weekday meeting does, in fact, conclude with some form of religious exercise or instruction. This religious setting in which all the activities are
- H carried on is to further the supreme object of the Sunday school which is to give religious education. Accordingly, it seems to us that the whole of the weekday activities, secular as well as devotional, can fairly and properly be brought within the category of meetings “in furtherance of the same object” within the meaning of the definition. Again, there is, of course, no doubt that no pecuniary profit is derived from these weekday meetings. If the gospel hall and the class rooms were the subject of one entry only in the valuation list, the building would not lose its exemption from rating because the class rooms

were used as a Sunday school. For these reasons, we think that, although the class rooms cannot be said to be exclusively appropriated to public religious worship within the meaning of s. 1 of the Act of 1833, they are, nevertheless, entitled to exemption under s. 2 as premises used for a Sunday school or Sunday schools within the meaning of that section. The appeal must, therefore, be allowed.

Appeal allowed.

Solicitors: *Stunt & Son* (for the appellant); *Solicitor of Inland Revenue.*

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

R. v. HARRISON-OWEN.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery, Byrne, Finmore and Ormerod, JJ.), July 30, 1951.]

Criminal Law—Defence—Absence of intention—Act done in state of automatism—Cross-examination of prisoner as to previous convictions.

The appellant was found in a dwelling-house about one o'clock in the morning. On his trial for burglary he gave evidence that he had no recollection of entering the house and must have done so in a state of automatism. The judge thereupon directed counsel for the prosecution to put to the appellant a number of previous convictions of housebreaking and larceny.

HELD: in the circumstances it was not permissible to cross-examine the appellant as to his previous convictions.

AS TO MISTAKE OR ACCIDENT AS GROUNDS OF DEFENCE, see HALSBURY, Hailsham Edn., Vol. 9, pp. 16, 17, paras. 9 and 10; and FOR CASES, see DIGEST, Vol. 14, pp. 48, 49, Nos. 160-167.

AS TO ADMISSION OF EVIDENCE THAT DEFENDANT HAS COMMITTED SIMILAR OFFENCES, see HALSBURY, Hailsham Edn., p. 186, para. 270; and FOR CASES, see DIGEST, Vol. 14, pp. 371-376, Nos. 3920-3965, and Digest Supps.

Cases referred to:

- (1) *R. v. Smith*, (1915), 84 L.J.K.B. 2153; 114 L.T. 239; 80 J.P. 31; 14 Digest 378, 3992. 317 L.R. 617
- (2) *Makin v. A.-G. for New South Wales*, [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 14 Digest 371, 3924.
- (3) *R. v. Geering*, (1849), 18 L.J.M.C. 215; 14 Digest 373, 3937.
- (4) *R. v. Bond*, [1906] 2 K.B. 389; 75 L.J.K.B. 693; 95 L.T. 296; 70 J.P. 424; 14 Digest 371, 3921.
- (5) *R. v. Starkie*, [1922] 2 K.B. 275; 91 L.J.K.B. 663; 86 J.P. 74; 14 Digest 379, 3996.

APPEAL against conviction.

The appellant, Edward Michael Harrison-Owen, was convicted at Flint Assizes of burglary and was sentenced to two years' corrective training. The ground of the appeal was that at the time of the offence his act was involuntary, he being in a state of automatism so that he did not know what he was doing. STABLE, J., at the trial directed counsel for the Crown to cross-examine the appellant as to his previous convictions on the ground that the appellant's real defence was that his presence in the house was accidental and that he had no criminal intent.

H. Edmund Davies, K.C., and P. L. W. Owen for the appellant.

Howard, K.C., and Gazdar for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was convicted before STABLE, J., at Flint Assizes of burglary. The judge gave a certificate to appeal on the question whether he had rightly permitted questions with regard to previous convictions to be put to the appellant in cross-examination.

The appellant is a man of bad character, with many convictions of larceny, housebreaking, and like offences, and it is obvious that when those convictions were revealed to the jury he had small chance of acquittal. It is curious, in view of the defence which the appellant put forward, that STABLE, J., thought it was necessary that the convictions should be put to the appellant. The defence was one which is seldom raised, namely, that he entered the house in a state of automatism. Now that we have heard counsel on both sides, the case seems to be one of great simplicity.

The appellant was found in a house, where a party was in progress, at 1 a.m. The mistress of the house, going upstairs to turn out some lights, found him. It appeared that she had placed her car outside the house and had left her bag in it. The appellant possessed himself of the bag and found inside it the key of the house. He used the key to let himself into the house. On being discovered inside he told some cock and bull story about looking for lodgings. He was brought downstairs and when the police were being sent for he ran away. He was not in a state of automatism then. Although he provided himself with the key of the house by opening the car, he did not seem able to make up his mind whether he was going to say he was drunk or had a "blackout" at the time. When he gave evidence STABLE, J., was puzzled whether he was not setting up a plea of insanity. Questions were asked directed to the issue whether he was sane or not; then whether he was drunk or not; and then whether he was in a state of automatism or not.

When a prisoner sets up such defences it is as well to leave the matter to the jury, who will probably reject them all, but in this case the judge directed counsel for the prosecution (who was by no means anxious to do it) to cross-examine the appellant as to his previous history. STABLE, J., said:

"I direct here that, in view of this defence that has been raised—that there was no intention in the act from start to finish, and that his presence in the house was purely accidental—you can put the whole of this man's history to him."

If I may say so with all respect to the judge, he confused intention and accident. If a certain event has happened, and the defence is that it was due to accident—such a position may arise in murder or manslaughter cases where a person, said to have been in connection with the prisoner, has died, and the prisoner says that death resulted from an accident—it has often been held that it is relevant to show that similar events have happened previously—in the case postulated, for instance, that other people who have been in connection with the prisoner have died in precisely the same circumstances. In *R. v. Smith* (1) a woman was found dead in a bath. It was said she had been accidentally drowned following a heart attack, and it was shown at the trial for murder of the husband (who had been married three times and was charged with the murder of his second wife) that his first and third wives had died in exactly the same circumstances. That evidence was given to negative the fact that the death of the second wife was accidental.

It was pointed out in the course of the argument by BYRNE, J., that the real defence here was that this was not a voluntary act, but that the appellant walked

into the house in a state of automatism. Whether it was a voluntary act or not was a question for the jury, and I think on that point the jury would have had no difficulty in coming to a conclusion. The defence was a pack of absurdities, but STABLE, J., took the view that on the authorities the appellant could be cross-examined regarding his previous convictions to show that his act was not voluntary. This court cannot find any authority for that. In our opinion, there is no question of principle in this case, except this, that where the defence is that the act proved against an accused was, not a voluntary, but an unintentional, act, it is not permissible to cross-examine him as to his previous convictions. As that was done here, this conviction must be quashed.

Conviction quashed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

Dictum of LORD GODDARD, C.J., at p. 732, corrected. R. v. DURHAM QUARTER SESSIONS. Ex p. VIRGO. [1952] 1 All E.R. 466.

R. v. WEST KENT QUARTER SESSIONS APPEAL COMMITTEE.

Ex parte FILES.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Ormerod, JJ.), July 19, 1951.]

Quarter Sessions—Appeal from magistrates' court—Appeal against conviction—Plea of Guilty—Failure to understand nature or gravity of offence—No right of appeal—Criminal Justice Act, 1948 (c. 58), s. 36 (1).

By s. 36 (1) of the Criminal Justice Act, 1948: "A person convicted by a court of summary jurisdiction shall have a right of appeal—(a) if he pleaded Guilty or admitted the truth of the information, against his sentence; (b) in any other case, against the conviction or sentence, to a court of quarter sessions . . ."

The applicant pleaded Guilty at a court of summary jurisdiction to a charge of dangerous driving. He appealed to quarter sessions against his conviction, his ground of appeal being that he had pleaded Guilty owing to a mistake as he did not understand the nature or gravity of the offence.

HELD: that, as the applicant had pleaded Guilty in the court below, quarter sessions had no jurisdiction to entertain the appeal.

Quaere, whether, in an extreme case where a defendant had pleaded Guilty under a genuine misapprehension, a remedy by *certiorari* would be available to him.

Cases referred to:

- (1) *R. v. Forde*, [1923] 2 K.B. 400; 92 L.J.K.B. 501; 128 L.T. 798; 87 J.P. 76; 14 Digest 504, 5542.
- (2) *R. v. Taylor*, [1950] 2 All E.R. 170; [1950] 2 K.B. 368; 2nd Digest Supp.

MOTION for order of prohibition.

At a court of summary jurisdiction at Northfleet one Sydney Neill pleaded Guilty to an information charging him with driving a motor vehicle to the danger of the public, and was fined £20 and disqualified for holding a driving licence for twelve months. He appealed to West Kent Quarter Sessions against his

conviction on the ground that he had pleaded Guilty owing to a mistake as he did not understand the nature or gravity of the offence. At quarter sessions objection was taken by the prosecution that the appeal could not be heard, but quarter sessions were of opinion that the decision in *R. v. Forde* (1) gave them power to entertain it. The prosecutor obtained leave to apply for a writ of prohibition prohibiting the appeal committee from hearing the appeal on the ground that they had no jurisdiction to entertain it by reason of the plea of Guilty in the magistrates' court.

Buzzard for the applicant.

B. R. Clapham for the appeal committee.

LORD GODDARD, C.J.: In this case counsel moves for a writ of prohibition directed to the appeal committee of the West Kent Quarter Sessions to prohibit them from proceeding with an appeal entered by one Sydney Neill against his conviction at a court of summary jurisdiction at Northfleet on Mar. 29, 1951, of driving a motor car to the danger of the public. The ground on which prohibition is sought is that quarter sessions have no jurisdiction to enter on the hearing of the appeal, because the said Neill pleaded Guilty in the court below. That he did plead Guilty in the court below there is not the smallest doubt, because the notice of appeal which he entered at quarter sessions, and against which objection was taken, is in these terms:

"The general grounds of such appeal are:—(i) that he pleaded Guilty to the said offence owing to a mistake as he did not understand the nature or gravity of the offence . . ."

The evidence which has been filed in this court and not contradicted is that on Mar. 29, 1951, when the summons was heard, first of all the summons was read out. The summons had been served on the applicant, the statement of offence being:

"Driving a motor vehicle on a road at a speed which was dangerous to the public, contrary to s. 11 (1) of the Road Traffic Act, 1930."

The particulars given were that the applicant

"on Feb. 3, 1951, at the parish of Northfleet . . . unlawfully did drive a motor vehicle, to wit, a motor car, on a road there called Watling Street, at a speed which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which was actually at the time, or which might reasonably have been expected to be, on the road."

Unless the applicant is blind, cannot read, or is mentally defective—none of which is suggested—there can be no doubt whatsoever that he must have understood that with which he was being charged. That goes to merits, perhaps, and not to jurisdiction. The evidence shows that the clerk of the court read out verbatim the full particulars of the charge as shown in the information. He asked the applicant if he was legally represented. The applicant said that he was not, and the clerk said that it was a serious charge. He then informed the applicant in formal language of his right to be tried by a jury at quarter sessions. Before he took his reply, he explained to him in simple language exactly what that meant, and the applicant answered: "I want to be dealt with this morning." "I then said", says the clerk in his affidavit: "In that case do you plead Guilty or Not Guilty? Neill replied: 'Guilty.' I spoke again to Neill in these terms: 'You are quite certain about that? You admit the offence, do you?', and Neill replied: 'Yes.'"

There, of course, was as clear and absolute a plea of Guilty as could possibly be imagined. The affidavit is not challenged in these proceedings. The justices fined the applicant £20 and disqualified him for a period of twelve months. When he found that he was disqualified for twelve months and had to pay a substantial fine, he began to repent of having pleaded Guilty and thought that he might have had a chance of being acquitted. He, therefore, tried to appeal to quarter sessions. At quarter sessions the objection was taken that he had no right to appeal as he had pleaded Guilty and the appeal committee could not hear the appeal. It is most elementary that no appeal from a court lies to any other court unless there is a statutory provision which gives a right to appeal. The decision of every court is final if it has jurisdiction, unless an appeal is given by statute.

So far as an appeal to quarter sessions from courts of summary jurisdiction is concerned, it has been the law ever since the Summary Jurisdiction Act, 1879, that no appeal against conviction lies to quarter sessions where a defendant has pleaded Guilty. It was provided by s. 19 of the Summary Jurisdiction Act, 1879:

"Where, in pursuance of any Act, whether past or future, any person is adjudged by an order of a court of summary jurisdiction to be imprisoned without the option of a fine, either as a punishment for an offence, or, save as hereinafter mentioned, for failing to do or to abstain from doing any act or thing required to be done or left undone, and such person is not otherwise authorised to appeal to a court of general or quarter sessions, and did not plead Guilty, or admit the truth of the information or complaint, he may, notwithstanding anything in the said Act, appeal to a court of general or quarter sessions against such conviction or order . . ."

He could appeal only (a) if he pleaded Not Guilty, and (b) if he was sentenced to imprisonment without the option of a fine. That remained law for a good many years until the Criminal Justice Administration Act, 1914. It was then thought that a more extended right of appeal should be given, and it was provided by s. 37 (1) of that Act:

"Any person aggrieved by any conviction of a court of summary jurisdiction in respect of any offence, who did not plead Guilty or admit the truth of the information, may appeal from the conviction in manner provided by the Summary Jurisdiction Acts to a court of quarter sessions."

Under that Act, therefore, any person could appeal although he might not have been sentenced to imprisonment without the option of a fine, but again, only if he did not plead Guilty.

By the Criminal Justice Act, 1925, for the first time a right of appeal was given although there had been a plea of Guilty, but it was against sentence only. Section 25 provided:

"A person who after pleading Guilty or admitting the truth of the information is convicted of any offence by a court of summary jurisdiction shall have a right to appeal in manner provided by the Summary Jurisdiction Acts to a court of quarter sessions against his sentence."

So, again, no appeal against conviction is provided if a person pleads Guilty. Finally, the law has been to a great extent codified, and extended by s. 36 of the Criminal Justice Act, 1948, which now controls appeals to quarter sessions. Section 36 (1) provides:

"A person convicted by a court of summary jurisdiction shall have a right of appeal—(a) if he pleaded Guilty or admitted the truth of the information, against his sentence; (b) in any other case, against the conviction or sentence . . ."

It is, therefore, abundantly clear that from 1879 to 1948 there has been consistent legislation which gives no right of appeal against conviction where a person has pleaded Guilty. He can now appeal against his sentence, but he cannot appeal against his conviction.

Therefore, as soon as the appeal committee saw, by the applicant's own notice of appeal, that he had pleaded Guilty, they should have refused to entertain the appeal. I know of no authority, and certainly no statute, which says that where a person has pleaded Guilty he can go to quarter sessions and ask the court of quarter sessions to inquire whether he intended to plead Guilty or whether he did not. If that sort of thing were allowed, it would be opening the door very wide indeed. Numerous people would then, at any rate for the sake of getting the sentence suspended, go to quarter sessions and say: "I pleaded Guilty in the court below. I never thought I would get six months. I now want to appeal, not only against sentence, but also against conviction." Then the court of quarter sessions would be asked to go into the question whether or not the person intended to plead Guilty. I can well understand that, if there were some real dispute whether a person had pleaded Guilty or not—it is very difficult to see how there could be, but the record which the clerk of a court of summary jurisdiction keeps is not a record in the technical sense—that might be a case which had to be argued.

There is no question here that the applicant pleaded Guilty. Therefore, the appeal committee ought to have refused to entertain the appeal. It is only fair to the justices to say that the chairman takes full responsibility for having advised them, and it is clear that he thought that *R. v. Forde* (1) gave the court power to entertain the appeal. That, however, was a case of an appeal to the Court of Criminal Appeal. Such an appeal depends on its own statute, and there is no limitation in the Act which gives a right of appeal—the Criminal Appeal Act, 1907—confining the right only to persons who have pleaded Not Guilty. The Court of Criminal Appeal can entertain, and on occasions, very rarely, has entertained, appeals although there has been a plea of Guilty. We did so a short time ago in a case, well known to the profession, *R. v. Taylor* (2), in which a man had pleaded Guilty, under the advice of his counsel, at the Central Criminal Court, to a charge of bigamy. He pleaded Guilty to that because, by reason of an earlier decision of the Court of Criminal Appeal, it appeared that the defence that his wife had been absent for seven years and he had not seen or heard of her during that period was not open to him because he had already gone through a ceremony of marriage between the time of his first marriage and the bigamous ceremony of marriage in respect of which he was charged. He applied to the court for leave to appeal against sentence only, but we saw that the earlier decision of the court was very much open to question and ought to be considered, and, therefore, we gave him leave to appeal against conviction.

There have also been cases, to which counsel has called our attention, in which for a particular reason, such as a false confession having been made by a man, the Court of Criminal Appeal has given leave to appeal. We are not concerned with what happens in the Court of Criminal Appeal, because the powers of the Court of Criminal Appeal and the right of appeal to it are entirely different from the powers given to quarter sessions and the right of appeal to it. It is true that AVORY, J., said in *R. v. Forde* ([1923] 2 K.B. 403):

"The first question that arises is whether this court can entertain the appeal. A plea of Guilty having been recorded, this court can only entertain an appeal against conviction if it appears (i) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it, or (ii) that upon the admitted facts he could not in law have been convicted of the offence charged."

That may be perfectly true with regard to the Court of Criminal Appeal, but with regard to quarter sessions it is entirely different. If the defendant has once pleaded Guilty, the statute gives him no right to appeal, and there is no question here that there was a plea of Guilty.

Whether or not there is any remedy if a man pleads Guilty under some genuine misapprehension, does not really fall for decision, but I am inclined to think that the remedy, if any, is *certiorari*, but it would certainly take a very strong case to give rise to it. The court of quarter sessions seems to have come to the conclusion in this case that the applicant did not understand what he was doing when he pleaded Guilty. We have only got to look at the evidence which was filed on this application for prohibition and shows that the applicant deliberately pleaded Guilty before the court of summary jurisdiction. But whether he did it deliberately or not is, in my opinion, quite immaterial. He pleaded Guilty, and, therefore, the court of quarter sessions had no jurisdiction. It is not the case of a court inquiring into matters to find out whether they had jurisdiction or not. On the face of the proceedings before the court was a statement by the appellant that he pleaded Guilty. In those circumstances, quarter sessions had no right to hear the appeal, and they must be prohibited from entertaining it.

HILBERY, J.: I agree.

ORMEROD, J.: I agree.

Order of prohibition.

Solicitors: *Eric W. G. Weale*, Maidstone (for the applicant); *Davenport, Lyons & Barker* (for the appeal committee).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

MIDDLESEX COUNTY COUNCIL *v.* MINISTER OF LOCAL GOVERNMENT AND PLANNING AND ANOTHER.

[KING'S BENCH DIVISION (Ormerod, J.), June 18, July 27, 1951.]

Compulsory Purchase—Land the property of local authority—Special parliamentary procedure—Material date of ownership by local authority—Persons competent to object to purchase order—Acquisition of Land (Authorisation Procedure) Act, 1946 (c. 49), sched. I, Part III, para. 9.

On Jan. 21, 1949, a borough council made an order for the compulsory purchase of 123 acres of land for use as a cemetery. On Feb. 22, 1949, objection to the order was made by the county council within whose area the land in question was. The borough council submitted the order to the Minister of Health for confirmation in accordance with the provisions of s. 1 (1) of, and sched. I, para. 1, to, the Acquisition of Land (Authorisation Procedure) Act, 1946, and the Minister, in view of the objections, ordered an inquiry to be held. On Nov. 7, 1949, two days before the inquiry began, the county council purchased by agreement with the owner the land comprised in the order. On Apr. 18, 1950, the Minister confirmed the order. On an application by the county council to quash the order,

HELD: regard must be had to the position which existed at the date of the inquiry and not to that which existed at the date of the making of the

order by the borough council; at the date of the inquiry the county council were the owners of the property within sched. I, Part III, para. 9, to the Act of 1946: *Marriott v. Minister of Health* ([1936] 2 All E.R. 865), applied; the operation of para. 9 was not confined to objections by owners, lessees or occupiers, and, accordingly, the objection of the county council (which had not been withdrawn) was a good objection within that paragraph; and, therefore, the order was subject to special parliamentary procedure under the paragraph and must be quashed.

A

FOR THE ACQUISITION OF LAND (AUTHORISATION PROCEDURE) ACT, 1946, s. 1 (2) and sched. I, Part III, para. 9, see HALSBURY'S STATUTES, Second Edn., Vol. 3, p. 1065 and p. 1077.

B

Case referred to:

(1) *Marriott v. Minister of Health*, [1936] 2 All E.R. 865; [1937] 1 K.B. 128; 106 L.J.K.B. 149; 155 L.T. 94; 100 J.P. 432; Digest Supp.

MOTION by the applicants, the Middlesex County Council, for an order that a compulsory purchase order made by the second respondents, the Islington Borough Council, on Jan. 21, 1949, under the London Government Act, 1939, s. 100, and confirmed by the Minister of Health * on Apr. 18, 1950, under the Acquisition of Land (Authorisation Procedure) Act, 1946, s. 1 (1) and sched. I, be quashed.

C

The county council contended that as they, a local authority, had made objection to the order (which objection had not been withdrawn) and had become the owners of the property in question before the date of the Minister's inquiry, the order was subject to special parliamentary procedure under s. 1 (2) of, and sched. I, Part III, para. 9, to, the Act of 1946. The Minister and the borough council contended that the relevant date for the purposes of para. 9 was the date of the order, and that, as at that date the county council were not the owners of the land, the order was not subject to special procedure. They also contended that the county council had not made objections as owners of the land, and, therefore, the provisions of para. 9 did not apply.

D

E

Capewell, K.C., and *J. R. Willis* for the county council.

The Solicitor-General (Sir Lynn Ungood-Thomas, K.C.) and *J. P. Ashworth* for the Minister of Local Government and Planning.

F

Rowe, K.C., *Squibb* and *W. J. Glover* for the borough council.

Curr. adv. vult.

July 27. **ORMEROD, J.:** This is an application made by the Middlesex County Council for an order to quash the Metropolitan Borough of Islington (Land at Trent Park) Compulsory Purchase Order, 1949, which was confirmed by the Minister of Health on Apr. 18, 1950, and published on May 12, 1950.

G

The order in question was made by the Islington Borough Council on Jan. 21, 1949, for the acquisition for the purpose of a cemetery of 123 acres of Trent Park, which is situated in the administrative county of Middlesex, and it was duly submitted to the Minister of Health for confirmation in accordance with the provisions of the Acquisition of Land (Authorisation Procedure) Act, 1946.

H

On May 23, 1949, and July 6, 1949, orders were made by the county council for the compulsory purchase of the whole of the land comprising Trent Park,

* By art. 3 (1) and Part I of the schedule to the Transfer of Functions (Minister of Health and Minister of Local Government and Planning) (No. 1) Order, 1951 (S.I., 1951, No. 142), which came into operation on Jan. 30, 1951, the functions of the Minister of Health under the London Government Act, 1939, s. 100, were transferred to the Minister of Local Government and Planning.

including the 123 acres comprised in the borough council's order. The three orders were duly advertised. On Feb. 22, 1949, objections to the borough council's order had been made by the county council, among others, and objections were also made to the two orders of the county council. A joint inquiry was ordered by the Minister which began on Nov. 9, 1949, and was completed on Dec. 2, 1949. On Nov. 7, 1949—that is, two days before the inquiry began—the county council entered into an agreement under seal with the owner of Trent Park to purchase the whole of the lands comprised in their two orders. On the first day of the inquiry they withdrew their submission for confirmation of their two orders, and the inquiry proceeded into the borough council's order alone and the objections thereto. At the inquiry the county council submitted that the land the subject of the order was the property of a local authority (namely, the county council), who had duly objected thereto and had not withdrawn the objection, and that the order was, therefore, subject to special parliamentary procedure, in accordance with para. 9 of Part III of sched. I to the Acquisition of Land (Authorisation Procedure) Act, 1946. On Mar. 15, 1950, the county council received a copy of a letter written by the Minister to the borough council in which he said that he did not intend to lay the order before Parliament, and on Apr. 18, 1950, the Minister confirmed the borough council's order of Jan. 21, 1949, and published the confirmation.

It is now contended by counsel for the county council that the order should be subject to special parliamentary procedure by virtue of the provisions of sched. I to the Act of 1946. Paragraph 9 of this schedule provides that a compulsory purchase order shall, in so far as it authorises the compulsory purchase of land which is the property of a local authority, be subject to special parliamentary procedure in any case where an objection has been duly made by that local authority and has not been withdrawn. It is contended that, as the county council duly made objection on Feb. 22, 1949—an objection which was never withdrawn—and also became the owners of the property before the order was confirmed, and, indeed, before the date of the inquiry, the conditions of this clause had been fulfilled. It was argued that the Minister must have regard to the circumstances as they were known to him at the time of the inquiry and not at the time when the order was first made, and in support of this contention counsel cited *Marriott v. Minister of Health* (1).

In that case on June 4, 1934, a local authority passed a resolution under s. 1 (1) of the Housing Act, 1930, that a certain area, which included twenty-seven houses of Marriott's, should be a clearance area, and on the same day made a compulsory purchase order under s. 1 (3) for the acquisition of the clearance area. This order required confirmation by the Minister of Health. Subsequently, Marriott started to demolish his houses in the area and put in an objection to the order. At the date of a public local inquiry held by the direction of the Minister of Health all Marriott's houses in the clearance area had been demolished, and this was made known to the inspector holding the inquiry. Notwithstanding this, the Minister, after receiving the inspector's report, confirmed the order. It was held by the Court of Appeal, affirming the decision of SWIFT, J., that the Minister must take into consideration the facts as they existed at the date of the public inquiry, and that, as no houses then remained on Marriott's land to be demolished, the order must be quashed in so far as it affected that land.

In the present case it was contended on behalf of the Minister that the position was crystallised at the time the order was made, and, therefore, the circumstances to be taken into account by the Minister were those in existence at that time. He sought to distinguish *Marriott's* case (1) on the ground that it was decided under a different statute and that the reason for that decision was that at the time of the inquiry all Marriott's houses in the clearance area had been demolished, and, therefore, there was nothing which could be the subject of the order. It was made clear in that case that the intention of the Act of 1930 was

that the Minister must take into account the circumstances as they existed at the time of the public local inquiry and not at the time when the order was originally made. ROMER, L.J., begins his judgment in this way ([1936] 2 All E.R. 875):

A "The question which this court has to determine on this appeal is one of the proper construction of Part I of the Housing Act, 1930, the question being this: when the Minister of Health confirms an order made by the local authority, whether it be a clearance order or a compulsory purchase order, must he merely consider the circumstances as they existed at the date when the local authority made the order, or should he consider the circumstances as they exist and are disclosed by the report of the result of the public local inquiry in those cases where objection has been raised to the order?"

Later, he says (*ibid.*, 876):

C "If the Minister of Health were to find that land, though properly included in a clearance area when the resolution establishing that area was passed, had been, owing to a change of circumstances, improperly included in the order of the local authority, it would be his bounden duty to refuse to confirm that order . . ."

D Applying the principle of that case, as I think I must, to the present case, because the procedure set out in the Act of 1930 is essentially similar to the procedure set out in the Act which is being construed now, it follows that the Minister here should have had regard to the fact that at the time of the inquiry the county council were the owners of the property, and that, therefore, the borough council's order should have been dealt with on that basis. Even if there had not been the decision in *Marriott's* case (1), I should still have felt constrained to come to this conclusion. It appears to me that the real purpose of the public local inquiry is to investigate the circumstances as they exist at the time of the inquiry, not as they existed at the time when the order was made. Some colour, although it is not conclusive, is given to that contention by the fact that the confirmatory order of the Minister as published is expressed to take effect, not from the time when the order was originally made by the local authority, but from the time when the order was first published by the Minister.

F It is further contended that the county council did not make objection as owners of the property, and, therefore, the provisions of para. 9 of sched. I did not apply. It is contended that Part I of sched. I sets out the procedure for making objections and in dealing with objections makes a distinction between objections made by an owner, occupier, or lessee, on the one hand, and any other objectors, on the other hand. It is necessary, therefore, to consider the provisions of the schedule so far as they relate to this particular matter.

G Paragraph 9 in Part III of sched. I provides:

H "A compulsory purchase order shall, in so far as it authorises the compulsory purchase of land which is the property of a local authority . . . be subject to special parliamentary procedure in any case where an objection to the order has been duly made by the local authority . . . and has not been withdrawn."

In para. 3 of the schedule the rules are set out for giving notice of the order to the public and to the people who are entitled to make objection, and para. 3 (1) provides:

" . . . the acquiring authority shall—(a) in two successive weeks publish in one or more local newspapers circulating in the locality in which the land comprised in the order is situated a notice in the prescribed form stating

that the order has been made and is about to be submitted for confirmation and the purpose for which the land is required, describing the land, naming a place within the locality where a copy of the order and the map referred to therein may be inspected, and specifying the time (not being less than twenty-one days from the first publication of the notice) within which and the manner in which objections to the order can be made."

That would appear to be a provision for giving notice to the public generally that the order has been made, and to give any person who wishes to object an opportunity of doing so. Paragraph 3 (1) further provides:

" . . . the acquiring authority shall (b) except in so far as the confirming authority directs that this provision shall not have effect in any particular case, serve on every owner, lessee and occupier (except tenants for a month or any period less than a month) of any land comprised in the order a notice in the prescribed form stating the effect of the order and that it is about to be submitted for confirmation, and specifying the time (not being less than twenty-one days from the service of the notice) within which and the manner in which objections thereto can be made."

Those two sections, read together, would appear to make it clear that objections were being contemplated, on the one hand, by owners, lessees, and occupiers of the land to whom a special procedure applied, because it is necessary they should receive specific notice, and, on the other hand, by other objectors who received notice of the fact that the order was being made by the advertisements which were inserted in the papers. Paragraph 4 (1) provides:

" If no objection is duly made by any such owner, lessee or occupier as aforesaid or if all objections so made are withdrawn, the confirming authority, upon being satisfied that the proper notices have been published and served, may, if the authority thinks fit, confirm the order with or without modifications."

That would appear to mean that, if objections are duly made by an owner, occupier, or lessee and those objections are subsequently withdrawn, or if no objections are made in that particular class of objectors, then, whether there have been other objections or not, the Minister, the confirming authority, may in proper circumstances confirm the order. Paragraph 4 (2) provides:

" If any objection duly made as aforesaid is not withdrawn, the confirming authority shall, before confirming the order, either cause a public local inquiry to be held or afford to any person by whom any objection has been duly made as aforesaid and not withdrawn an opportunity of appearing before and being heard by a person appointed by the confirming authority for the purpose . . . "

In para. 4 (1) the objections dealt with are those made by an owner, lessee, or occupier. If any of these objections remain and a public inquiry is held, para. 4 (2) would appear to permit any person—not merely an owner, lessee, or occupier—who has put in an objection within the time and in the manner prescribed by the notice, to have an opportunity of being heard.

It is argued by the Minister and the borough council that the intention of the schedule is that the only person who has a right to object so as to cause a public local inquiry to be held is a person who comes within the category of an owner, lessee, or occupier, and, as at the time of giving notice of objection the county council were not the owners, lessees, or occupiers of this land, they had not made an effective objection within the meaning of the schedule which would entitle them to have the benefit of the provisions of para. 9. I have come to the conclusion that to take that view of the provisions of the schedule would be straining

unnecessarily the meaning of the words in para. 9—"where an objection to the order has been duly made by the local authority . . . and has not been withdrawn." It would necessitate importing into the schedule the words: "where an objection to the order has been duly made by the local authority during the time when it was the owner of the land" or words to that effect. That is something more than the plain meaning of the words will allow, and in the circumstances I am satisfied that, at the time when the public local inquiry was held, the property which was the subject of the order was the property of the county council who were a local authority, that they were persons who had duly made an objection in accordance with the notice of the order which had been given, and that that objection had never been withdrawn. It follows, therefore, that this order must be quashed, and the matter must be the subject of special parliamentary procedure as laid down in para. 9 of sched. I to the Act.

Application allowed.

Solicitors: *C. W. Radcliffe* (for the applicants); *Solicitor, Ministry of Health* (for the Minister of Local Government and Planning); *H. D. Clark*, town clerk (for the Islington Borough Council).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

SMITH v. BRITISH EUROPEAN AIRWAYS CORPORATION AND ANOTHER.

[KING'S BENCH DIVISION (Hilbery, J.), July 4, 5, 27, 1951.]

Master and Servant—Liability of master—Negligence of fellow servant—Common employment—Provision excluding employer's liability—Agreement collateral to contract of service—Compulsory pension scheme—Law Reform (Personal Injuries) Act, 1948 (c. 41), s. 1 (3).

Negligence—Damages—Deductions from damages—"Contract of assurance or insurance"—Flight steward killed in aircraft accident—Death benefit paid under pension scheme—Fatal Accidents (Damages) Act, 1908 (c. 7), s. 1.

Estoppel—Negligence—Fatal accident to servant—Acceptance by widow, as administratrix, of death benefit under pension scheme—Damages claimed under Fatal Accidents Acts, 1846 to 1908, for benefit of widow and infant children.

As a condition of his employment by an airways corporation the employee, a flight steward, was a compulsory member of the Airways Corporations' Joint Pension Scheme, which was administered by custodian and management trustees and governed by rules contained in the schedule to a trust deed, dated Oct. 8, 1948, a copy of which was set out in the schedule to the Airways Corporations (General Staff Pensions) Regulations, 1948, made pursuant to the Civil Aviation Act, 1946, s. 20. Contributions, assessed on an actuarial calculation, were payable by members of the scheme, throughout their period of service, for the purpose of securing pension benefits, and the balance of the amount required for the members' pensions and the whole of the death and accident benefits provided by the scheme were contributed, on an actuarial calculation, by the employers. On the death of a member his own contributions, with interest thereon,

became payable to his personal representative, together with an amount equal to four times the annual pay of the member in the event of his death from an accident, and twice his annual pay in the case of a death from any other cause. By r. 24: "In consideration of the benefits provided hereunder each member agrees with his employer as part of the terms of his employment and undertakes for himself and for his executors and administrators dependants and representatives and for any person who would but for this rule become entitled to rights against his employer as a result of the member's death to look only to the benefits provided under the scheme in case of injury arising out of and in the course of his employment whether resulting in death or not and the member further undertakes and agrees that neither his employer nor any of its servants shall be liable to him or to his . . . dependants or representatives or to any such person as aforesaid for and in respect of any default negligence act or omission of the employer or its servants for which any claim might have been made either under the Employers Liability Act, 1880, or under the Fatal Accidents Act, 1846, or at common law or in any way otherwise howsoever Provided always that if the appropriate benefits shall not become payable . . . for any reason whatsoever other than any act or omission of the member then the member and his . . . dependants and representatives and any such person as aforesaid shall be entitled to all the rights (if any) against his employer under either the Employers Liability Act, 1880, or under the Fatal Accidents Act, 1846, or at common law or in any way otherwise howsoever to which they would respectively have been entitled but for the provisions of this rule." On Feb. 9, 1949, the employee, while employed on an aeroplane belonging to the corporation and piloted by another servant of the corporation, met his death as a result of a collision between that aeroplane and an aeroplane belonging to the Crown and piloted by an officer of the Royal Air Force, the accident being caused by the negligence of the pilots of the respective aeroplanes. In June, 1949, the plaintiff, as administratrix of the deceased employee's estate, accepted £1,508 from the managing trustees of the scheme, as death benefit under the scheme. She now claimed damages against the corporation and the Air Ministry under the Fatal Accidents Acts, 1846 to 1908, for the benefit of herself, as the employee's widow, and of his two infant children.

HELD: (i) the pensions scheme was to be regarded as an agreement collateral to the employee's contract of service, within the meaning of the Law Reform (Personal Injuries) Act, 1948, s. 1 (3), and, therefore, under the sub-section, r. 24 of the scheme was void in so far as it excluded the corporation's liability in respect of personal injuries caused to the employee by the negligence of a person in common employment with him.

(ii) the infant dependants, on whose behalf the claim was partly brought, could not be estopped by the plaintiff's conduct in taking the money payable under the scheme; nor was the plaintiff estopped from maintaining the action on behalf of herself as the employee's widow, as (a) even if her conduct amounted to a representation that she abided by the rules, that representation was made to the managing trustees of the scheme and not to the corporation, and as (b) the corporation's contributions to the fund out of which the death benefit received by the plaintiff was paid being the actuarially assessed contributions required to cover the risk, *inter alia*, of death by accident of any member of the scheme, it was not proved that their contribution to that fund had been increased by payment out of the fund to the plaintiff, and so they had not altered their position to their

detriment as a result of the plaintiff's conduct; and, therefore, the plaintiff was entitled to recover damages under the Fatal Accidents Acts.

(iii) as the death benefit under the scheme was provided entirely out of the contributions of the employers and the periodical payments made by the employee covered only the amount necessary on an actuarial calculation, for any pension for which he might have qualified, the sum received by the plaintiff was not a sum "paid or payable . . . under any contract of assurance or insurance," within the Fatal Accidents (Damages) Act, 1908, s. 1, and, therefore, was to be taken into account in diminution of the damages recoverable under the Fatal Accidents Acts.

Lory v. Great Western Ry. Co. ([1942] 1 All E.R. 230), applied.

AS TO DEDUCTIONS FROM DAMAGES, see HALSBURY, Hailsham Edn., Vol. 23, p. 698, para. 986; and FOR CASES, see DIGEST, Vol. 36, p. 140, No. 943, and 2nd Digest Supp.

FOR THE LAW REFORM (PERSONAL INJURIES) ACT, 1948, s. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 25, p. 364.

Cases referred to:

- (1) *Bradburn v. Great Western Ry. Co.*, (1874), L.R. 10 Exch. 1; 44 L.J.Ex. 9; 31 L.T. 464; 36 Digest 127, 839.
- (2) *Baker v. Dalgleish S.S. Co., Ltd.*, [1922] 1 K.B. 361; 91 L.J.K.B. 392; 36 Digest 140, 943.
- (3) *Grand Trunk Ry. Co. of Canada v. Jennings*, (1888), 13 App. Cas. 800; 58 L.J.P.C. 1; 59 L.T. 679; 36 Digest 139, 936.
- (4) *Pym v. Great Northern Ry. Co.*, (1863), 4 B. & S. 396; 32 L.J.Q.B. 377; 8 L.T. 734; 122 E.R. 508; 36 Digest 129, 859.
- (5) *Lory v. Great Western Ry. Co.*, [1942] 1 All E.R. 230; 2nd Digest Supp.

ACTION for damages for negligence.

The plaintiff's husband, who was employed as a flight steward by the first defendants, British European Airways Corporation, was killed in the course of his employment as the result of a collision between the aeroplane in which he was serving, which belonged to the first defendants and was piloted by another servant of the first defendants, and an aeroplane belonging to the Crown and piloted by an officer in the Royal Air Force, the accident being due to the negligence of the pilots of the aeroplanes. As the legal personal representative of the deceased's estate, the plaintiff received from the first defendants a sum of £1,508 as death benefit under a pension scheme of which the deceased was a member. She now sought to recover damages from the first defendants and the Air Ministry, the second defendants, under the Fatal Accidents Acts, 1846 to 1908, for the benefit of herself and her two infant children, and under the Law Reform (Miscellaneous Provisions) Act, 1934, for the benefit of the deceased's estate. In resisting her claim the first defendants relied on a rule in the pension scheme whereby each member undertook for himself and his personal representatives and dependants to look only to the benefits arising under the scheme in case of injury in the course of his employment, whether resulting in death or not. The rule excluded the employers' liability at law in terms which included a case where a deceased servant's personal representatives and dependants would be entitled, under the Law Reform (Personal Injuries) Act, 1948, s. 1, to claim against the employer because the death of the servant had been caused by the negligence of another servant of the employer acting in a common employment with the deceased. The first defendants contended (a) that under the rule the action was not maintainable, as death benefit under the scheme had been paid, and (b) that, by accepting the death benefit under the scheme, the plaintiff was estopped from maintaining the action. They further contended that, if they were liable in damages, the sum paid to the plaintiff under the

scheme was to be taken into consideration in diminution of the damages recoverable, as it was not a sum paid under a contract of insurance, within the meaning of the Fatal Accidents (Damages) Act, 1908, s. 1, as contended by the plaintiff.

Berryman, K.C., and R. T. Monier-Williams for the plaintiff.

H. Edmund Davies, K.C., and Stephen Chapman for the first defendants, British European Airways Corporation.

C. N. Shawcross, K.C., and Wingate-Saul for the second defendants, the Air Ministry.

Cur. adv. vult.

July 27. **HILBERY, J.**, read the following judgment. This is a claim under the Fatal Accidents Acts, 1846 to 1908, by the widow and administratrix of one John Andrew Taylor Smith. The action is brought for the benefit of the plaintiff, as widow of the deceased, and of the two children of her marriage with the deceased, a son aged sixteen and a daughter aged thirteen.

For some time prior to Feb. 19, 1949, the deceased man had been a flight steward in the employment of the British European Airways Corporation, which had been constituted as a corporation by the Civil Aviation Act, 1946, s. 1. By s. 20 (1) of that Act it was provided:

“The Minister shall by regulations provide for the establishment and maintenance of one or more pension schemes for the purpose of providing pensions and other similar benefits in respect of the service of corporation employees of such classes as may be specified in the regulations, and the Minister shall by such regulations in particular provide for securing benefits in the case of injury or death. In this section the expression ‘corporation employee’ means an employee of any of the three corporations.”

On Oct. 25, 1948, in the exercise of the powers conferred by s. 20 of the Act of 1946, the Minister of Civil Aviation made and published the Airways Corporations (General Staff Pensions) Regulations, 1948 (S.I., 1948, No. 2361), by reg. 2 of which it was ordered that there should be established and maintained by the three corporations—British Overseas Airways, British European Airways and British South American Airways—a joint pension scheme for full-time employees of the three corporations other than pilots, navigating officers, radio officers and engineer officers, and that the said scheme should be in accordance with the provisions of the trust deed dated Oct. 8, 1948, together with the rules and table contained in Part I of the schedule to the said deed. A copy of the deed, rules and table were set out in the schedule to the regulations. By reg. 3 it was enacted that, for the purpose of providing funds from which benefits under the scheme were to be paid, contributions should be paid by the three corporations and by each of the employees who were members of the scheme in accordance with the provisions of the trust deed.

The trust deed was expressed to be made on Oct. 8, 1948, between the three corporations, of the one part, certain persons named therein and called “the management trustees”, of the second part, and Airways Corporations Joint Pension Fund Trustees, Ltd. (called “the custodian trustees”), of the third part. The deed contained the following terms:

“2. The main object of the scheme is to provide pension benefits on retirement and a subsidiary object is to provide benefits in cases of injury or death for the staff of the corporations in accordance with the rules. The scheme is not in any sense a benevolent scheme and no benevolent or compassionate payments can be made therefrom. 3. Each of the corporations severally covenants with the management trustees that it will pay or cause to be paid to the management trustees all contributions to be contributed

by it and by members in its employment in accordance with the rules. The management trustees shall manage and administer the scheme and shall have power to perform all acts incidental or conducive to such management and administration and the custodian trustees shall concur in and perform all acts necessary or expedient to enable the management trustees to exercise their powers of management or any other power or discretion vested in them accordingly and shall deal with the fund and the income thereof as the management trustees shall from time to time direct. . . . 6 (b). The custodian trustees shall out of the income of the fund or out of the capital thereof as the management trustees may from time to time direct or failing direction as the custodian trustees at their discretion think fit provide the management trustees with such moneys as they may require for the purpose of enabling them to pay the pensions and other payments for the time being chargeable against the fund or the administration or other expenses thereof and shall in all respects facilitate as far as their powers extend the discharge by the management trustees of their responsibilities in the management of the fund. 7. No person whether a member or otherwise shall have any claim right or interest upon to or in respect of the fund or any contributions thereto or any interest thereon or any such claim upon or against the management trustees or the custodian trustees or the corporations except under and in accordance with the provisions of the trust deed and the rules."

The rules in the schedule included the following:

" 3. *Membership Compulsory for Employees.* Except as otherwise expressly provided by these rules it shall be a compulsory condition of service for all full-time employees between the ages of twenty years and fifty years in the case of males and twenty years and forty-five years in the case of females to join the scheme under the terms of these rules provided that this condition shall not apply in the case of: (a) Members of the Imperial Airways Pension Scheme or British Overseas Airways Corporation Pension Fund (b) Employees in the service of the corporations at the date on which the scheme comes into force (c) Employees whose service agreements contain a provision excluding them from membership of the scheme (d) Employees engaged outside the United Kingdom. An employer may however either at the request of the management trustees and an employee or by the terms of any service agreement entered into between an employer and an employee agree to waive the requirements of this rule as to that employee . . . 4 (g) Every employee as a condition of admission to membership shall sign an application for admission containing an undertaking in the form prescribed by the management trustees to be bound by the trust deed and these rules. It is a condition of membership that a birth certificate or other evidence of age satisfactory to the management trustees shall be produced to the secretary within six months of the date of joining the scheme . . . 6 (a) Contributions are payable by a member for the purpose of securing pension benefits only from the date of his admission to the scheme until the normal retirement age or the actual retirement age if earlier at rates which depend on the category or categories (as specified in Table I) to which he may from time to time belong (b) The contributions of each employer shall consist of:—(i) Contributions at such rates certified by the actuary from time to time as shall be required in addition to the contributions payable by the members to provide the balance of the pension benefits and the whole of the death and accident benefits of the scheme in respect of persons becoming members at the normal average age of entry such contributions to be payable at such times so far as possible as the members' contributions are paid into the fund. 9 (a) Subject to r. 7 (h) a member qualifies for a

pension the amount whereof depends on his period of membership under these rules and on the category or categories as specified in Table I to which he may have belonged during that period. The standard pensions payable to members at the normal age of retirement are set out in Table I . . . 10 (a) In the event of the death of a member his own contributions plus compound interest thereon at the rate of $2\frac{1}{2}$ per centum per annum to the date of death become payable together with such amount as may be payable under either para. (b) or (c) of this rule. (b) Subject to para. (d) of this rule in the event of the death of a member from any cause other than a death arising as a result and within six months of an accident the death benefit shall be a sum equal to twice the annual pay of the member at the date of his death (subject to a minimum payment of £500 and a maximum payment of £10,000). (c) Subject to para. (d) of this rule in the event of the death of a member arising as a result and within six months of an accident the death benefit shall be a sum equal to four times the annual pay of the member at the date of his death (subject to a minimum payment of £1,000 and a maximum payment of £10,000) Provided that at the request of an employer the management trustees may extend the period of six months referred to in this paragraph by such period as they think fit either generally or in any particular case . . . (f) The amounts referred to in this rule shall be payable to the legal personal representative of the deceased member or former member . . . 18. Subject to the power of nomination conferred by these rules neither pensions nor other benefits under the scheme may be assigned or borrowed against and any purported assignment thereof or charge thereon will not be recognised by the management trustees and in the event of any such purported assignment or charge or if the beneficiary (being the member or other person entitled to the pension or benefit) shall be adjudicated bankrupt or make a composition with creditors the management trustees shall be at liberty to forfeit the same in whole or in part . . . 23. If the member or his personal representative shall make any claim against an employer for compensation under the Workmen's Compensation Acts, 1925-43, or under any law which provides against 'contracting out' for the time being in force then the management trustees shall be entitled to retain all moneys payable under the scheme in respect of the same accident until the claims so made shall have been finally disposed of whereupon the management trustees shall be entitled before payment of such moneys to the member or his personal representative to deduct an amount equal to the aggregate sums received by the member or his personal representative as a result of any claim and to retain for the use of the employer the amount so deducted . . . 24. In consideration of the benefits provided hereunder each member agrees with his employer as part of the terms of his employment and undertakes for himself and for his executors and administrators dependants and representatives and for any person who would but for this rule become entitled to rights against his employer as a result of the member's death to look only to the benefits provided under the scheme in case of injury arising out of and in the course of his employment whether resulting in death or not and the member further undertakes and agrees that neither his employer nor any of its servants shall be liable to him or to his executors or administrators dependants or representatives or to any such person as aforesaid for and in respect of any default negligence act or omission of the employer or its servants for which any claim might have been made either under the Employers Liability Act, 1880, or under the Fatal Accidents Act, 1846, or at common law or in any way otherwise howsoever Provided always that if the appropriate benefits shall not become payable to the member or to his executors or administrators dependants or representatives for

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any reason whatsoever other than any act or omission of the member then the member and his executors administrators dependants and representatives and any such person as aforesaid shall be entitled to all the rights (if any) against his employer under either the Employers Liability Act, 1880, or under the Fatal Accidents Act, 1846, or at common law or in any way otherwise howsoever to which they would respectively have been entitled but for the provisions of this rule."

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On Dec. 14, 1948, the deceased man made and signed a written application headed "Airways Corporations' Joint Pension Scheme," addressed to the management trustees of that scheme, for admission as a member of the scheme as from Jan. 1, 1949, and requested the management trustees to arrange with his employer to deduct his contributions to the scheme from his salary or wages, and he thereby expressly agreed with his employer and the management trustees to be bound by all the provisions of the trust deed and rules for the time being in force constituting and governing the scheme. He was duly admitted and thereafter became and was until the date of his death a member of the scheme. Shortly after 9 a.m. on Feb. 9, 1949, in the ordinary course of his employment as an aircraft steward, he was on a flight in an aeroplane piloted by another servant of his employers when the aeroplane came into a head-on collision with an aeroplane belonging to the Crown and piloted by an officer in the Royal Air Force. John Andrew Taylor Smith and the other occupants of the aeroplane in which he was being carried were killed.

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The plaintiff consulted, and was advised by, a firm of solicitors in Glasgow, and on Mar. 31, 1949, in a letter to them from the solicitor to the British European Airways Corporation they were informed that the deceased was a member of the Airways Corporations' Joint Pension Scheme and that a total of £1,509 1s. 9d. would be payable to the estate, computed as follows: Death benefit—four times £377 (being salary at date of death), £1,508, and returned contributions, seven weeks at 3s. per week, £1 1s., making £1,509 1s. It was further stated that there was no salary due to the deceased at the date of his death, nor were there any outstanding payments due from him to the corporation. On May 18, after some further correspondence, the plaintiff's solicitors wrote to the British European Airways asking for a cheque for the amount due to the estate, and on June 14 the assistant solicitor sent a cheque for £1,509 1s., made out in favour of the plaintiff, together with a form of receipt for her signature.

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The plaintiff signed the receipt, which was in the following terms:

"John Andrew Taylor Smith deceased. I, Mrs. Elizabeth Smith, of 8, Barnfield Street, Rutherglen, Glasgow, administratrix of the estate of the above-named deceased, hereby acknowledge the sum of £1,509 1s. in payment of all moneys and benefits whatsoever due to the estate from the management trustees of the Airways Corporations' Joint Pension Scheme and this receipt is in full discharge of all liabilities of the said management to the estate of the deceased."

The receipt, signed by the plaintiff, was returned by her solicitors to British European Airways on June 22, 1949.

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On Jan. 11, 1950, the plaintiff issued the writ in this action, and on Mar. 22 delivered her statement of claim alleging that the death of her husband was caused by the negligence of one or other, or both, of the defendants, the British European Airways Corporation and the Air Ministry, or their servants or servant. Each of the defendants, by their defence, denied the negligence alleged against them and alleged that it was the negligence of the servant or servants of the other defendants which had caused the accident. By a letter of Mar. 5, 1951, each of the defendants admitted the allegations of negligence of their own servants relied on and alleged by the plaintiff in the statement of claim. There

remained, however, for decision at the trial the issues raised by the special pleas in bar pleaded by the first defendants in addition to their denial of the negligence relied on by the plaintiff. By para. 5 of the defence of the first defendants it was pleaded for a first special plea in bar that

" . . . it was a term of the deceased's employment with these defendants that he should be a member of and/or bound by the rules of the pension scheme annexed as a schedule to a trust deed dated Oct. 8, 1948, which deed was confirmed by the Minister of Civil Aviation under s. 20 of the Civil Aviation Act, 1946, on Oct. 25, 1948, by the Airways Corporations (General Staff Pensions) Regulations, 1948 (S.I., 1948, No. 2361), and it was expressly provided by r. 24 of the said rules that . . . "

Rule 24 is then set out, and it is further alleged that

" . . . the benefits under the said scheme amounting to £1,508 have been duly paid to the plaintiff, wherefore the present action is, so far as these defendants are concerned, not maintainable."

At the trial the plaintiff's answer to this plea was that, by the Law Reform (Personal Injuries) Act, 1948, s. 1 (3), this provision in the rules was a contractual provision which was made void; further, that the £1,508 was a sum paid or payable on the death of the deceased under a contract of assurance or insurance; and, lastly, that, in any event, only one-half of that £1,508 became payable by reason of the death and the other half was money which would have come to the plaintiff in any event, by operation of r. 10 of the scheme, on her husband's death, and was, therefore, only a receipt by her of an accelerated payment.

This latter contention is, in my view, quite untenable. In the first place, the death here did arise as a result and within six months of an accident, whether or not the claim under the Fatal Accidents Acts is barred by r. 24. Even if one-half the sum is to be treated as money forming part of the estate of the deceased at the date of his death, none the less it is well established that, if the person claiming damages is put, on the death of the relative, into possession of an estate, then, to that extent, there is no loss. It was argued, not that the plaintiff must in any event, therefore, give credit against any damages recovered to the extent of one-half of £1,508, but that, because the plaintiff only recovered an accelerated payment, no part of it was to be set off against the damages. I am unable to follow or accept the argument. I turn, therefore, to deal with the first of the two main contentions of the first defendants.

The contract term expressed in r. 24 of the pension scheme came into force by virtue of the regulations of 1948 on Oct. 25, 1948, almost four months after the Law Reform (Personal Injuries) Act, 1948, had abolished the defence of common employment. This rule, therefore, came into operation at a time when the employer was liable at law to the legal personal representative and dependants of an employee killed through the negligence of a fellow servant when acting in a common employment with the man so killed, and it excludes the employer's liability at law in terms which will include a case where a servant's executors, administrators and dependants would be entitled to claim against the employer because the death of that servant had been caused by the negligence of another servant of the employer acting in a common employment with the deceased. The Law Reform (Personal Injuries) Act, 1948, s. 1 (3), is in these terms:

" Any provision contained in a contract of service or apprenticeship, or in an agreement collateral thereto, (including a contract or agreement

entered into before the commencement of this Act) shall be void in so far as it would have the effect of excluding or limiting any liability of the employer in respect of personal injuries caused to the person employed or apprenticed by the negligence of persons in common employment with him."

- A These terms are so wide that it is difficult to see why its effect is not, as the plaintiff contends, to render void the collateral provision in r. 24, in so far as that rule has the effect, in a particular case, of excluding the liability of the employer in respect of the personal injuries caused to the person employed by the negligence of a person in common employment with him. The kind of
- B collateral provision which s. 1 (3) renders to some extent void is not confined to such a provision in a contract of service. It expressly avoids such a provision if it occurs in an agreement collateral to a contract of service. The pension scheme in question is an agreement, and it is an agreement to which those who enter the employment of any one of the three employers named in the scheme after the scheme has come into operation are bound to become parties. For such full-
- C time employees, entry into the scheme is made a compulsory condition of service under r. 3. It is an agreement, and an agreement separate from, but subordinate and linked to, the actual contract of service, and which exists side by side with that contract. It has, therefore, all the characteristics of a collateral contract, and, in my view, must be regarded as such. Rule 24 is, then, a provision in an agreement collateral to a contract of service, and the only question which
- D remains on this part of the case is whether it is a provision one of the effects of which is to exclude or to limit the liability of the employer in respect of personal injuries caused to the person employed by the negligence of persons in common employment with him. It is conceded in this case that the deceased man was killed partly by the negligence of a person in common employment with him at the time, namely, the pilot of the aeroplane in which the deceased was the
- E steward, on a date and in circumstances such as would, but for the rule, entitle his dependants to recover under the Fatal Accidents Acts. That this contractual rule would have the effect of excluding the employer's liability for that fellow servant's negligence is contended by the defendants and conceded by the plaintiff. In other words, it is acknowledged to be a provision in an agree-
- F ment collateral to a contract of service which would have the effect of excluding the liability of the employer in respect of the accident to the deceased man which was caused by the negligence of a person in common employment with him. To the extent to which it has this effect, s. 1 (3) of the Law Reform (Personal Injuries) Act, 1948, enacts that it shall be void, and I, therefore, so decide. The first defendants' plea of r. 24 in bar of the claim consequently fails.
- G The second special plea of the first defendants in answer to the claim was that, by accepting the £1,508—I disregard the £1—which the plaintiff undoubtedly accepted under the scheme, she was estopped from maintaining this action. The first thing to be observed is that the infant dependants, on whose behalf this claim is partly brought, cannot be estopped by the conduct of their mother.
- H It was argued that the plaintiff, the widow, was, however, estopped because, in taking the money payable under and in accordance with the rules of the scheme, she had done so on the basis and representation that she was bound by those rules and that the first defendants had altered their position to their detriment in consequence of her so acting. This argument, however, breaks down at every point. The plaintiff, by acting as she did, made no representation to and accepted no money from the deceased man's employers, the first defendants. If her conduct amounted to a representation that she abided by

the rules, that representation was made to the managing trustees of the scheme. Furthermore, the first defendants have not been shown by the evidence to have altered their position or to have had their position altered to their detriment or at all by this alleged representation by conduct of the adult plaintiff. It was said on their behalf that under the scheme they and the other employers who are parties to this scheme alone provide, under r. 6 (b), the money for the fund out of which this £1,508 taken by the plaintiff was paid. That is true, but those contributions are the actuarially assessed contributions required to cover the risk, *inter alia*, of death by accident of any employee in the scheme, and it was not proved that the contribution of these employers to that particular fund had been or would be increased by reason of the payment out of the fund of this sum to this adult plaintiff. The plea of estoppel, therefore, also fails.

The only question which remains is: What is the proper amount of damages to be awarded under the Fatal Accidents Acts according to the decided law governing such a claim? Here, one more difficulty arises for if, as the defendants contend, the sum of £1,508 which the plaintiff has received as administratrix of the deceased man's estate is a benefit which has accrued to the deceased's estate solely by reason of his death, it must be set against the financial loss to his dependants which has resulted from his death.

In *Bradburn v. Great Western Ry. Co.* (1) BRAMWELL, B., said (L.R. 10 Exch. 2):

"The statute had laid down no rule as to the mode of calculating the damages to be given in respect of the right of action which it created. The rule was first laid down in this court, and that rule was, that the damages were to be a compensation to the family of the deceased equivalent to the pecuniary benefits which they might have reasonably expected from the continuance of his life. If, therefore, the person claiming damages was put by the death of his relative into possession of a large estate, there was no loss; he was the gainer by the event; and similarly, whatever comes into the possession of the family who have suffered by the death of their relative by reason of his death must be taken into account."

Those words express what has been the principle applied ever since in calculating the damages to be given under the Fatal Accidents Acts. The argument for the plaintiff is that it is not such a benefit, because it is a sum paid under a contract of assurance or insurance and, as such, is expressly excluded from consideration in the assessment of damages by the Fatal Accidents (Damages) Act, 1908, s. 1, which provides that, in assessing damages under the Fatal Accidents Acts,

"... there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act."

Unless, therefore, this sum was a sum payable on the death of the deceased under a contract of assurance or insurance, within the meaning of those words as used in the Act of 1908, it must be taken into account in diminution of the damages which are recoverable here under the Fatal Accidents Acts, since the family has come into the present possession and benefit of that sum as part of the deceased's estate by reason of his death. If the words of the Act of 1908 are given their ordinary meaning, *i.e.*, if they are taken to be intended to refer to what, in every-day affairs, would be regarded as a contract of assurance or insurance, plainly membership of a pension scheme, though it involves an agreement to be bound by rules and to that extent is contractual, is not such a contract. The Act of 1908 was creating an exception to what was otherwise the law, and ought not, therefore, to be given any wider interpretation than the ordinary meaning of the language would convey, unless such wider meaning is necessary to give

effect to the intention of the Act as a whole. It is not necessary, because the Act is dealing with two well-known and recognised types of contract. It is argued, however, that a member of the scheme enters into a contract, that a contract of assurance or insurance does not need, with certain exceptions which do not apply, to be expressed in a policy or in any particular form, that this contractual scheme involved the member in a contractual obligation to make

A periodical payments in return for a right to receive at an uncertain date, or on the happening of an uncertain event, a money benefit, and, therefore, it was contended, all the essentials of a contract of insurance were present.

In the first place, it is to be observed that under the scheme the deceased man, as an employee member, was not making, and never contracted to make, periodical payments in return for an undertaking on the part of the management

B trustees of the scheme to pay this death benefit. By being a member of the scheme, he incidentally obtained this benefit, but he did not derive it from the periodical payments which he made. His periodical payments were the amount taken from his pay which, on an actuarial calculation, were necessary to provide the funds for the various scales of pensions for which he might qualify. Under

C r. 6 (b) only the employers had to contribute the moneys required to provide the whole of the death and accident benefits of the scheme. All contributory pension schemes may be said to be contractual and to involve periodical payments by members, generally by deductions from pay, as here, yet the courts have not yet held that the proceeds of membership of such schemes, when received by the widow or into the estate of the deceased by reason of the death

D of the member, should be disregarded in assessing the damages recoverable under the Fatal Accidents Acts.

In *Baker v. Dalglish S.S. Co., Ltd.* (2) the court held that the value of the probability of the continuance of a voluntary pension paid to a widow of a deceased petty officer in the Royal Navy under the Navy Pay and Pensions Order, 1920 (S.R. & O., 1920, No. 1021) must be taken into account in assessing

E the damages recoverable by the widow under the Fatal Accidents Act, 1846. SCRUTTON, L.J., said ([1922] 1 K.B. 372):

“ . . . as the question is what is her pecuniary loss by the death, any pecuniary advantage she has received from the death must be set off against her probable loss. This is clear if she receives such advantage as of

F legal right. Thus a sum received by the claimant under an accident insurance policy must have been deducted until the passing of the statute of 1908; in the case of a sum received under a life policy the premiums the deceased would have had to pay if he lived must have been taken into account in assessing his probable income, though the sum paid under the policy need not be deducted: *Grand Trunk Ry. Co. of Canada v. Jennings* (3).

G And where the claimant received in consequence of the death under a settlement (*Pym v. Great Northern Ry. Co.* (4)) or under a partnership agreement, pecuniary benefit from the death, such benefit must be taken into account. In my view the same principle applies to voluntary benefits conferred in consequence of the death. Just as in assessing the loss by the

H death the probability of voluntary contribution destroyed by the death of the contributor may be included to swell the claim, so the probability of voluntary contribution bestowed in consequence of the death may be used to reduce the claim by showing what loss the claimant has in fact sustained by the death. Less weight will be given to voluntary contributions than to those made under legal obligation, just because they are voluntary. Still less weight will be given to voluntary contributions in instalments, because they are obviously terminable; and still less weight if the contributor

announces he will reduce his contribution by the amount of compensation obtained from a wrongdoer who causes the death."

In that case it is true that the court was not dealing with a contributory pension scheme, but in *Lory v. Great Western Ry. Co.* (5), where the deceased man had been a member of the police pensions fund and his widow, who was claiming damages under the Fatal Accidents Acts by reason of her husband's death, was in receipt of a pension from that fund, the court was dealing with a pecuniary benefit derived from a contributory pension scheme fund and took into account the pecuniary benefit which the pension represented in assessing those damages. After pointing out that the widow's pension might cease in certain events, ASQUITH, J., stated his view that it was clear that, subject to those contingencies and possibilities, the pension had to be taken into account in arriving at the amount of the damages. The pension moneys were not, he said, sums in the nature of insurance moneys. A

These cases are not on all fours with the present case, but they support the view which I take in this case, namely, that the £1,508 received from the management trustees of the pension fund in question was not money paid or payable on the death of the deceased under any contract of assurance or insurance, within the meaning of the Fatal Accidents (Damages) Act, 1908, s. 1. It has come into present enjoyment through the death of the deceased as part of his estate and must be taken into account in arriving at the amount of the damages which it is proper to award. I have calculated in accordance with the principles applicable to such a case what the gross amount of damages should be, and, in my view, the right figure is £3,900. The £1,508 must be deducted, and the figure for which judgment must be entered is, therefore, the difference, namely, £2,392. [HIS LORDSHIP gave judgment for the sum of £100 under the Law Reform (Miscellaneous Provisions) Act, 1934, and for the gross sum of £2,292 under the Fatal Accidents Act, 1846, and apportioned the latter sum between the widow and the two children of the deceased.] B C D

Judgment for the plaintiff. E

Solicitors: *Shaen, Roscoe & Co.* (for the plaintiff); *L. Bingham & Co.* (for the first defendants); *Treasury Solicitor* (for the second defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

HANILY v. MINISTER OF LOCAL GOVERNMENT AND PLANNING.

[COURT OF APPEAL (Cohen and Singleton, L.J.J.), July 30, 1951.]

A *Compulsory Purchase—Application to quash order—Allegation that purchase not authorised by statute—Application made within six weeks of publication of order—Application after termination of six weeks to add further ground—Jurisdiction to permit amendment—Acquisition of Land (Authorisation Procedure) Act, 1946 (c. 49), sched. I, Part IV, para. 15—R.S.C., Ord. 55B, r. 73.*

B By the Acquisition of Land (Authorisation Procedure) Act, 1946, sched. I, Part IV, para. 15, if any person aggrieved by a compulsory purchase order desires to question the validity thereof on the ground that the authorisation of a compulsory purchase thereby granted was not empowered to be granted under the Act (or certain other enactments, including the Town and Country Planning Act, 1947, by virtue of s. 43 (3) of that Act) he may within six weeks from the date on which notice of the making of the order was first published, apply to the High Court, which may suspend or quash the order.

C The applicant applied to the court by notice of motion under R.S.C., Ord. 55B, r. 71 (7), to have quashed a compulsory purchase order which purported to have been made pursuant to s. 43 (2) of the Act of 1947. The application was made within the prescribed period of six weeks from the date on which the making of the order was first published, and the applicant by the motion invited the court to hold that the making of the order was not within the powers conferred by s. 43 (2) of the Act of 1947 on certain grounds which were stated. After the expiration of the six weeks, the applicant applied under R.S.C., Ord. 28, r. 1, to amend her notice of motion by stating a further or alternative ground.

D

E **HELD:** the amendment did not disclose a new cause of action, but only an additional ground supporting the cause of action disclosed in the notice of motion, *viz.*, that the authorisation of the compulsory purchase was not empowered to be granted, and, notwithstanding the provisions of R.S.C., Ord. 55B, r. 73, the court was not precluded from permitting the amendment to be made although the period of six weeks mentioned in para. 15 had expired.

F *Dictum of LORD WRIGHT, M.R., in Marshall v. London Passenger Transport Board* ([1936] 3 All E.R. 87), applied.

FOR THE ACQUISITION OF LAND (AUTHORISATION PROCEDURE) ACT, 1946, sched. I, Part IV, para. 15, see HALSBURY'S STATUTES, Second Edn., Vol. 3, p. 1079.

G Cases referred to:

- (1) *Fitzwilliam's (Earl) Wentworth Estates Co. v. Minister of Town & Country Planning*, [1951] 1 All E.R. 982.
- (2) *Marshall v. London Passenger Transport Board*, [1936] 3 All E.R. 83; Digest Supp.
- (3) *Batting v. London Passenger Transport Board*, [1941] 1 All E.R. 228; 2nd Digest Supp.

H

APPEAL by the applicant from an order of ORMEROD, J., dated July 11, 1951. The applicant had applied under R.S.C., Ord. 28, r. 1, to amend her notice of motion to quash a compulsory purchase order by adding a further ground. The judge held that, apart from any question of merit, he was bound to refuse the application because it involved raising a new cause of action which would have been barred by the time limit of six weeks laid down by the Acquisition

of Land (Authorisation Procedure) Act, 1946, sched. I, Part IV, para. 15, had it been necessary to serve a new notice of motion.

Kekwick for the applicant.

J. P. Ashworth for the Minister of Local Government and Planning.

COHEN, L.J.: This appeal arises out of a compulsory purchase order made by the Central Land Board and confirmed by the Minister of Local Government and Planning. To the order thus made an objection was taken in accordance with the provisions of the Acquisition of Land (Authorisation Procedure) Act, 1946, sched. I, para. 15. That paragraph is to be found in Part IV of the schedule which deals with the validity and date of operation of compulsory purchase orders and certificates and, so far as is material, provides:

"(1) If any person aggrieved by a compulsory purchase order desires to question the validity thereof, or of any provision contained therein, on the ground that the authorisation of a compulsory purchase thereby granted is not empowered to be granted under this Act or any such enactment as is mentioned in s. 1 (1) of this Act . . . he may, within six weeks from the date on which notice of the confirmation or making of the order . . . is first published in accordance with the provisions of this schedule in that behalf, make an application to the High Court, and on any such application the court—(a) may . . ."

do various things which include suspending the operation of the order. If the court is satisfied that the authorisation granted is not empowered to be granted, it may quash the order. Paragraph 16 provides:

"Subject to the provisions of the last foregoing paragraph [*i.e.*, subject to any application which may be made thereunder] a compulsory purchase order . . . shall not, either before or after it has been confirmed . . . be questioned in any legal proceedings whatsoever, and shall become operative on the date on which notice is first published as mentioned in the last foregoing paragraph."

The Act does not provide how the application is to be made. That is covered by a rule of the Supreme Court made in the exercise of the powers conferred by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 99, for the making of rules of the Supreme Court. The relevant order is R.S.C., Ord. 55B, and the relevant rules are r. 71 (7), r. 73 and r. 75. Rule 71 provides:

"An application under . . . (7) para. 15 of Part IV of sched. I to the Acquisition of Land (Authorisation Procedure) Act, 1946 . . . shall be made by an originating notice of motion to a judge of the High Court."

Rule 73 provides:

"The notice of motion shall be dated as of the day of service and state the grounds for the application and the date mentioned in the notice for the hearing of the application shall not be less than fourteen days after the service of the notice."

Finally, r. 75 provides:

"(1) The ordinary practice and rules of the King's Bench Division shall apply so far as they are applicable, and are not inconsistent with the provisions of the Acts referred to in this part of this order, or of the rules contained therein. (2) Any party may issue a summons returnable at the chambers of the judge for an order or direction on any matter of procedure."

Those being the relevant provisions of the Act and of the rules, the applicant, Miss Hanily, launched an originating motion to the court inviting it to quash the order on the ground that the making of the order was not within the powers conferred by the Town and Country Planning Act, 1947, s. 43, in that:

- A “(i) The reason for the making of the said orders was that the land to which the same relate was being offered for sale and sold by the applicant at a price in excess of the price which in the view of the Central Land Board was its value for the purposes of its existing use; and/or (ii) that the said orders were made because the applicant refused to sell the land to which the same relate to a prospective purchaser on terms approved by the Central Land Board; and/or (iii) that the said orders were made, not
B for the purpose of the functions of the Central Land Board or for the purpose of bringing into development the land to which the said orders relate, but for the purpose of preferring one approved development of the said land to another.”

- C Counsel for the applicant told us that the first two grounds of the application were covered by the decision of this court in *Earl Fitzwilliam's Wentworth Estates Co. v. Minister of Town & Country Planning* (1) and must stand or fall by the decision of the House of Lords in that case*, and that the third ground was something independent of that. However, before the motion came on for hearing a new ground on which the applicant desired to say that the authorisation of the compulsory purchase was outside the power of the Minister occurred to her, and she applied for leave to amend her notice of motion by adding a further
D ground:

- “ (iv) alternatively, that at the time of the making of the said orders and each of them there was no planning permission under Part III of the [Act of 1947] for the development for the purpose of which the land was to be disposed,”
E and she asked for leave to file two affidavits in support of that new ground. That application came before ORMEROD, J., who refused to allow the amendment. We are told that he made it plain that, if he had taken the view that he had a discretion he would have exercised it in favour of the applicant, but he thought he had no discretion in the matter.

- F The applicant appeals, and before us counsel for the Minister very properly said that he did not desire to argue the question how the discretion should be exercised, if discretion there were. He agreed that, if we thought there was a discretion, we should act as the learned judge would have done and make the order, but he submitted that the learned judge was right in thinking that he had no jurisdiction to make the order. The ground on which the learned judge
G came to that conclusion was that he treated the matter as governed by the decisions in which this court has refused applications to amend which involve, in effect, raising a new cause of action which would be barred by the relevant statute of limitations if a new writ had to be issued. Counsel for the Minister called our attention to two cases in which that principle was laid down: *Marshall v. London Passenger Transport Board* (2) and *Batting v. London Passenger
H Transport Board* (3). It will be sufficient if I refer to a short passage from the judgment of LORD WRIGHT, M.R., in the first case where there was a question of setting up a different case of negligence from that in the original statement of claim. LORD WRIGHT said ([1936] 3 All E.R. 87):

* We are informed that notice of appeal to the House of Lords has been given by the Company.

"The question is whether that involves a new cause of action within the meaning of the Public Authorities Protection Act, 1893, within the meaning of the words which I have just read. I think it does, and I think that the learned judge was right in dismissing the application, because it is well settled that an amendment will not be allowed if its introduction would deprive the defendant of a defence under the Statute of Limitations or under the Public Authorities Protection Act, 1893—in other words, if it is something which involves a new departure, a new head of claim, or a new cause of action."

Strictly speaking, here we are not dealing with a question of a new cause of action. As SINGLETON, L.J., pointed out in the course of the argument, all that the Act itself prescribes is that the person aggrieved must establish that the authorisation of the compulsory purchase is not empowered to be granted under this Act. So far as the Act itself is concerned, that would be all that it is necessary to allege. It is true that the rules of court have themselves gone further, because under Ord. 55B, r. 73, the grounds for the application must be stated in the notice of motion. But that is not a statutory provision. It is a provision of the rules, and it seems to me, therefore, that there is nothing inconsistent with the provisions of the Act in applying to the full the power which the court has under Ord. 28, r. 1, to allow an amendment, provided, of course, that the original notice of motion clearly raised the point that the authorisation was not empowered to be granted under the Act. It seems to me that the applicant is here merely seeking leave to deliver further and better particulars of the allegation that she has made in her original notice of motion. Counsel for the Minister suggested that the Act intended to impose an absolute limit of six weeks, but the fact that such a short period is specified inclines my mind against that view. I can find nothing in the statute which drives us to the conclusion that the courts are deprived of their ordinary power to allow an amendment in a proper case. I will not say anything about the merits of this case. On principle I think that ORMEROD, J., had the power to allow the amendment. In my opinion, this appeal should be allowed.

SINGLETON, L.J.: I agree.

Appeal allowed.

Solicitors: *Stow & Co.* (for the applicant); *Treasury Solicitor.*

[Reported by C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

R. v. STOBART.

COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Pilcher, JJ.),
October 2, 1951.]

Criminal Law—Sentence—Corrective training—Previous convictions—Probation order not previous conviction for purpose of sentence of corrective training—Criminal Justice Act, 1948 (c. 58), s. 12 (1), s. 21 (1).

A

The appellant, who was twenty-one years of age, was convicted of shop-breaking and sentenced to three years' corrective training. On two previous occasions since he attained the age of seventeen he had been convicted of indictable offences punishable with imprisonment for a term of two years or more in respect of one of which he had been placed on probation.

B

HELD: in view of the terms of s. 12 (1) of the Criminal Justice Act, 1948, a conviction resulting in a probation order being made was not a conviction for the purpose of s. 21 (1) of the Act, and, therefore, the appellant could not be sentenced to corrective training.

FOR THE CRIMINAL JUSTICE ACT, 1948, s. 12 (1) and s. 21 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 28, pp. 363 and 371.

C

APPEAL against sentence.

The appellant, John Stobbart, was convicted at Lancashire Assizes of shop-breaking with intent to commit a felony and was sentenced to three years' corrective training. It was contended that under s. 21 (1) of the Criminal Justice Act, 1948, there was no power to impose such a sentence where one of the two previous convictions required under the sub-section resulted in a probation order being made.

D

H. Hague for the appellant.

The Crown was not represented.

LORD GODDARD, C.J., delivered the following judgment of the court.

E

The appellant was convicted before OLIVER, J., at Lancashire Assizes of shop-breaking with intent and was sentenced to three years' corrective training. He is twenty-one years of age and he has been convicted on two previous occasions—in March, 1950, at Workington magistrates' court of larceny, when he was fined, and in January, 1951, of breaking and entering and stealing, when quarter sessions put him on probation for two years. While he was on probation he committed the present offence. The learned judge considered that those two convictions entitled him to pass a sentence of corrective training.

F

The simple point is whether a conviction which results in a probation order being made can be one of the two convictions which have to be proved before a sentence of corrective training can be passed. Section 12 (1) of the Criminal Justice Act, 1948, provides:

G

"Subject as hereinafter provided, a conviction of an offence for which an order is made under this Part of this Act placing the offender on probation or discharging him absolutely or conditionally shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under the foregoing provisions of this Act . . ."

H

The provisions with regard to corrective training are contained in s. 21, sub-s. (1) of which provides:

"Where a person who is not less than twenty-one years of age—(a) is convicted on indictment of an offence punishable with imprisonment for a term of two years or more; and (b) has been convicted on at least two previous occasions since he attained the age of seventeen of offences punishable on indictment with such a sentence, then . . . the court may pass . . . a sentence of corrective training . . ."

It seems to the court clear that the conviction when the appellant was put on probation was not one which can be taken into account for the purposes of s. 21 (1). With all respect to the learned judge, I think that the provisions of s. 12 (1) are too clear. It seems odd that, if a man has been placed on probation and fails to comply with the requirements of the order, he should not be subject to corrective training. He seems just the sort of person who might be a fit person for corrective training, but Parliament has taken a different view. That being the case, in the opinion of the court in the present case, there was no power to pass a sentence of corrective training and a sentence of two years' imprisonment will be substituted for the sentence of corrective training.

Sentence varied.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant).

[Reported by J. D. PENNINGTON, Esq., *Barrister-at-Law.*]

D'ALESSIO AND ANOTHER *v.* ENFIELD URBAN DISTRICT COUNCIL.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Pilcher, JJ.), October 4, 5, 1951.]

Town and Country Planning—Enforcement of planning control—Unauthorised development—“Deemed to comply with planning control until Dec. 31, 1949, and no longer,” by determination under Building Restrictions (War-Time Contraventions) Act, 1946 (c. 35), s. 2 (8)—Power to enforce control thereafter—Town and Country Planning Act, 1947 (c. 51), s. 75 (2) (a), s. 76 (5).

The appellants carried on an iron and steel scrap metal business on certain land, which had been used for that purpose since 1931. In September, 1945, they began to manufacture small metal parts and fittings on part of the land without permission granted by an interim development order under the Town and Country Planning Act, 1932, s. 10 (3), although the use of the land for that purpose constituted a development within the meaning of s. 53 of the Act. On June 30, 1948, on an appeal by the appellants from determinations of the respondent council under s. 2 (2) and s. 2 (3) of the Building Restrictions (War-Time Contraventions) Act, 1946, the Minister of Health determined, under s. 2 (8) of the Act, that the use of the land for industrial purposes failed to comply with planning control, but that it should “be deemed to comply with . . . planning control until Dec. 31, 1949, and no longer.” On Feb. 2, 1951, the respondent council served an enforcement notice on the appellants under s. 23 and s. 75 of the Town and Country Planning Act, 1947, requiring them to discontinue the use of the land for the purpose of the manufacture of small metal parts and fittings.

HELD: as the Minister of Health had determined under s. 2 (8) of the Building Restrictions (War-Time Contraventions) Act, 1946, that the use of the premises for the manufacture of small metal parts and fittings should be deemed to comply with planning control, by s. 75 (2) (a) and s. 76 (5) of the Town and Country Planning Act, 1947, the provisions of s. 75 of the Act of 1947 did not apply to the case, and, by s. 76 (5), the appropriate section was s. 76; and, therefore, the enforcement notice was bad and should be quashed.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 23, s. 75 and s. 76, see HALSBURY'S STATUTES, Second Edn., Vol. 25, pp. 524, 583 and 587.

FOR THE BUILDING RESTRICTIONS (WAR-TIME CONTRAVENTIONS) ACT, 1946, s. 2, see *ibid.*, Vol. 26, p. 269.

CASE STATED by Enfield (Middlesex) justices.

The appellants carried on an iron and steel scrap metal business on certain land in Enfield, the business having been started on that land by their father in 1931. In September, 1945, they began to manufacture small metal parts and fittings on part of the land. On July 25, 1947, under the Building Restrictions (War-Time Contraventions) Act, 1946, s. 2 (1), they applied to the respondent council, as the authority responsible for enforcing planning control in the district, for a determination with respect to the use of the land for the purpose of the manufacture of small metal parts and fittings, and on Feb. 3, 1948, the respondent council determined (a) under s. 2 (2) of the Act, that the use of the premises failed to comply with the planning control which the council were responsible for enforcing, as it was an industrial use carried on without the council's consent and did not conform with the council's planning scheme, and (b) under s. 2 (3), that the use should not be deemed to comply with planning control. On June 30, 1948, on an appeal by the appellants from the determinations of the respondent council, the Minister of Health determined under s. 2 (8) of the Act of 1946 that the use of the land for industrial purposes failed to comply with planning control as it was begun without permission granted under an interim development order, but that, subject to certain conditions, the use should "be deemed to comply with . . . planning control until Dec. 31, 1949, and no longer." The appellants continued to use the land for the manufacture of small metal parts and fittings after Dec. 31, 1949. On Feb. 2, 1951, the respondent council served on them an enforcement notice under s. 23 and s. 75 of the Town and Country Planning Act, 1947, requiring them to discontinue the use of the land for the manufacture of small metal parts and fittings. On Apr. 16, 1951, an appeal by the appellants against the notice was heard by a court of summary jurisdiction sitting at Enfield. It was contended by the appellants, *inter alia*, (i) that, having regard to the determination made by the Minister of Health that the manufacturing use should be deemed to comply with planning control, by s. 75 (2) and s. 76 (5) of the Act of 1947 the section which was applicable and should have been recited in the enforcement notice was s. 76, and not s. 75, of the Act of 1947; (ii) that, although the change of use of the premises in September, 1945, was a contravention of planning control in force at the time, the statutory definition of "development" was amended by the Act of 1947, and the amended definition was in operation when the deemed compliance with planning control under the Minister's determination expired on Dec. 31, 1949; and (iii) that the change of use after July 1, 1948, the appointed day under the Act of 1947, was subject to planning control only if it was a material change of use. The respondent council contended, *inter alia*, (i) that, under the determination of the Minister, the use of the premises for the manufacture of small metal parts and fittings was deemed to comply with planning control until Dec. 31, 1949, and was deemed not to comply with such control after that day, and, therefore, s. 76 of the Act of 1947 applied to the use until Dec. 31, 1949, and s. 75 applied after that date, and (ii) that the definition of "development" in the Act of 1947 was irrelevant. The justices, being of the opinion that s. 75 of the Act of 1947 was the section applicable and that they, therefore, had no power to quash the enforcement notice, dismissed the appeal.

H *Kerrigan* for the appellants.
F. A. Stockdale for the respondent council.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Middlesex to whom the appellants appealed against an enforcement notice served on them by the respondent council under s. 23 and s. 75 of the Town and Country Planning Act, 1947, requiring them to discontinue the use of certain land for the purpose of the manufacture of small metal parts and fittings. The appellants had a scrap yard at Enfield where they carried on an iron and steel

scrap metal business. In September, 1945, without applying, under the Town and Country Planning Act, 1932, s. 10 (3), for permission to develop the land under an interim development order, they also began to manufacture light engineering parts on the same premises. Although this was useful for the war effort, it was, strictly speaking, a breach of the Town and Country Planning Act, 1932, as it amounted to a "development" of the land, within the meaning of s. 53 of the Act, in that the land was being used for a different purpose from that for which it had hitherto been used.

By the Town and Country Planning Act, 1947, s. 23 (1):

"If it appears to the local planning authority that any development of land has been carried out after the appointed day [July 1, 1948,] without the grant of permission required in that behalf under this Part of this Act, or that any conditions subject to which such permission was granted in respect of any development have not been complied with, then, subject to any directions given by the Minister, the local planning authority may within four years of such development being carried out, if they consider it expedient so to do having regard to the provisions of the development plan and to any other material considerations, serve on the owner and occupier of the land [an enforcement] notice under this section."

By s. 23 (4) a person on whom an enforcement notice is served may appeal to a court of summary jurisdiction against the notice and

"... the court, (a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates."

An enforcement notice having been served on the appellants on Feb. 2, 1951, by the respondent council, on the ground, *inter alia*, that no planning permission under the Act of 1932 had been obtained, the appellants appealed to the court of summary jurisdiction on the ground that no such permission was required by reason of a determination of the Minister of Health, made on June 30, 1948, under the Building Restrictions (War-Time Contraventions) Act, 1946, s. 2 (8), on an appeal by the appellants from determinations of the respondent council under s. 2 (2) and s. 2 (3) of the Act. By s. 2 (8) the Minister* is entitled to authorise a person, subject to such conditions as the Minister likes to impose, to carry on the development although it is in breach of the town and country planning schemes or orders. In the present case the Minister determined:

"(i) that the use of the premises for industrial purposes fails to comply with the planning control which the council are responsible for enforcing, inasmuch as the said use was begun otherwise than in accordance with an interim development order or of permission granted under such an order, and (ii) that, subject to compliance with the following conditions, the use of the premises for the manufacture of small metal parts and fittings shall be deemed to comply with the said planning control until Dec. 31, 1949, and no longer."

That is, perhaps, a rather elaborate way of doing it, but, of course, if the use of the premises did not violate any interim development order, there would have been no necessity for the Minister to make an order saying that the use of the land should be deemed to comply with planning control. In my opinion,

* By art. 3 (1) and Part I of the schedule to the Transfer of Functions (Minister of Health and Minister of Local Government and Planning) (No. 1) Order, 1951 (S.I., 1951, No. 142), which came into operation on Jan. 30, 1951, the functions of the Minister of Health under the Building Restrictions (War-Time Contraventions) Act, 1946, were transferred to the Minister of Local Government and Planning, and the references to the Minister of Health in s. 2 are to be construed accordingly.

the determination of the Minister is really no more than a recital saying: "It is true that the use to which this land has been put does not comply with planning control, but I shall determine that it shall be deemed to comply with it, under the powers which are given to me by the Building Restrictions (War-Time Contraventions) Act, 1946, until Dec. 31, 1949, and no longer." The Minister then set out two conditions:

A "1. No additional machinery shall be installed or used on the premises which may cause a greater degree of vibration or noise than the machinery now installed and used therein. 2. No process shall be carried out on the premises which may cause annoyance to the owners or occupiers of neighbouring property by reason of the emission from the premises of smoke, dust, or noxious or injurious fumes or effluvia."

B We have to see what is the effect of the Minister's determination. Section 75 of the Act of 1947 deals first with existing development contravening previous planning control and provides for the service of the appropriate orders. Section 75 (1) provides:

C "Where any works on land existing at the appointed day were carried out, or any use to which land is put on that day was begun, in contravention of previous planning control, then, subject to the provisions of this section, the provisions of Part III of this Act with respect to enforcement notices shall apply in relation thereto as they apply in relation to development carried out after the appointed day without the grant of permission in that behalf under the said Part III . . . "

D Section 75 (2) provides:

E "Where any such works as aforesaid were carried out, or any such use as aforesaid was begun, during the war period as defined by the Building Restrictions (War-Time Contraventions) Act, 1946, then (a) if by virtue of the provisions of that Act, or of any determination effected thereunder (whether before or after the appointed day), the works or use are deemed to comply with planning control within the meaning of that Act, the provisions of this section shall not apply, or, as the case may be, shall cease to apply to those works or that use . . . "

It is unnecessary to refer to the remaining sub-sections of s. 75.

Section 76 provides:

F "(1) Where any works on land existing at the appointed day, or any use to which land is put on that day, has been authorised by a permission granted subject to conditions under a planning scheme or under an interim development order, the provisions of Part III of this Act shall apply in relation to those works or that use as if the conditions had been imposed on the grant of planning permission under the said Part III. (2) Without prejudice to the generality of the foregoing sub-section, where any such permission as aforesaid was granted subject to conditions (in whatever form) restricting the period for which the works or use may be continued on the land, then, if that period has not expired at the appointed day and the works are not removed, or the use discontinued, at the expiration of that period, the provisions of Part III of this Act with respect to enforcement notices shall apply in relation thereto as if the works had been carried out, or the use begun, as the case may be, at the expiration of that period and without the grant of permission in that behalf under the said Part III . . . (5) Where at any time before the appointed day, it has been determined under the Building Restrictions (War-Time Contraventions) Act, 1946, that any works on land or any use of land shall be deemed to comply with planning control within the meaning of that Act subject to any conditions specified in the determination, the provisions of this section shall apply in relation to those

works or that use, and in relation to any interest in the land in question, as if the said conditions had been imposed on the grant of permission under a planning scheme or under an interim development order; and notwithstanding any breach of those conditions, the provisions of the last foregoing section shall not apply thereto."

It seems to the court that, as the Minister had determined under s. 2 (8) of the Act of 1946 that, subject to compliance with certain conditions,

"... the use of the premises for the manufacture of small metal parts and fittings shall be deemed to comply with the said planning control until Dec. 31, 1949, and no longer",

the provisions of s. 75 of the Act of 1947 do not apply and cannot be made to apply. Therefore, it seems to me clear that s. 75 is excluded in this case and that the justices ought to have held that it was s. 76 which applied. For these reasons we must answer the question which the justices have put to us by saying that s. 75 was not the section correctly applicable and they should have quashed the enforcement notice in this case. The appellants will have the costs of this argument.

HILBERY, J.: I agree. I would like to add that we are not deciding anything except the point which LORD GODDARD, C.J., has stated. We are not called on to decide, nor do we decide, the contention of the appellants, set out in the Case, that, although the change of use of the said premises in September, 1945, from the scrap metal business to the manufacture of small metal parts was a contravention of planning control in force at that time the statutory definition of "development" was amended by the Act of 1947 and this amended definition was in operation when the deemed compliance with planning control under the said determination expired on Dec. 31, 1949.

PILCHER, J.: I agree.

Appeal allowed.

Solicitors: *Stanley de Leon & Co.* (for the appellants); *T. D. Jones & Co.* (for the respondent council).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

R. v. HIGGINS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Pilcher, JJ.), October 2, 8, 1951.]

Criminal Law—Sentence—Attempt to commit crime—Common law misdemeanour—Imprisonment for longer than two years.

The appellant was convicted of attempted housebreaking and was sentenced by quarter sessions to three years' imprisonment.

HELD: for a common law misdemeanour the court could pass a sentence of imprisonment at discretion: *R. v. Morris*, [1950] 2 All E.R. 965; but a sentence exceeding two years should only be imposed in serious cases, or where the misdemeanour was an attempt to commit a crime and the person convicted of the attempt would have received a severe sentence if he had achieved his purpose.

AS TO PUNISHMENT FOR A COMMON LAW MISDEMEANOUR, see HALSBURY, *Hailsham Edn.*, Vol. 9, p. 227, para. 319; and FOR CASES, see DIGEST, Vol. 14, p. 477, Nos. 5195, 5196, and 2nd Digest Supp.

Case referred to:

(1) *R. v. Morris*, [1950] 2 All E.R. 965; [1951] 1 K.B. 394; 115 J.P. 5; 2nd Digest Supp.

APPEAL against sentence.

The appellant was convicted at Hertfordshire Quarter Sessions of attempted housebreaking and was sentenced to three years' imprisonment. In view of the decision in *R. v. Morris* (1), counsel for the appellant conceded that there was power to pass a sentence of more than two years' imprisonment, but to avoid any misunderstanding with regard to the appropriate sentences in cases of attempts to commit crimes, the Court of Criminal Appeal made certain observations with which this report is concerned.

C. T. B. Leigh for the appellant.

Edward Clarke for the Crown.

Cur. adv. vult.

Oct. 8. **LORD GODDARD, C.J.**, read the following judgment of the court. The appellant was convicted at Hertfordshire Quarter Sessions of attempted housebreaking and was sentenced to three years' imprisonment. He was given leave to appeal against his sentence, but not against conviction. In giving leave to appeal the court said that the charge on which the appellant was convicted was a common law misdemeanour for which normally the maximum punishment is two years' imprisonment, and the court thought that, having regard to the fact that a question of law might be involved, he should have leave to appeal.

At the hearing counsel for the appellant did not contend that the sentence was one which could not lawfully be passed, conceding, as we think rightly, that that matter was concluded by *R. v. Morris* (1). That case laid down that the law is, and always has been, that for a common law misdemeanour the court can sentence to imprisonment and fine at discretion, provided that the sentence is not inordinate. It is unnecessary for us to re-state at length the reasons for that judgment, but in case there should be any doubt or misunderstanding with regard to attempts to commit felonies or misdemeanours we will expand the judgment in that respect.

Attempts to commit crime are common law misdemeanours, but in the following cases statutes have expressly dealt with attempts, thereby making them statutory offences, and have provided maximum punishments. Attempts to murder, contrary to s. 14 and s. 15 of the Offences against the Person Act, 1861, and attempts to choke, suffocate or strangle, contrary to s. 21 of that Act, are both made statutory felonies with a maximum sentence of imprisonment for life. Attempts to commit buggery, contrary to s. 62 of the Act of 1861, are misdemeanours punishable with ten years' imprisonment, and attempts to have carnal knowledge of girls, whether under thirteen or under sixteen years of age, are both expressly dealt with in the Criminal Law Amendment Act, 1885, s. 4 and s. 5 (1), and are both punishable by imprisonment for two years. By the Attempted Rape Act, 1948, s. 1, attempted rape is punishable with seven years. All other attempts are misdemeanours at common law. Those misdemeanours were punishable only by simple imprisonment until certain statutory provisions enabled the punishment of hard labour to be added. Imprisonment with hard labour could only be imposed under statutory authority. The first of the Acts authorising this punishment was the Hard Labour Act, 1822, and among the offences for which hard labour could be imposed was an attempt to commit a felony. Certain other offences were added by the Criminal Procedure Act, 1851, and there have been other statutes, which we need not enumerate, creating offences for which imprisonment with hard labour could be awarded. Then, in 1891, the Penal Servitude Act was passed where by s. 1 (2) it was provided that:

"Where under any Act now in force or under any future Act a court is empowered or required to award a sentence of penal servitude, the court may in its discretion, unless such future Act otherwise provides, award imprisonment for any term not exceeding two years, with or without hard labour."

It was that Act, as was pointed out in *R. v. Morris* (1), which enabled the court to mitigate sentences for offences for which penal servitude, perhaps for seven or fourteen years, or even for life, could be given by passing a sentence of imprisonment of two years. Finally, the Criminal Justice Administration Act, 1914, s. 16 (1), provides that

" . . . Where a person convicted by or before any court of an offence is sentenced to imprisonment without the option of a fine, the imprisonment may, in the discretion of the court, be either with or without hard labour, notwithstanding that the offence is an offence at common law or that the statute under which the sentence is passed does not authorise the imposition of hard labour or requires the imposition of hard labour."

But, as was also pointed out in *R. v. Morris* (1), the law with regard to common law misdemeanours remained the same, except that under the Act of 1914 hard labour could be imposed for a common law offence. The limitation of two years' imprisonment, however, is only to be found in the Penal Servitude Act, 1891, where the court passes a sentence of imprisonment instead of one of penal servitude because, if the offence was one punishable with penal servitude and the court thought fit to pass it, it had to impose a sentence of not less than three years. An attempt to commit a crime, other than those enumerated above, was never punishable with penal servitude, and, therefore, the provisions of that Act do not apply.

It was very largely because of the Act of 1891 that the idea became general that no sentence of imprisonment could exceed two years, and we do not suppose, at any rate in modern times, that any sentence was ever passed of imprisonment with hard labour for a period in excess of two years. Penal servitude and imprisonment with hard labour are now abolished, and, accordingly, there is no reason why a court should not impose a longer sentence of imprisonment than two years except in cases where the period is limited by the statute creating the offence to two years or less. It may well be that a court would consider that a more severe sentence than two years should be imposed on a man with a long record of crime who was attempting to commit a felony such as housebreaking or burglary for which he would be liable, perhaps, to imprisonment for life, and merely because he was disturbed during his attempt, or for some other reason, was unable to effect his purpose. At the same time we think that a sentence exceeding two years for a common law misdemeanour should only be imposed in serious cases, well illustrated by *Morris's* case (1), or, where the misdemeanour is an attempt to commit a crime and the convicted person, if he had achieved his end, would obviously have received a severe sentence.

In the present case, not only did the quarter sessions not exceed their powers, but we can well understand that they thought they should exercise them on a man whose age is forty-one and who has had six convictions. But, by reason of certain facts which were brought to the attention of the court, and the fact that he had only once been sent to prison, and then only for twelve months, and that he had been for a year out of trouble, the court, with some hesitation, decided to reduce the sentence and substitute one of twenty-one months. To that extent the appeal succeeds.

Sentence varied.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[Reported by J. D. PENNINGTON, ESQ., *Barrister-at-Law.*]

R. v. FUSSELL.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Pilcher, JJ.), October 8, 1951.]

Street Traffic—Attempt to take and drive away motor vehicle without owner's consent—Attempt to commit indictable offence triable summarily—Road Traffic Act, 1930 (c. 43), s. 28 (1)—Criminal Justice Act, 1925 (c. 86), s. 24 (1), sched. II, para. 17.

A

The appellant, having elected to be dealt with summarily, pleaded Guilty to a charge of attempting to take and drive away a motor vehicle without the consent of the owner, contrary to s. 28 (1) of the Road Traffic Act, 1930. The justices, being satisfied that it was a suitable case for Borstal training, committed the appellant to quarter sessions for sentence. On an appeal on the ground that an attempt to commit an offence under s. 28 (1) was not triable summarily,

B

HELD: although an offence under s. 28 (1) was not included among the indictable offences triable summarily mentioned in sched. II to the Criminal Justice Act, 1925, an attempt to commit the offence was an attempt to commit an indictable offence which might be dealt with summarily, and, therefore, under para. 17 of sched. II, a charge of such an attempt could itself be dealt with summarily and the justices had acted within their powers.

C

FOR THE ROAD TRAFFIC ACT, 1930, s. 28 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 598; and FOR THE CRIMINAL JUSTICE ACT, 1925, sched. II, see *ibid.*, Vol. 14, p. 961.

D

Case referred to:

(1) *Hastings & Folkestone Glassworks, Ltd. v. Kalson*, [1948] 2 All E.R. 1013; [1949] 1 K.B. 214; [1949] L.J.R. 627; 113 J.P. 31; 2nd Digest Supp.

APPEAL against sentence.

E

The appellant pleaded Guilty before a court of summary jurisdiction sitting at Exeter to a charge of attempting to take and drive away a motor vehicle without the consent of the owner, contrary to s. 28 (1) of the Road Traffic Act, 1930, and he was committed to quarter sessions for sentence. He contended that the justices had no power to deal with the case summarily because the completed offence was not an indictable offence triable summarily within sched. II to the Criminal Justice Act, 1925, and, therefore, the attempt was not so triable.

F

W. H. E. James for the appellant.

D. M. Scott for the Crown.

G

LORD GODDARD, C.J.: The appellant having consented to be dealt with summarily, pleaded Guilty before justices for the city of Exeter to a charge of attempting to drive away a motor car without the consent of the owner.

The offence of driving away a motor car without the consent of the owner is a statutory offence created by the Road Traffic Act, 1930, s. 28 (1). The justices, being satisfied that it was a case for Borstal training, committed the appellant to quarter sessions for sentence under s. 20 (3) of the Criminal Justice Act, 1948. Section 20 (3) provides:

H

"Where a person is convicted by a court of summary jurisdiction of an offence punishable on summary conviction with imprisonment, then if on the day of his conviction he is not less than sixteen but under twenty-one years of age, and the court is satisfied of the matters mentioned in sub-s. (1) of this section, the court may commit him in custody to quarter sessions for sentence in accordance with the following provisions of this section."

By sub-s. (1) of s. 20, the court must be satisfied, having regard to the character and previous conduct of the offender and to the circumstances of the offence, that it is expedient for his reformation and the prevention of crime that he should undergo a period of Borstal training.

The point taken by counsel for the appellant, based on a doubt expressed in *STONE'S JUSTICES' MANUAL*, 83rd ed., vol. 2, p. 2078, whether the offence was triable summarily with consent or only on indictment, was that the justices had no jurisdiction to deal with the appellant because the offence of taking and driving away a motor car is not an indictable offence triable summarily with the consent of the accused person within the meaning of s. 24 (1) of and sched. II to the Criminal Justice Act, 1925, and, therefore, an attempt to take and drive away is not so triable.

In the present case, however, the justices were entitled to deal with the case summarily because para. 17 of sched. II to the Act of 1925 includes among the indictable offences triable summarily:

"Aiding, abetting, counselling or procuring the commission of any indictable offence which may be dealt with summarily, or attempting to commit any such offence,"

By s. 28 (1) of the Act of 1930 the offence which it creates is triable either summarily or on indictment. *Hastings & Folkestone Glassworks, Ltd. v. Kalson* (1) lays down in the clearest possible terms that if an offence is one which by statute can be tried either summarily or on indictment, it is for all purposes an indictable offence. In that case the defendant, a company director, had been convicted of an offence under the Defence (Finance) Regulations, 1939, which was punishable either summarily or on indictment, and had been dealt with summarily, and it was held that he had been convicted of an indictable offence.

So, by s. 28 (1) of the Road Traffic Act, 1930, the offence of taking and driving away a motor car without the consent of the owner can be dealt with summarily or on indictment. Therefore, as the appellant attempted to commit the offence, this case comes within the very words of para. 17 of sched. II to the Criminal Justice Act, 1925—attempting to commit an indictable offence. It follows that the justices, if they thought fit, could deal with him. They having dealt with him, there is no reason for us to interfere since it is not suggested that it was not a proper case for Borstal if the appellant was properly before the quarter sessions.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *White & Leonard*, agents for *Cocks & Ashford*, Exeter (for the Crown).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

BEAL v. KELLEY.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Pilcher, JJ.), October 5, 1951.]

Criminal Law—Indecent assault on male person—Ingredients of offence—Boy asked to act indecently—Hostile act by respondent on boy's refusal—Offences against the Person Act, 1861 (c. 100), s. 62.

A To establish the offence of indecent assault under the Offences against the Person Act, 1861, s. 62, it is not necessary to prove that the assault was of an indecent nature. It is sufficient if there was an assault accompanied by an indecent motive or other circumstances of indecency.

B So, where the respondent exposed his person to a boy of fourteen and asked the boy to handle him indecently, and the boy refused and tried to go away, but the respondent caught hold of him and pulled him towards himself,

HELD: the respondent was guilty of indecent assault under s. 62 as he had performed a hostile act towards the boy accompanied with circumstances of indecency.

C FOR THE OFFENCES AGAINST THE PERSON ACT, 1861, s. 62, see HALSBURY'S STATUTES, Second Edn., Vol. 5, p. 812; and FOR CASES, see DIGEST, Vol. 15, pp. 752, 753, Nos. 8120, 8121, and Digest Supp.

CASE STATED by Peterborough justices.

D On Apr. 20, 1951, at a court of summary jurisdiction sitting at Peterborough, an information was preferred by the appellant, a superintendent of police, under s. 62 of the Offences against the Person Act, 1861, charging that the respondent had indecently assaulted a male person under the age of sixteen. The respondent elected to be dealt with summarily and pleaded Not Guilty. It was proved in evidence that the respondent, pretending to be the gamekeeper's assistant, asked a boy, aged fourteen, to help him to look for some other boys who were shooting game-birds. In a lonely spot the respondent undid the fly-buttons of his trousers, exposed his person, and asked the boy to handle it. The boy refused and turned to go away. The respondent then got hold of the boy's arm and pulled him towards himself. The boy pulled back in an attempt to get away and after a short while the respondent let the boy go. For the appellant it was contended that to establish an offence under s. 62 of the Offences against the Person Act, 1861, it was sufficient that there was an assault accompanied by an indecent motive. It was contended for the respondent that it was not sufficient to prove an assault with an indecent motive, which in the present case was not disputed, but that to justify a conviction of indecent assault on a male person it was necessary to prove that the assault itself was of an indecent nature. If the assault itself was not indecent, the state of mind of the person committing the assault was irrelevant, and the assault, therefore, was not indecent within the meaning of s. 62. The justices being of the opinion that the offence proved by the evidence was in fact an attempt to procure the commission of an act of gross indecency with another male person, which they had no jurisdiction to try, dismissed the case.

Swanwick for the appellant.

H *Van Oss* for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the Liberty of Peterborough before whom the respondent was charged with an indecent assault on a boy of fourteen. The justices dismissed the information because they thought that the offence "was in fact an attempt to procure the commission of an act of gross indecency with another male person," which they had no jurisdiction to try summarily. I express no opinion whether or not they were right in that view, or whether they were right in not at least having the respondent

charged with common assault and convicting him of that offence, because, in my opinion, they were wrong in taking the view that the conduct of the respondent was not an indecent assault.

The respondent, being in a wood with a boy of the age of fourteen, exposed his erect penis to the boy and asked him to rub it. The boy refused to do so, whereupon the respondent caught hold of him and pulled him towards himself. There, at any rate, was the assault—a hostile act because it was done against the boy's will. It does not matter that the boy could not give consent. It is said that that was not an indecent assault. Why not? In my opinion, the definition given in ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE, 32nd ed., p. 1067, of an indecent assault is right, namely,

“ . . . an assault, accompanied with circumstances of indecency on the part of the prisoner.”

That is to say, indecency offered towards the person alleged to have been assaulted. If there is a hostile act with every circumstance of indecency, I cannot see why it is not an indecent assault. If a man assaults a woman, at the same time exposing his person to her, I have no doubt that is an indecent assault on a female. In the present case I have no doubt that the conduct of the respondent amounted to an indecent assault. In my view, it should go back to the justices with a direction to convict.

HILBERY, J.: I agree.

PILCHER, J.: I agree.

Case remitted.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *C. P. Clarke*, town clerk, Peterborough (for the appellant); *C. Grobel, Son & Co.*, agents for *Greenwoods*, Peterborough (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

ANDREWS v. H. E. KERSHAW, LTD. AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Pilcher, JJ.), October 5, 1951.]

Street Traffic—Heavy motor car—Overhang—Pantechnicon with movable tailboard—Permitted overhang exceeded when tailboard down—Road Traffic Act, 1930 (c. 43), s. 3 (1)—Motor Vehicles (Construction and Use) Regulations, 1947 (S.R. & O., 1947, No. 670), reg. 33.

The respondents were charged under the Motor Vehicles (Construction and Use) Regulations, 1947, reg. 33, with unlawfully using on a road a heavy motor car of which the overhang exceeded that permitted by reg. 33. The vehicle used by the respondents was of the pantechnicon type, and its back was constructed of a tailboard, hinged at the bottom, extending to the whole width of the vehicle and halfway up the back, surmounted by two half doors. Both the tailboard and the half doors were detachable. With the tailboard up and the half doors closed the overhang was less than that permitted by reg. 33, but with the tailboard in the lowered position it was in excess of that permitted by the regulation. When the vehicle was stopped the tailboard was in a lowered position at an angle of approximately eighty degrees from the vertical, and the vehicle was loaded to the extent of the tailboard with bales of fibre. The two half doors were open and tied to secure the load.

HELD (LORD GODDARD, C.J., *dissentiente*): as the overhang of the vehicle when the tailboard was up and the doors of the back were closed did not

exceed the overhang permitted by reg. 33, the vehicle was constructed in accordance with the requirements of reg. 33; the letting down of the tailboard did not alter the construction of the vehicle; and, therefore, in using it on the road with the tailboard down, the respondents had not committed an offence against reg. 33.

EDITORIAL NOTE. By reg. 2 (1) of the Motor Vehicles (Construction and Use) (Amendment) Regulations, 1950 (S.I., 1950, No. 666), which came into operation on May 15, 1950, the definitions of "overall length" and "overall width" in the Motor Vehicles (Construction and Use) Regulations, 1947 (S.R. & O., 1947, No. 670), reg. 3 (1), were amended. Measurements of length are now to be made between vertical planes at right angles to the longitudinal axis of the vehicle and measurements of width are to be made between vertical planes parallel to the longitudinal axis, instead of between parallel planes in each case.

FOR THE ROAD TRAFFIC ACT, 1930, s. 3, see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 574.

CASE STATED by Bedfordshire justices.

On Mar. 21, 1951, at a court of summary jurisdiction sitting at Leighton Buzzard, informations under the Road Traffic Act, 1930, s. 3, and the Motor Vehicles (Construction and Use) Regulations, 1947, reg. 33, were preferred by the appellant against the respondents that on Jan. 29, 1951, they unlawfully did use on a road a heavy motor car the overhang of which exceeded fifty per cent. of the distance between the plane perpendicular to the longitudinal axis of the vehicle which passed through the centre or centres of the front wheel or wheels and the foremost vertical plane from which the overhang was to be measured, as defined in reg. 3 (1) of the regulations of 1947.

The vehicle, which was of the pantechnic type, was owned by the first respondent and was being driven by the second respondent. The back of the vehicle was constructed of a tailboard, hinged at the bottom, extending to the whole width of the vehicle and halfway up the back, surmounted by two half doors. At the time when the vehicle was stopped the tailboard was in a lowered position at an angle of approximately eighty degrees from the vertical and the vehicle was loaded with bales of fibre. The two doors were open and tied to secure the load. The tailboard and half doors were detachable. The measurements applicable to the vehicle were as follows. The distance between the plane perpendicular to the longitudinal axis of the vehicle which passed through the centres of the front wheels and the foremost vertical plane from which the overhang was to be measured as defined by reg. 3 (1) was sixteen feet three inches. The distance from the foremost vertical plane from which overhang was to be measured, as defined by reg. 3 (1), to the rearmost edge of the tailboard in the lowered position in which it was at the time when the vehicle was stopped was eleven feet eleven inches. The distance from the foremost vertical plane from which overhang was to be measured, as defined by reg. 3 (1), to the rearmost point of the vehicle with the tailboard raised in the closed position and the half doors closed was less than eight feet $1\frac{1}{2}$ inches, the permitted overhang of the vehicle under reg. 33. The vehicle was first registered in June, 1949, and did not fall within any of the provisos to reg. 33.

The appellant contended, *inter alia*, that, as the vehicle was constructed in a way in which the length of the overhang could be varied by lowering or raising the tailboard, the overhang must be measured at the actual time of the use, and, as the tailboard, at the material time, was in a lowered position and there was an excess overhang of three feet $9\frac{1}{2}$ inches, the offences had been committed. The respondents contended, *inter alia*, that, as reg. 33 was to be found in Part II of the regulations of 1947, which govern the construction of a vehicle, the overhang must be measured at the time of the construction of the vehicle, and in its normal closed position the vehicle complied with reg. 33.

The justices were of opinion (i) that, since reg. 33 was a regulation governing the construction of a motor vehicle, the gravamen of the charges was that the respondents were using a vehicle which was not constructed in accordance with the regulation; (ii) that the vehicle in its normal position as constructed complied with reg. 33; (iii) that the lowering of the tailboard was not a reconstruction of the vehicle so as to make its original lawful construction unlawful; (iv) that, if the contention of the appellant were correct, any person using the vehicle and opening the half doors or lowering the tailboard on the highway for the purpose of loading or unloading the vehicle would be committing an offence, which seemed to be an unreasonable proposition in view of the great number of vehicles of that and similar types which must be loaded and unloaded on the highway every day; (v) that the items specifically excluded from being the rearmost point of the vehicle in reg. 3 (1) (i) were distinguishable from a tailboard in that they could all be described as "permanent excrescences" on the back of a vehicle, while a tailboard in the normal closed position was flush with the sides of the vehicle; and (vi) that the question whether the tailboard was used for load-carrying or not was not material to the offences as charged. Accordingly, they held that the respondents were not guilty of the offences charged and dismissed the informations.

Stabb for the appellant.

Molony for the respondents.

HILBERY, J., stated the facts and continued: The question before us is, therefore, whether the vehicle, at the time it was stopped and was carrying goods in that way, offended against reg. 33 of the Motor Vehicles (Construction and Use) Regulations, 1947. That regulation is one of the regulations in Part II of the regulations of 1947 expressed as governing the construction of motor vehicles. The regulations controlling user are grouped separately [reg. 54 *et seq.*, in Part III]. Regulation 3 (1) defines the overall length, the overall width and the overhang, and it is useful to look at all those definitions. "Overall length" is defined as meaning

" . . . the length of a vehicle measured between parallel planes passing through the extreme projecting points of the vehicle exclusive of: (a) any starting handle, (b) any hood when down, (c) any ladder forming part of a turntable fire-escape fixed to a vehicle, (d) any telescopic fog lamp when extended, (e) any snow-plough fixed in front of a vehicle, and (f) any post office letter box the length of which measured parallel to the longitudinal axis of the vehicle does not exceed twelve inches."

"Overall width" is defined as meaning

" . . . the width measured between parallel planes passing through the extreme projecting points of the vehicle, exclusive of the driving mirror, and of any direction indicator when in operation and of any snow-plough fixed in front of the vehicle and of so much of the distortion of any tyre as is caused by the weight of the vehicle, and in the case of vehicles registered before Jan. 2, 1939, of so much of a swivelling window designed to allow the driver to give hand signals as projects when opened not more than four inches beyond the side of the vehicle."

"Overhang" is defined as meaning

" . . . the distance measured horizontally and parallel to the longitudinal axis of the vehicle between two vertical planes at right angles to such axis passing through the two points specified in para. (i) and para. (ii) of this definition respectively. (i) The rearmost point of the vehicle exclusive of (a) any hood when down, (b) any post office letter box, the length of which measured parallel to the longitudinal axis of the vehicle, does not exceed twelve inches, (c) any ladder forming part of a turntable fire-escape fixed to

a vehicle, and (d) any luggage carrier fitted to a motor car constructed solely for the carriage of passengers and their effects and adapted to carry not more than seven passengers exclusive of the driver. (ii) (a) in the case of a motor vehicle having only two axles, one of which is not a steering axle, through the centre point of that axle . . . ”

A This was a vehicle with two axles, and the measurements found as matters of fact by the justices show that, as originally constructed, the vehicle had no greater overhang than was permitted by reg. 33, which provides:

B “ The overhang of a heavy motor car shall not exceed fifty per cent. of the distance between the plane perpendicular to the longitudinal axis of the vehicle which passes through the centre or centres of the front wheel or wheels and the foremost vertical plane from which the overhang is to be measured as defined in reg. 3 of these regulations.”

C There follow certain provisos which are not material to the case. If the tailboard was up and the doors at the back were closed, the overhang, measured as defined in reg. 3 (1), did not exceed the overhang permitted by reg. 33. It could only be said that the overhang exceeded the overhang permitted by reg. 33 on the occasion in question because, for the purposes of the carriage of the load then in the vehicle, the tailboard was partly down at an angle of approximately eighty degrees and the half doors were being used to secure the load being carried in that way. It was contended by the appellant that the vehicle offended against reg. 33 because on the occasion in question the overhang caused in that way exceeded the overhang permitted by the regulation. The question, therefore, D narrows itself down to whether the vehicle, when it was stopped, could be said to be a vehicle which was being used, contrary to s. 3 (1) of the Road Traffic Act, 1930, as being a vehicle in use on a road which did not comply with the regulations applicable to the class or description of vehicles to which that vehicle belonged, as to the construction thereof. In other words, was that vehicle when so used a vehicle which was not constructed in accordance with the regulations because its tailboard was then down in such a way as made the overhang, if E measured to the rearmost point of the tailboard, exceed the permitted extent of overhang ?

I think it is impossible to say, first, that a vehicle is not in use on a road, within the meaning of s. 3 (1) of the Act of 1930, when it is stationary for the purpose of loading or unloading. It obviously is. Secondly, I think it is impossible F to say that this vehicle was not constructed in accordance with the regulations, for when the tailboard was not down the vehicle was constructed so as to comply with the measurements as defined by reg. 3 (1) and required by reg. 33. The mere letting down of the tailboard cannot be said, except, it seems to me, with the extreme of artificiality, to be a reconstruction. It makes an alteration, perhaps, in what is the overall length of the vehicle as then being used, but it does not, in G my view, alter the construction. If the interpretation which is sought by the appellant were correct, then every time one of the lorries—and their number is legion—on the road today which was built to comply with the measurements prescribed by the regulations lowered its tailboard for the purpose of loading or unloading, it would be used in contravention of reg. 33. It would be said that its construction had become a contravention of the regulations. That would equally H apply to such vehicles as are on the road every day for the carriage of livestock and animals, many of which are constructed so as to have a back which lowers on the road for the purpose of loading and unloading the animals into and from the vehicle. I am unable to take the view that that interpretation of reg. 3 (1) and reg. 33 can be right. I take the view which I do with the greatest diffidence because I know that LORD GODDARD, C.J., holds strongly another opinion. I would, however, point out that the regulations of 1947 deal with construction and use and that the use of vehicles on the road is regulated by a different set

of regulations [reg. 54 *et seq.* in Part III] from those which govern construction [reg. 6 to reg. 53, in Part II]. On the occasion in question it was the use of the vehicle and not its construction which made the overhang exceed what is permitted. I think that the justices came to the right conclusion, and I would dismiss the appeal.

PILCHER, J.: I agree with the judgment which has just been delivered by **HILBERY, J.**, and for the same reasons. Here two informations were preferred before the justices for breaches of reg. 33 of the Motor Vehicles (Construction and Use) Regulations, 1947, made under the Road Traffic Act, 1930. Section 3 (1) of the Road Traffic Act, 1930, provides:

“ . . . it shall not be lawful, to use on any road a motor vehicle . . . which does not comply with the regulations applicable to the class or description of vehicles to which the vehicle belongs, as to the construction . . . thereof.”

The point in this case is susceptible of being stated quite shortly: Is a pantechnicon with its tailboard up constructed differently from a pantechnicon with its tailboard down? Giving the words their ordinary meaning, it seems to me that the answer to that question must be that there is no difference in the construction of the two vehicles. Like **HILBERY, J.**, I have no doubt whatsoever that it is impossible to say that this pantechnicon was not being “used” on a road, within the meaning of s. 3 (1) of the Act, if at the material time it was stationary with the tailboard down. The tailboard of the vehicle has to be put down at some time if the vehicle is to fulfil its purpose. While it is, perhaps, not really useful to draw analogies, one’s mind turns to cattle trucks and horse-boxes, the construction of which is well known. One cannot get cattle into or out of these vehicles unless there is a ramp, which consists either of the side of the lorry or the back of the lorry that lets down, and I suppose it is almost certain that, whether the side lets down or whether the back lets down, the overall width or the overall length permitted by the regulations as to construction will be exceeded. Therefore, feeling as I do that the question of the lowering of the tailboard of the pantechnicon was not a question of construction, and certainly not a question of reconstruction, I think that these two summonses under s. 3 (1) of the Road Traffic Act, 1930, were misconceived. If it is undesirable, as it well may be, that pantechnicons should go about the roads with their tailboards down, more particularly if there is a heavy weight on the tailboard, proceedings can be taken in an appropriate case under reg. 67 of the regulations of 1947, because they may constitute dangerous vehicles on the road, but I cannot feel that the lowering of a tailboard on an otherwise properly constructed vehicle converts that vehicle into an improperly constructed vehicle. In view of the fact that I know that **LORD GODDARD, C.J.**, holds a different opinion, I also have arrived with considerable hesitation at the conclusion that this appeal should be dismissed.

LORD GODDARD, C.J.: Unfortunately, I differ from **HILBERY, J.**, and **PILCHER, J.**, but, as they have both given judgments dismissing this appeal, it would not serve any useful purpose for me to deal with the matter at any length in a dissenting judgment. I think this vehicle was constructed so that the overhang could be enlarged or reduced at will. The tailboard would be level with the floor, and, if the tailboard is down, the floor at the end of the vehicle projects further than is permitted by reg. 33. I base my judgment simply on the short ground that under reg. 3 (1) one of the points which is necessary for measuring the overhang is the rearmost point of the vehicle, and I cannot bring myself to hold that, where a vehicle is on the road with its tailboard down, the rearmost point of the vehicle, within the meaning of reg. 3 (1), is anything but the end of the tailboard. I can well see that, if a contrary view to that expressed by **HILBERY, J.**, and **PILCHER, J.**, is taken, it may lead to certain anomalies, but I

think equal anomalies will follow if their view is accepted. I think that the regulations might be re-drafted because they do not seem to me to be as clear as they might be. In the circumstances I would have allowed the appeal, but, as HILBERY, J., and PILCHER, J., are of a different opinion, the appeal will be dismissed with costs.

Appeal dismissed.

A Solicitors: *Turner & Evans*, agents for *J. Q. Clayton & Co.*, Luton (for the appellant); *Amery-Parkes & Co.* (for the respondents).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

B WOOLWICH EQUITABLE BUILDING SOCIETY v. MARSHALL AND ANOTHER.

[CHANCERY DIVISION (Danckwerts, J.), October 5, 1951.]

Mortgage—Power of leasing—Tenancy by estoppel—Tenancy agreement entered into by mortgagor before completion of purchase by him of mortgaged property.

C *Real Property—Registered land—Overriding interest—Occupation of dwelling-house—Land Registration Act, 1925 (c. 21), s. 70 (1).*

In August, 1948, L. was the tenant of a basement flat in a dwelling-house belonging to O., who in that month introduced M. to L. as L.'s future landlord. Shortly afterwards L. entered into an oral agreement with M., under which L. was to relinquish his tenancy of the basement flat and to take a tenancy as from Sept. 13, 1948, of the top-floor flat in the house at the increased rent of £1 per week payable in advance. On Sept. 13, 1948, the sale of the house by O. to M. was completed, and on the same day M. granted a legal charge on the house to a building society to secure an advance of £1,300, in his application for which, and also in his acceptance thereof, he stated that he would be in possession of the top-floor flat. The legal charge recited that M., being the estate owner in respect of the property described therein, had requested the building society to advance to him £1,300, and, after providing for the charge on the house in the usual form, excluded the mortgagor's powers of leasing "vested in him by virtue of this deed or any statute in that behalf without the consent in writing of the society given under the hand of the secretary for the time being of the society." The title to the house was registered under the Land Registration Act, 1925, and the transfer and the legal charge were registered on Sept. 28, 1948. The mortgage repayments for which the legal charge provided fell into arrear, and the building society sought possession. L. claimed to be entitled to remain in possession of his flat under a tenancy protected by the Rent Restrictions Acts.

G HELD: (i) by virtue of his occupancy L. was the owner of an overriding interest under the Land Registration Act, 1925, s. 70 (1), and the rights of the building society were subject to those of L.

(ii) in view of the recital in the legal charge that M. was the estate owner in respect of the property it must be presumed that the conveyance was executed before the legal charge, and, therefore, on the completion of M.'s purchase L.'s tenancy was confirmed by estoppel, and, at the time of the execution of the legal charge, L. was entitled to a legal tenancy binding on the building society.

H *Coventry Permanent Economic Building Society v. Jones* ([1951] 1 All E.R. 901), distinguished.

AS TO MORTGAGEE'S RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 23, pp. 358-361, paras. 535-539; and FOR CASES, see DIGEST, Vol. 35, pp. 394-398, Nos. 1370-1404.

Cases referred to:

- (1) *Coventry Permanent Economic Building Society v. Jones*, [1951] 1 All E.R. 901.
- (2) *Dudley & District Benefit Building Society v. Emerson*, [1949] 2 All E.R. 252; [1949] Ch. 707; [1949] L.J.R. 1441; 2nd Digest Supp.

ADJOURNED SUMMONS.

The plaintiffs, Woolwich Equitable Building Society, as mortgagees, claimed possession of the mortgaged property against the mortgagor and against the occupier of part of the mortgaged property. The occupier claimed to be entitled to possession as tenant of the mortgagor. A

E. D. Sutcliffe for the plaintiff.

The first defendant, the mortgagor, was not represented.

Harold Lightman for the second defendant, occupier of part of the property. B

DANCKWERTS, J.: This is an originating summons issued by the mortgagees, the Woolwich Equitable Building Society, to enforce a legal charge dated Sept. 13, 1948, against the mortgagor, Kenneth William Marshall, and a second defendant, Lesley Edward Long, who is in possession of the top-floor flat included in the mortgaged property, No. 39, Spencer Road, Clacton. Kenneth William Marshall derived his title from a Mr. Orchard and the latter's sister. The property was purchased by Marshall, who does not appear before me, for £1,450, and to complete his purchase he obtained £1,300 from the building society on the security of the charge. C

The legal charge recites that the mortgagor, Marshall, being the estate owner in respect of the property described in the schedule thereto and a member of the society, had requested the society to advance to him £1,300. The mortgagor then proceeds to charge the property in the ordinary way. The legal charge provides by cl. 4: D

"The mortgagor shall not exercise the powers of leasing and of accepting surrenders of leases vested in him by virtue of this deed or any statute in that behalf without the consent in writing of the society given under the hand of the secretary for the time being of the society." E

Clause 9 contains a provision for attornment by the mortgagor to the mortgagees as their tenant which is perfectly useless, but which, fortunately, in the present case does not appear to cause any difficulty because any such tenancy thereby created at the rent of sixpence a month has been duly determined. F

The instalments under the mortgage charge are in arrears, and there would be no doubt of the building society's rights to enforce their legal charge and recover the property from the defendant Marshall, but for any difficulties which may be provided by the rights which are claimed by the second defendant, Long. He claims to be entitled to a tenancy protected by the Rent Restrictions Acts. In an affidavit to which he has deposed he says that in 1946 he became the tenant of the basement flat in the property in question from the Orchards at the rent of 10s. a week, payable in advance, and that his dealings were always with Miss Orchard. He says, further, that in August, 1948, Miss Orchard introduced Marshall to him as his future landlord, and on Aug. 30, 1948, Marshall collected the rent. Then he deposes to an agreement which was entered into between him and Marshall by which he was to give up the tenancy of the basement flat and receive instead a tenancy of the top-floor flat at the rent of £1 per week, payable in advance. He asked Marshall from what date he would have to pay the increased rent, and he was told that the new rent would become due in advance on Sept. 13, 1948, *i.e.*, the tenancy would begin on that date. He says, further, that on Sept. 7, 1948, immediately after the interview, he began to move his furniture and other belongings into the top-floor flat, that he entered into occupation on Sept. 11, and that he has remained there ever since. The date on G
H

which the conveyance was made by the Orchards to Marshall has not been proved. It is alleged that it was on Sept. 13, 1948, the same day as the date of the legal charge to the building society. All the probabilities are in favour of that statement being correct. My judgment will proceed on the footing that Marshall's title depended on a conveyance dated Sept. 13, 1948.

- A The title to the land in question was registered under the Land Registration Act, 1925, and it appears from an inspection of the charge certificate that the registered transfer and the legal charge in favour of the building society were not completed by registration under the Land Registration Act, 1925, until Sept. 28, 1948. It is claimed on the evidence which has been given that on Sept. 13 and on Sept. 28, 1948, Long was in fact in possession of the top-floor flat. He was, undoubtedly, at that date in possession under an oral agreement of a tenancy made with Marshall which was to begin on Sept. 13. If he was in possession at a previous date it is not at all clear that his right to possession was due to any tenancy. It may have been merely by leave and licence of the landlord preparatory to a tenancy to begin on Sept. 13. It is also plain that until the end of the week preceding Sept. 13 he was still tenant of the basement flat because he had paid his rent of 10s. in advance at the beginning of that week.
- C It is argued on behalf of Long that the right to his tenancy does not depend solely on the legal title of Marshall, which, it appears, by reason of the provisions of the Land Registration Act, 1925, s. 19, did not become effective until Sept. 28, 1948, but depends on, and is supported by, the legal ownership of the Orchards, which existed as long ago as 1946, and which, it is contended, supported the agreement by Marshall to create a new tenancy in respect of the top-floor flat as early as Sept. 7, or earlier. It is said that Marshall was an agent of the Orchards to manage the property at the material dates on behalf of the Orchards, and also that, by representing to Long, at any rate from the end of August, 1948, that Marshall was the landlord, they would be estopped from denying that he was the legal owner of the property from that date. Therefore, by estoppel, any tenancy granted by Marshall would be effective against the
- E Orchards, and would also be effective against the building society, whose title is derived from and based on the title of the Orchards.

- I seems to me that both branches of that argument fail. I see no reason to suppose that Marshall was in any way made the agent of the Orchards, nor do I think any estoppel was created against them. There was a representation, according to Long's evidence, that Marshall was to become the landlord, but
- F that statement seems to be an ambiguous statement which is perfectly consistent with the facts, which are that at that date Marshall had agreed to purchase the property in question and was, therefore, in equity the owner of it by virtue of his contract. Either coincidentally with or immediately before the creation of the legal charge, however, Marshall had become the legal owner of the freehold in the property, and, therefore, when he became the legal owner of the freehold
- G he was in a position to implement the oral contract for a tenancy which he had made with Long. It is true that it appears that to create any such tenancy was a breach of faith, to say the least of it, as regards the building society, because in the application for an advance and in his acceptance of the advance he had stated that he would be in possession of the top-floor flat. Further, it is equally clear that, once he had executed the legal charge, it was a breach of his contract
- H contained in the legal charge to create any tenancy without the consent of the building society, and as from that date any tenancy which he created would be void as against the building society, as mortgagors.

I am bound, it is said, by the decision of HARMAN, J., in *Coventry Permanent Economic Building Society v. Jones* (1) to hold that these transactions for the acquisition of the property and the mortgaging of it to the building society represent, and are to be regarded as, one transaction, so that there was no *scintilla* of time by virtue of which Marshall, as the legal owner of the property,

was free to deal with it as he chose and not yet be subject to the legal charge to the society. In that case the mortgagor had agreed to buy the property for £1,800 on Feb. 15, 1949. On Feb. 16, Mrs. Jones, the purchaser (who was the mortgagor also), entered into an agreement with her tenants for a tenancy at the rate of 25s. a week of a flat in the house which she had contracted to buy, which tenancy was to commence on the day the tenants should take possession of the flat as provided in cl. 2 of the agreement. Clause 2 of the agreement provided that the tenants would, within fourteen days after the landlord (Mrs. Jones) should have repaired and re-decorated the said flat, surrender to the landlord the tenancy of a dwelling-house which they already held as her tenants and yield the same up to her. It appeared that the building society in that case agreed to make an advance of £1,440 to the mortgagor to enable her to complete her purchase. That means, of course, that they were prepared to make the advance and not that they bound themselves legally so that they could be compelled to make any such advance. On Mar. 16, 1949, the mortgagor let the tenants into possession and gave them a rent book. On Mar. 18 the property was conveyed to the landlord by the vendor in consideration of the sum of £1,800 expressed to be paid by her. At the same time she mortgaged the property by demise to the building society for the usual term of three thousand years, subject to redemption, to secure the £1,440, the obligation being to pay it back by instalments in the usual way. The statutory power of the mortgagor to create leases was excluded by that document. HARMAN, J., said ([1951] 1 All E.R. 903):

“After that, therefore, she could create no lease without the leave of the mortgagees which would be binding against them. That is shown, if authority for it be needed, by *Dudley & District Benefit Building Society v. Emerson* (2). It is said, however, that the tenancy of the Misses Mason preceded the rights of the mortgagees in this way. There is an old doctrine (none the worse for being old) that if A purports to create a lease in B's favour, A having no estate sufficient to support the lease, then, if A afterwards acquires a sufficient estate, he will be bound not to deny that he always had a good right to create the tenancy and the lease is said to take effect by estoppel. That doctrine, it is argued, applies here. The giving of a rent book to the tenants on Mar. 16, 1949, created, it is said, a tenancy by estoppel which was immediately effective when the grantor acquired the legal estate in fee simple, which she did by the conveyance to her on Mar. 18, 1949, and there must be predicated a *scintilla temporis* between the conveyance to her and the mortgage by her into which the tenancy by estoppel can be inserted so as to get precedence to the mortgage of the building society. The question is whether I must assume the *scintilla temporis* and assume that because of the obligations of the landlord she must be held to have defrauded her mortgagee by creating a tenancy which is good against the society although it was not willing to lend the money except on the footing that she had no such right. I do not see why I need postulate this. The whole transaction was one transaction. The vendor would not sell without receiving his purchase money, and the mortgagee would not provide the purchase money without receiving the term of years. The money, in fact, went straight—as is the universal practice—from the mortgagee to the vendor, and not until it was in the vendor's hands would a legal estate be created either in favour of the landlord or of the mortgagee. It seems to me that the whole thing is one transaction in substance, and I am not constrained to introduce an artificiality so as to affect the rights of the building society. Consequently, I reject the argument that the doctrine of estoppel must have created in the tenants an estate in priority to that of the building society. The grantor of the so-called tenancy would never have acquired the estate which she did acquire but for that mortgage money, and

it would not be right, therefore, to introduce a fiction in the manner suggested."

So far as morality is concerned, in the present case there is not a great deal between the position of the building society and Long. Each has, no doubt, been deceived by Marshall. Marshall deceived the building society because he had obtained the advance on the footing that he would be the occupier of the top flat. Marshall deceived Long because he never told him of the proposed borrowing from the building society and led him to suppose that he was perfectly free to create a tenancy in his favour. There is not much reason for favouring one party more than the other, or for sympathising with the building society rather than the tenant who finds his tenancy threatened. The second point dealt with by HARMAN, J., was the question whether the building society had notice of the tenants' rights. That point he decided against the tenants on the ground that the agreement for a tenancy which the tenants possessed required registration under the Land Charges Act, 1925, as an estate contract within s. 10 (1) C (iv) of that Act, and, therefore, by virtue of the Law of Property Act, 1925, s. 199 (1), owing to failure to register the land charge, the agreement was not effective against the building society as a purchaser for value.

In the present case, so far as that point is concerned, the matter depends on the provisions of the Land Registration Act, 1925. Section 70 (1) of that Act provides:

"All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto, and such interests shall not be treated as incumbrances within the meaning of this Act, (that is to say) . . . (g) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where inquiry is made of such person and the rights are not disclosed."

Therefore, it would appear that, so far as Long's tenancy is concerned, if there is no other reason under which it is to be dismissed as not effective against the building society, it is binding on the building society as an overriding interest under s. 70 (1) (g) of the Land Registration Act, 1925, because it is quite plain that from the beginning of the day, Sept. 13, and, *a fortiore*, on Sept. 28, 1945, Long was in possession of the upper flat of the property concerned. Therefore, by virtue of his occupancy he was an owner of an overriding interest in a manner similar to the old rule that the fact that persons are in possession puts the purchaser on inquiry, and the rights of the building society are subject to his overriding interest and to the rights (whatever they may be) that he has. That factor, at any rate, distinguishes this case from the *Coventry Permanent Building Society* case (1) in respect of HARMAN, J.'s second point.

There remains the point whether I ought to hold, following the decision of HARMAN, J., that the transaction by which Marshall acquired and passed on the legal estate to the building society is so entirely one transaction that there was no moment of time between the acquisition of his estate and the mortgage to the building society in which an estate by estoppel could be created in favour of Long. I think it is clear from the judgment of HARMAN, J., that, if there had been any appreciable interval, he would have held that an estate was completed by estoppel under the rule which he says is an old rule but none the worse for that. The terms of the mortgage in *Coventry Permanent Building Society v. Jones* (1) are not set out in the report, nor does the argument of counsel appear, so I am unable to ascertain whether there was in that mortgage anything in the terms of the recital which I find in the present legal charge. In view of my inability to ascertain that fact, I do not feel that I ought to follow that decision in a matter which seems to me to be of considerable

doubt, and which, unless the former case is exactly similar to the case I have now, I do not feel is necessarily concluded beyond argument. It seems to me that a mortgagee who has inserted in the deed under which he acquires title a statement that the mortgagor is the estate owner in respect of the property which is being mortgaged or charged to the mortgagee cannot object if that statement is taken to be true. It seems to me that the irresistible inference is that I must presume that the transfer must have been executed at a time earlier than the charge to the building society, so that there was a time at which it would be correct to say that the mortgagor had become the estate owner, *i.e.*, the legal owner of the fee simple of the property which was subsequently by him charged to the building society to secure the amount of his loan.

If I reach that conclusion it seems to me to follow that the tenancy which the mortgagor attempted to create while equitable owner in favour of Long was confirmed by estoppel, that at the moment when the legal charge was executed Long had a legal tenancy of the portion of the land in respect of which he was in possession, and that that was prior to the mortgage and must rank in priority to it. The tenancy is not, therefore, within the stipulation in the mortgage that leases should not be made of the property subject to the mortgage without authority of the building society. I come to the conclusion that the defendant Long has an effective weekly tenancy, and to that extent he is entitled to retain possession against the building society.

Order accordingly.

Solicitors: *A. E. Shrimpton* (for the plaintiff); *W. A. G. Davidson & Co.* (for the second defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

CAREY AND OTHERS v. HEATH.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Pilcher, JJ.), October 10, 11, 1951.]

Street Traffic—Licence—General trade licence—Break-down van used by repairer and dealer for towing for hire—Road Vehicles (Registration and Licensing) Regulations, 1949 (S. I., 1949, No. 1618), reg. 29, art. D (1).

Street Traffic—Trailer—"Not more than two wheels"—Motor vehicle with four wheels towed after break-down with two wheels on the road—"Motor car"—Break-down lorry—Road Traffic Act, 1930 (c. 43), s. 17 (1)—Motor Vehicles (Construction and Use) Regulations, 1947 (S.R. & O., 1947, No. 670), reg. 85 (iii).

A motor car dealer who held general trade licences used break-down vans to haul for hire and reward defective motor vehicles belonging to a government department to a repair depot, but he himself did not perform any of the repairs. Each break-down van was fitted with a crane and chain by means of which the front wheels of the lorry being towed were raised so that only the two rear wheels remained in contact with the road. No person in addition to the driver of the break-down van was carried on that vehicle or on the towed vehicle.

HELD: (i) the towing of broken-down motor vehicles for hire or reward was not part of the business of a manufacturer or repairer of or dealer in mechanically propelled vehicles, and there was, therefore, a use of the general trade licences in breach of reg. 29, art. D (1), of the Road Vehicles (Registration and Licensing) Regulations, 1949.

(ii) a four-wheeled motor vehicle did not become a trailer with two wheels within the meaning of reg. 85 (iii) of the Motor Vehicles (Construction and Use) Regulations, 1947, because, while it was being towed only two wheels

remained on the ground, and so, there having been no person employed to attend to the trailer, the exception provided by reg. 85 (iii) of the Motor Vehicles (Construction and Use) Regulations, 1947, did not apply, and an offence had been committed against s. 17 (1) of the Road Traffic Act, 1930.

Semble: A break-down van is a motor car within the meaning of reg. 85 (iii).

Language used by HILBERY, J., in Garner v. Burr ([1950] 2 All E.R. 685), explained.

AS TO GENERAL TRADE LICENCES, see HALSBURY, Hailsham Edn., Vol. 28, pp. 426, 427, paras. 924, 925; and FOR CASES, see DIGEST Supp.

FOR THE DEFINITION OF TRAILER, see HALSBURY, Hailsham Edn., Vol. 31, pp. 764-766, paras. 1187, 1188, and 1951 Supplement.

Case referred to:

(1) *Garner v. Burr*, [1950] 2 All E.R. 683; 114 J.P. 484; 2nd Digest Supp.

CASE STATED by Leicestershire justices.

At a court of summary jurisdiction, sitting at Market Harborough, informations were preferred by the respondent, an inspector of police, charging against the first appellant that by the hand of his servant he used a motor lorry under a general trade licence for a purpose other than the purpose for which such licence was authorised to be used, namely, that he used it to convey damaged motor vehicles for the Ministry of Supply, contrary to the Road Vehicles (Registration and Licensing) Regulations, 1949, reg. 29, art. D, and also that he caused the said vehicle, while drawing a four-wheeled trailer, to be driven on a highway without having one person in addition to the driver of the lorry for the purpose of attending to the trailer, contrary to the Road Traffic Act, 1930, s. 17. Informations against the second and third appellants, the drivers of the vehicle in question, charged them with aiding and abetting the first appellant in the commission of the second offence.

The first appellant was a director of a company whose objects, *inter alia*, were the carrying out of transactions in relation to the hiring, retailing, and general marketing of all kinds of private and commercial motors and automobiles. He held general trade licences as nominee of the company. A motor lorry belonging to the company was used for hire or reward to haul damaged lorries belonging to the Ministry of Supply from one Ministry depot to another. The lorry was fitted with a crane and chain by which the front wheels of the vehicle being towed were lifted off the road so that only the rear wheels were in contact with it. Neither the first appellant nor his company was responsible for carrying out any repairs or other work on those vehicles. The general trade licences had been issued by the Buckinghamshire County Council with the knowledge that the licences would be used in connection with the towing of damaged vehicles for the Ministry.

It was contended for the appellants (a) that the motor lorries were trailers with no more than two wheels drawn by a motor car within the meaning of reg. 85 (iii) of the Motor Vehicles (Construction and Use) Regulations, 1947; and (b) that the towing of motor vehicles for hire or reward was a purpose connected with the business of a dealer in mechanically propelled vehicles within the meaning of the Road Vehicles (Registration and Licensing) Regulations, 1949, reg. 29, art. D (4), since in the absence from the regulations of any definition of the word "dealer" it should be given its fullest meaning, and, alternatively, if the meaning was restricted to one who buys, sells or barterers, the first appellant was a dealer by virtue of the memorandum of association of the company on whose behalf he held the licences. For the respondent it was contended that the proviso in reg. 85 (iii) did not apply inasmuch as the lorries being towed were not "trailers with not more than two wheels" within the Motor Vehicles (Construction and Use) Regulations, 1947, reg. 85 (iii), and that the

use of general trade licences for haulage for hire or reward was not within the course of business of the first appellant as a dealer in mechanically propelled vehicles.

The justices were of the opinion that it was necessary that one person in addition to the driver should be carried on the towing vehicle and also that the towing of lorries for hire or reward was not part of the first appellant's business as a dealer in mechanically propelled vehicles, and, accordingly, they found all the offences proved. In view of the circumstances they discharged the appellants absolutely on payment of £1 ls. costs by the first appellant.

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E. D. Lewis for the appellants.

Havers for the respondent.

LORD GODDARD, C.J.: This case is a striking instance of the extraordinarily complicated questions which can be submitted to lay justices by reason of the provisions of the Road Traffic Acts and the enormous number of regulations and orders issued thereunder. The justices have dealt properly with this case. They convicted the appellants and granted absolute discharges, because obviously nobody intended to evade the law.

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The appellants were summoned in connection with the use of a motor lorry, which was licensed under a general trade licence, for a purpose other than the purpose for which such licence was authorised to be used, namely, for the purpose of conveying motor vehicles for the Ministry of Supply, contrary to the Road Vehicles (Registration and Licensing) Regulations, 1949, reg. 29, art. D. I will deal first with that summons. The first appellant is a director of a company and the other appellants are employed by the company. The company had a contract with the Ministry of Supply for hauling motor lorries that had broken down from one depot of the Ministry to another where they would be repaired. Neither the first appellant nor the company had anything to do with repairing the vehicles. All they had to do was to haul them. The company deals in motor cars, and the first appellant had personally been granted certain trade licences, generally called trade plates. These are granted to motor car dealers to enable them to take cars to show customers and for other purposes in connection with their business. Trade plates are a privilege, and the current regulations dealing with them are the Road Vehicles (Registration and Licensing) Regulations, 1949, reg. 29, art. C, of which, in Part II of the regulations, provides:

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"A general trade licence shall not be used by any person other than the person to whom the same is issued and the person to whom the same is issued shall not allow or suffer the licence or the plates issued in connection therewith to be used by any other person but no offence under this article shall be deemed to have been committed if the person to whom the licence is issued or a person *bona fide* in his employ and acting under his authority is present and in charge of the vehicle or if such vehicle is constructed for use by one person only and is being used by a prospective purchaser for the purpose of test or trial."

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That throws some light, because the prospective purchaser is mentioned.

Article D (1), the important article in this case, provides:

"A general trade licence shall not be used upon any vehicle other than a vehicle which is in the possession of the holder of such licence in the course of his business as a manufacturer or repairer of or dealer in mechanically propelled vehicles or is a mechanically propelled vehicle which is for the time being laid up by its owner."

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That is perfectly clear in its terms and there is no question for what purposes a trade licence can be used. Manufacturers have trade licences to enable them to convey their cars to different places for sale. Repairers often fetch cars for repair, or cars which are to be laid up for storage, and a repairer can use his trade licence

to drive such cars to his garage. A dealer in mechanically propelled vehicles uses a trade licence because he wants to show his cars to prospective purchasers. He may have to drive his car to a show or to a purchaser's house so that the purchaser can see the car, and, perhaps, test it and drive it. The object of these trade licences is to permit the use of motor vehicles on the road in connection with those purposes although the licence duty has not been paid.

A There is no doubt in my mind that regulations prescribing the purposes for which a trade licence can be used must be strictly construed, but I do not think any question of a strict or a liberal construction arises here. I think the words are really too clear for argument. A haulage contractor is not in business as a manufacturer or repairer of, or dealer in, mechanically propelled vehicles. He may have another business—as in this case—of a repairer or dealer, but, when B he is acting as a haulage contractor, he is not engaged in his business as a manufacturer, repairer, or dealer. Therefore, in my opinion, the justices came to a right decision when they found “that the towing of motor lorries for hire or reward was not part of the business of a dealer in mechanically propelled vehicles,” and convicted on that summons.

C The other questions that have been raised are of greater difficulty, and I hope that the attention of the appropriate Ministry may be drawn to them, as it may be that some amendment or clarification of the regulations is desirable to prevent the difficult questions that arise in this case arising again. The justices have submitted two questions to us. First, they ask whether, in the circumstances which I will mention in a moment, a lorry which was being towed by a break-down car is to be regarded as a trailer with not more than two wheels; secondly, D they ask whether the towing vehicle, which was fitted with a crane, was or was not a motor car within the meaning of s. 2 of the Road Traffic Act, 1930.

E In this case there was used a break-down van fitted with a crane and chain so that the front wheels of the vehicle being towed were lifted off the road, only the rear wheels being in actual contact with the road. The question raised here is whether the vehicle being towed is to be regarded as a two-wheeled trailer and whether the vehicle towing is to be regarded as a motor car. That depends on the complicated definitions which are to be found in the Road Traffic Act, 1930. First, I will deal with the question whether the lorry which was being towed is to be regarded as a two-wheeled trailer. Section 1 of the Act refers to trailers as “vehicles drawn by motor vehicles.” There is not much difficulty about that. If a vehicle is being drawn by a motor vehicle, whatever F sort of vehicle it is, the vehicle which is being drawn and is not proceeding under its own power is a trailer. That is the only definition in the Act which deals with a trailer. Section 17 (2) of the Act provides:

G “Where a motor vehicle other than a heavy locomotive or a light locomotive is drawing a trailer or trailers on a highway, one person, in addition to the driver of the vehicle, shall be carried either on the vehicle or on a trailer for the purpose of attending to the trailer or trailers.”

H The offence alleged to have been committed here was that there was only one man, the driver, in attendance on the motor car and he was not accompanied by a second person, and the question whether an offence has been committed depends on certain exceptions which have been grafted on s. 17 by regulation. The Motor Vehicles (Construction and Use) Regulations, 1947, reg. 85, provides:

“The requirements of s. 17 of the Road Traffic Act, 1930, with regard to the employment of drivers and attendants shall not apply . . . (iii) where a trailer with not more than two wheels is drawn by a motor car or a motor cycle.”

It is said that these lorries which were being drawn were trailers with not more than two wheels because in each case two of the wheels were lifted off the road at the material time, and it was contended that support for that argument

is contained in the definition section of the regulations, reg. 3 (1), which provides:

“ . . . Wheel in the case of a motor vehicle or trailer means a wheel, the tyre of which when the vehicle is in motion on a road is in contact with the ground.”

The question is, therefore, neatly put in this way: Does a vehicle with four wheels which, if it had not broken down but was being used in the ordinary way as a vehicle and would be a four-wheeled vehicle, become a two-wheeled vehicle because it has broken down and for the purpose of moving it two of the wheels are raised and held above the ground? In my opinion, that is not a possible construction. I think it is well known that the sort of trailer referred to in art. 85 (iii) is a trailer with not more than two wheels, like a caravan or a trailer used to carry goods. It is really impossible to say that a large four-wheeled lorry can be regarded as a trailer with not more than two wheels merely because at the time it is being towed two of the wheels are off the ground. This order relates to construction as well as to use and this trailer is, by construction, a four-wheeled vehicle. It is true that at the moment it is being towed only two wheels are on the ground, but it has four wheels and all of those wheels and the tyres of all those four wheels would, when the vehicle is in motion on a road, be in contact with the ground. I find myself unable to say, because, when a lorry is being towed, two wheels are lifted off the ground, that the lorry thereby becomes a two-wheeled and not a four-wheeled lorry. I think it remains a four-wheeled vehicle. That being so, there was a breach here of s. 17 (1).

The justices have also asked our opinion—and we have had the advantage of an argument about it from counsel for the appellants—whether or not the break-down van was a “motor car” within the meaning of reg. 85 (iii) of the Motor Vehicles (Construction and Use) Regulations, 1947. It is not necessary for us to give an opinion on that and I do not think any *obiter* remarks from this court would be of real assistance in future cases. I content myself with saying, as the justices have asked the question, that the inclination of my mind is that, applying all the different sections and definitions which are to be found in the regulations and the Road Traffic Acts, it is a motor car provided it is under three tons in weight, but it is not necessary to give a decision on that point. The justices have come to a right decision in convicting on both the summonses and this appeal will be dismissed.

HILBERY, J.: I agree. I have nothing to add to my Lord's judgment, but I take this opportunity, as the decision of this court in *Garner v. Burr* (1) has been cited, to say that in that case ([1950] 2 All E.R. 685), I used a word in giving an extemporary judgment which was, I think, most unfortunate. I spoke of giving a “generous construction” to s. 1 of the Act of 1930. The word “generous” was, I think, inapt and certainly inaccurate to express what I wanted to express. I say that because I feel that the word as used there might be taken as an indication that I was departing from the ordinary and accepted rule of construction of penal sections. I certainly did not intend to depart in any way from the ordinary canon of construction of penal sections. What I had in mind was to say that we ought to give an ordinary, and not a strictly technical, construction to the words in that section if they were used in a popular sense.

PILCHER, J.: I agree.

Appeal dismissed.

Solicitors: *Ellis & Ellis*, agents for *Horwood & James*, Aylesbury (for the appellants); *Bennett, Ferris & Bennett*, agents for *Bray & Bray*, Leicester (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

BANK VOOR HANDEL EN SCHEEPVAART v. SLATFORD
(sued as CUSTODIAN OF ENEMY PROPERTY) AND ANOTHER.

[KING'S BENCH DIVISION (Devlin, J.), June 27, 28, 29, July 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 30, 1951.]

Conflict of Laws—Decree of foreign government affecting movables situate outside its jurisdiction—Gold belonging to Dutch bank and deposited in London—Vested in and sold by Custodian of Enemy Property after occupation of Netherlands by Germany—Netherlands government decree purporting to vest property of bank in Netherlands government—Trading with the Enemy Act, 1939 (c. 89), s. 7—Trading with the Enemy (Custodian) Order, 1939 (S.R. & O., 1939, No. 1198), art. 4.

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Peace Treaty—Hungary—Charge on property within United Kingdom territory and belonging to Hungarian national—Gold and bank balances belonging to Dutch company—Shares of company held by Hungarian national—"Property, rights or interests . . . belonging to or held or managed on behalf of . . . a Hungarian national"—Order for recovery of property from Administrator of Hungarian Property—Right of court to award interest—Treaty of Peace (Hungary) Order, 1948 (S.I., 1948, No. 116), art. 1 (2), (3), (5) (g).

The plaintiff bank was a limited company carrying on business in Holland, all the shares of which were owned from 1936 until 1947 by a Hungarian national, resident and domiciled in Switzerland. After his death in 1947, 62½ per cent. of the shares were owned by a Hungarian national. On the outbreak of the war in 1939 a quantity of gold belonging to the bank was in safe deposit in London and there were also due to the bank certain balances from banks in London. The plaintiff bank retained its commercial domicile in Holland after the invasion of that country by Germany in May, 1940, and, as a result, it acquired enemy character, which it retained until the end of hostilities. On May 24, 1940, the Royal Netherlands government, then in exile in London, issued the A.1 Decree, the object of which was to entrust to the State for as long as was necessary property belonging to persons resident in occupied Netherlands so as to prevent it from being used in a manner incompatible with the interests of the Netherlands. Subject to its enforceability by the English courts, the decree was effective to transfer to the Netherlands State the property in the gold and in the bank balances. On July 3, 1940, under the Trading with the Enemy Act, 1939, s. 7, and the Trading with the Enemy (Custodian) Order, 1939, the Board of Trade made a vesting order transferring the gold to the Custodian of Enemy Property. By art. 4 of the order of 1939 no person could deal with the property of an enemy, save as provided in the order, without the consent of the Board of Trade. On July 24, under an order of July 22, the Custodian sold the gold and retained the proceeds as enemy property. On Dec. 7, 1941, the United Kingdom and Hungary became at war. By art. 29 of the Treaty of Peace between Hungary and the United Kingdom, which was concluded on Feb. 10, 1947, the United Kingdom had the right to seize, retain and liquidate all property, rights and interests which were then within its territory and belonged to Hungarian nationals and to apply such property or the proceeds thereof to such purposes as the United Kingdom might desire within the limits of its claims against Hungarian nationals. The Treaty of Peace (Hungary) Order, 1948, gave effect to art. 29 of the treaty, and art. 1 (2) of the order provided that all "property, rights or interests" to which the order applied were to be charged with the amounts due at the date when the treaty came into force in respect of claims against the Hungarian government or Hungarian nationals. By art. 1 (3) of the order the property charged was "any property, rights or interests within His Majesty's dominions . . . belonging to or held or managed on behalf of the government of Hungary or a Hungarian

national . . .” By a direction to release, dated Jan. 26, 1948, and made under the order of 1948, all property of a Hungarian national resident in non-enemy territory, except property subject to a vesting order under the Act of 1939, was released from the charge. After the end of hostilities, the plaintiff bank was under the control of the Netherlands government until July, 1948, when the control was removed. In April, 1950, on a demand by the Administrator of Hungarian Property, made under art. 1 (5) (e) of the order of 1948, the proceeds of the sale of the gold and the bank balances were transferred to him by the Custodian of Enemy Property as property subject to the charge imposed by the order. On May 19, 1950, the Netherlands government made an order making restitution to the bank of property taken under the A.1 Decree, and the bank demanded from the Custodian and the Administrator the proceeds of the sale of the gold and the bank balances.

HELD: (i) foreign legislation purporting to have effect over property within the territory of the United Kingdom would not be recognised by the English courts, it being immaterial (a) whether or not the legislation was confiscatory, and (b) that it was the legislation of an allied government made with the purpose of keeping property out of the hands of a common enemy; the question whether foreign legislation should, in particular circumstances, be recognised on the ground of public policy was a matter, not for the courts, but for the legislature; and, therefore, the A.1 Decree of the Netherlands government was ineffective to transfer the gold or the bank balances to that government, and, as they became subject to the control imposed by the Trading with the Enemy Act, 1939, on the occupation of the Netherlands by Germany in May, 1940, they were rightly vested in the Custodian of Enemy Property, and he was not liable in respect of them to the bank.

El Condado (1939) (63 Lloyd L.R. 330), applied.

Lorentzen v. Lydden & Co., Ltd. ([1942] 2 K.B. 202), not followed.

(ii) the object of the order of 1948 being to give effect to the Treaty of Peace between Hungary and the United Kingdom, the words “property, rights or interests . . . belonging to or held or managed on behalf of . . . a Hungarian national” in art. 1 (3) of the order of 1948 were intended merely as an elucidation of the words “property, rights and interests which . . . belong to . . . Hungarian nationals” in art. 29 of the treaty, and they were not intended to add something substantial to the word “belong”; therefore, as the property of a company “belonged” to the company and not to its shareholders, the gold and the bank balances were not “property, rights or interests . . . belonging to or held or managed on behalf of . . . a Hungarian national” within the meaning of art. 1 (3) of the order, notwithstanding that the majority shareholder of the plaintiff bank was a Hungarian national, and, accordingly, they were not subject to the charge imposed by art. 1 (2) of the order, and, under art. 1 (5) (g) the bank was entitled to recover them from the Administrator.

(iii) the power of the court to award interest was not a separate and additional remedy but a relief ancillary to the right under art. 1 (5) (g) to recover from the Administrator property not subject to the charge, and, therefore, the court had a discretion to award interest, and, in the circumstances, interest was to run from the date on which the bank balances and the proceeds of the sale of the gold reached the Administrator.

FOR THE TRADING WITH THE ENEMY ACT, 1939, see HALSBURY'S STATUTES, Second Edn., Vol. 26, p. 326.

Cases referred to:

- (1) *A/S Tallinna Laevauhisus v. Tallinn Co., Ltd.*, (1946), 175 L.T. 285; 2nd Digest Supp.

- (2) *R. v. Paddington & St. Marylebone Rent Tribunal. Ex p. Bedrock Investments, Ltd.*, [1948] 2 All E.R. 528; [1948] 2 K.B. 413; [1949] L.J.R. 284; 112 J.P. 367; 2nd Digest Supp.
- (3) *R. v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Marks*, [1951] 2 All E.R. 465.
- (4) *Lorentzen v. Lydden & Co., Ltd.*, [1942] 2 K.B. 202; 111 L.J.K.B. 327; 167 L.T. 363; 2nd Digest Supp.
- A (5) *O/Y Wasa Steamship Co., Ltd. v. Newspaper Pulp & Wood Export, Ltd.*, (1949), 82 Lloyd L.R. 936.
- (6) *El Condado*, (1939), 63 Lloyd L.R. 330.
- (7) *Lecouturier v. Rey*, [1910] A.C. 262; 79 L.J.Ch. 394; 102 L.T. 293; 11 Digest 360, 421.
- B (8) *Sedgwick Collins & Co. v. Rossia Insurance Co. of Petrograd*, [1926] 1 K.B. 1; 95 L.J.K.B. 7; 133 L.T. 808; *affd.* H.L. *sub nom. Employers' Liability Assurance Corp'n. v. Sedgwick Collins & Co.*, [1927] A.C. 95; 95 L.J.K.B. 1015; 136 L.T. 72; Digest Supp.
- (9) *The Jupiter* (No. 3), [1927] P. 122; 96 L.J.P. 62; *affd.* C.A. [1927] P. 250; 97 L.J.P. 33; 137 L.T. 333; Digest Supp.
- C (10) *Re Russian Bank for Foreign Trade*, [1933] Ch. 745; 102 L.J.Ch. 309; 149 L.T. 65; Digest Supp.
- (11) *Monkland v. Jack Barclay, Ltd.*, [1951] 1 All E.R. 714; [1951] 2 K.B. 252.
- (12) *Egerton v. Brownlow (Earl)*, (1853), 4 H.L. Cas. 1; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 10 E.R. 359; 12 Digest 240, 1971.
- (13) *Anderson v. N.V. Transandine Handelsmaatschappij*, (1942), 28 New York Supplement, 2nd series, 547; *affd.* 289 New York Reports 9.
- D (14) *United States v. Belmont*, (1937), 301 United States Reports 324.
- (15) *Salomon v. Salomon & Co. Salomon & Co. v. Salomon*, [1897] A.C. 22; 66 L.J.Ch. 35; 75 L.T. 426; 9 Digest 34, 11.
- (16) *Macaura v. Northern Assurance Co.*, [1925] A.C. 619; 94 L.J.P.C. 154; 133 L.T. 152; Digest Supp.
- E (17) *E.B.M. Co., Ltd. v. Dominion Bank*, [1937] 3 All E.R. 555; Digest Supp.
- (18) *Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (Great Britain), Ltd.*, [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 9 Digest 541, 3565.
- (19) *The Noordam* (No. 2), [1919] P. 255; *varied* H.L., [1920] A.C. 904; 89 L.J.P. 234; 123 L.T. 477; 37 Digest 605, 465.
- F (20) *Standard Oil Co.'s Claim*, (1926), British Year Book of International Law, 1927, p. 156.
- (21) *Re Miller. Ex p. Official Receiver*, [1893] 1 Q.B. 327; 62 L.J.Q.B. 324; 68 L.T. 367; 57 J.P. 469; 4 Digest 472, 4265.
- (22) *Driefontein Consolidated Gold Mines, Ltd. v. Janson*, [1901] 2 K.B. 419; 70 L.J.K.B. 881; 85 L.T. 104; *affd. sub nom. Janson v. Driefontein Consolidated Gold Mines, Ltd.*, [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 22 Digest 318, 3123.
- G (23) *Heritable Reversionary Co. v. Millar*, [1892] A.C. 598; 42 Digest 630, 323.
- (24) *British Thomson-Houston Co. v. Sterling Accessories, Ltd. British Thomson-Houston Co. v. Crouther & Osborn, Ltd.*, [1924] 2 Ch. 33; 93 L.J.Ch. 335; 131 L.T. 535; Digest Supp.
- H ACTION by a Dutch banking company claiming *inter alia* (i) a declaration that the first defendant, the Custodian of Enemy Property, was a trustee for the State of the Netherlands, and for the plaintiffs, of gold deposited in London of which the plaintiffs were the owners immediately before May 24, 1940, and of balances due at that time to the plaintiffs from certain banks in London, and that he was liable to account to the plaintiffs for the same and all interest and dividends accruing thereto; (ii) damages against the first defendant for conversion of the gold; (iii) a declaration that sums transferred by the first defendant

to the second defendant, the Administrator of Hungarian Property, in April, 1950, being the sum received by the first defendant on the sale of the gold and the sum total of the bank balances (less a fee retained by the Custodian under the Trading with the Enemy (Custodian) Order, 1939, art. 7), were not subject to any charge imposed by the Treaty of Peace (Hungary) Order, 1948, and that the plaintiffs were absolutely entitled to them; and (iv) an order for recovery of the sums with interest thereon. The gold was vested in the first defendant by a vesting order, dated July 3, 1940, made by the Board of Trade under the Trading with the Enemy Act, 1939, s. 7, and the Trading with the Enemy (Custodian) Order, 1939, and was sold by him on July 24 under a power of sale contained in an order made under the Act and order of 1939, and dated July 22. The bank balances were paid to the first defendant under instructions contained in letters from him, dated Jan. 19, 1950, as moneys held by the banks since May 20, 1940, for his account and subject to his directions. The plaintiffs contended, *inter alia*, that the orders made in July, 1940, under the Act and order of 1939 were invalid, because under the A.1 Decree of the Netherlands government, made on May 24, 1940, the gold and the bank balances vested in the Netherlands State and, therefore, were not enemy property, and that they were returned to the plaintiffs by an order of the Netherlands government, dated May 19, 1950, making restitution to the plaintiffs of the property taken under the decree. The defendants contended, *inter alia*, (a) that a decree made by a foreign government was not effective to transfer property situate in England, and, therefore, the gold and the bank balances, having become enemy property within the meaning of the Act of 1939 on the invasion of the Netherlands by Germany in May, 1940, were rightly vested in the first defendant and he was not liable to the plaintiffs for the conversion of the gold, and (b) that the sums transferred by the first defendant to the second defendant were "property, rights or interests . . . belonging to or held or managed on behalf of . . . a Hungarian national," within the meaning of the Treaty of Peace (Hungary) Order, 1948, art. 1 (3), as, until 1947, all the plaintiffs' shares were owned by a Hungarian national and from 1947 a majority of the shares was owned by a Hungarian national, and, therefore, the sums were subject to the charge imposed by the order and the plaintiffs were not entitled to them.

Sir Walter Monckton, K.C., Foster, K.C., and Littman for the plaintiffs.

The Solicitor-General (Sir Lynn Ungoed-Thomas, K.C.), Upjohn, K.C., J.P. Ashworth and R. J. Parker for the defendants.

Barrowclough, a watching brief for the Royal Netherlands government.

Cur. adv. vult.

July 30. **DEVLIN, J.**, read the following judgment. This is a claim by the plaintiff bank in respect of property taken by one or other or both of the defendants and consisting mainly of gold. The claim is for a sum which at its highest is £2,947,762 and at its lowest £1,962,120. The claim arises out of the outbreak of war and turns on the effect of trading with the enemy and treaty of peace legislation and also on the enforceability of a Dutch war-time decree.

The plaintiff bank is a Netherlands limited company which, so far as it is material to this case, has all the legal characteristics of an English limited company. It was incorporated in 1918 and was from the start one of the commercial interests of the German family of Thyssen, a family which had large interests in coal and iron in the Ruhr. The member of the family with which this case is principally concerned is Baron Heinrich Thyssen-Bornemisza. He was a Thyssen who married into the Hungarian family of Bornemisza and himself acquired Hungarian nationality in 1906. I shall refer to him as the baron. The Thyssen interests in the plaintiff bank are not simple to unravel since a number of holding companies is involved, but it is clear that from 1926 onwards the baron held a controlling interest in the bank, and from 1936 onwards he owned directly or indirectly all the shares in the bank. In 1932 he went to reside

at Lugano in Switzerland where he acquired a Swiss domicil and remained until his death on June 26, 1947. At his death he was still the sole owner of the shares in the plaintiff bank, still domiciled in Switzerland and still a Hungarian national.

The plaintiff bank, although it originated as a family concern, carried on a normal banking business. Before the war and as part of its ordinary business, it deposited with the City Safe Deposit in London a quantity of gold. The gold was there at the outbreak of war on Sept. 3, 1939, when the Trading with the Enemy Act, 1939, came into force. The Custodian appointed under the Act was aware of this deposit of gold, which he supposed, erroneously, to belong to the German family of Stinnes. He had some communication with the City Safe Deposit about it in September, 1939, but he took no action then. In May, 1940, the Netherlands were invaded and on May 20 they became enemy territory.

The plaintiff bank retained its commercial domicil in Holland, so that it at once acquired, and during the war never lost, enemy character. In addition to its property in the gold, there was due to it on May 20 from various banks in London sundry balances amounting in all to £17,682 17s. 8d. The Royal Netherlands government, as is well known, thereafter with the approval of the British government exercised their sovereign powers from London. On May 24, 1940, they issued a decree, known as the A.1 Decree, containing special provisions regarding property belonging to persons resident in occupied Netherlands. Its object was to prevent such property from being used in a way which was incompatible with the interests of the Netherlands and for that purpose to cause it to be entrusted to the State for so long as might be necessary. It is not disputed that this decree was a valid exercise of the sovereign power of the Netherlands and that, subject to its enforceability by the courts of this country, it was effective to transfer to the State of the Netherlands on May 24 the property in the gold bars and in the bank balances.

On July 3, 1940, the Board of Trade, under the Trading with the Enemy Act, 1939, s. 7, made a vesting order transferring the gold to the Custodian. On July 22 a further order gave the Custodian a power of sale. On July 24 the Custodian sold the gold for the sum of £1,984,120 15s. 5d. and retained the proceeds as enemy property. This last fact was established by the belated disclosure, during the hearing, of two apparently innocuous documents, in respect of which the routine claim for Crown privilege was then waived. The Custodian took no action with regard to the bank balances. Those were, if the trading with the enemy legislation applied to them, payable to him under art. 1 (ii) (e) of the Trading with the Enemy (Custodian) Order, 1939, within fourteen days after May 20, 1940, but were not in fact transferred to him until long after the conclusion of hostilities. On Dec. 7, 1941, the United Kingdom and Hungary became at war with each other. Hungary had in fact been enemy territory for the purpose of the Trading with the Enemy Act since Apr. 8, 1941.

On Oct. 2, 1944, the government of the United Kingdom and the government of the Netherlands entered into an agreement, which has been referred to as the Property Agreement, whose object was to reconcile the A.1 Decree with the trading with the enemy legislation. It provided, broadly, that Netherlands property held under the trading with the enemy legislation should be transferred to the Netherlands government. By Netherlands property was meant, according to correspondence which accompanied the agreement, property belonging to genuine Netherlands persons or concerns which were not subject to control, direct or indirect, by German interests. In the more precise language of the agreement itself, it consisted of property which

“ . . . falls within the definition of enemy property contained in the United Kingdom trading with the enemy legislation and belongs to persons or bodies of persons who are and have been ‘enemies’ within the meaning of the Trading with the Enemy Act solely because they are and have been

resident or carrying on business in Netherlands territory in Europe on and since May 15, 1940."

"Enemy" under the trading with the enemy legislation included much else, of course, besides Germans. It would have included, for instance, Hungarians. Holland and Hungary were never at war, and the main object of the limitation was, doubtless, to ensure that property which was really German property, although in the name of some Netherlands concern, should not be handed back. Under this agreement a committee was set up to determine what was Netherlands property and what was not. This committee did not begin to function until some time after the end of hostilities.

The Treaty of Peace between Hungary and the United Kingdom (Cmd. 7022) was concluded on Feb. 10, 1947. It provided by art. 29, para. 1, that the United Kingdom should have the right to seize, retain and liquidate all property, rights and interests which were then within its territory and belonged to Hungarian nationals and to apply such property or the proceeds thereof to such purposes as the United Kingdom might desire within the limits of its claims against Hungarian nationals, any excess to be returned, and, by art. 29, para. 3, the Hungarian government was to compensate Hungarian nationals whose property was taken under this article and not returned to them. If the treaty had stopped there, it would have meant that friendly Hungarians resident in the United Kingdom might have had all their property taken and been left to be compensated by a government that was, perhaps, hostile to them, so a further provision was made (by art. 29, para. 5 (c)) that the property of Hungarians resident in United Nations territory should not in general be seized. On Apr. 29, 1947, the Treaties of Peace (Italy, Roumania, Bulgaria, Hungary and Finland) Act, 1947, to provide for carrying into effect the Hungarian treaty, among other treaties of peace, received the Royal Assent. In substance it provided simply that Orders in Council might be made to carry out the treaties and to give effect to any of their provisions. The Treaty with Hungary came into operation (it had been subject to ratification) on Sept. 15, 1947. On Jan. 26, 1948, the Treaty of Peace (Hungary) Order, 1948 (S.I., 1948, No. 116) was made, to take effect from Feb. 2, 1948. By this order art. 29 of the treaty was given effect as law. Article 1 (4) of the order set up the office of Administrator of Hungarian Property, and art. 1 (2) provided that all property, rights or interests to which the order applied were thereby charged with the amounts due at the date when the treaty came into force in respect of claims against the government of Hungary or Hungarian nationals. On Feb. 3, 1948, by art. 1 of the Trading with the Enemy (Enemy Territory Cessation) (Hungary) Order, 1948 (S.I., 1948, No. 159), made under the Trading with the Enemy Act, 1939, Hungary ceased to be enemy territory.

Meanwhile, as I have said, on June 26, 1947, the baron had died. Of his estate 62½ per cent. went to his youngest son, whom I shall call Baron Heini, and the remainder in equal shares, *i.e.*, 12½ per cent. each, to his other three children. It is not disputed that Baron Heini had at all material times Hungarian nationality and that the other three children had not at any material time Hungarian nationality. Meanwhile, also, on Nov. 6, 1947, the committee set up under the Property Agreement had held its first meeting. As the result of its deliberations a black list was drawn up by the Trading with the Enemy department of assets which were not to be released without prior investigation as to enemy interests. The property in question in this case was included in this list as being among the cases where there was *prima facie* evidence of substantial enemy interests. It was still at that date erroneously supposed by the Trading with the Enemy Department that some German interest was concerned. What happened in relation to the Property Agreement when it was discovered that the controlling interest was Hungarian I do not know, and the Solicitor-General's instructions do not enable him to throw any light on the matter. The Solicitor-General is, I think, right in saying that the agreement is not justiciable, and that neither

its language nor that of its accompanying letters is suited to legal interpretation. I shall not find it necessary to decide whether, either in the spirit or in the letter, it required the British government to hand over the assets of the bank. The British government, whether justifiably or not, took, I assume, the view that it did not.

- A It was not the object of the treaty to catch the property of all Hungarians resident outside Hungary, but the exclusion of the property of Hungarian nationals permitted to reside in United Nations territory would not apply to the property of a Hungarian national resident in a friendly neutral country such as Switzerland. Accordingly, that situation was covered by a direction to release, made under the Treaty of Peace (Hungary) Order, 1948, and of the same date as the order itself, whereby all property of a Hungarian national resident in non-enemy territory was released from the charge, other than property which B had been subject to a vesting order under s. 7 of the Act. The property of the baron (the Administrator's case being that he was the real owner of the bank's assets) would have qualified for this release, but for the fact that in July, 1940, before England was at war with Hungary, a vesting order was made on it when the Board of Trade were under the mistaken impression that it belonged to a German. The Solicitor-General has quite rightly pointed out that a Hungarian C vesting order, if I may so put it, might, on his case, have been made at any time after April, 1941, but would then have been superfluous because of the Dutch vesting order already in existence. In practice, however, it was only in very exceptional cases that vesting orders were made on the property of Hungarians not resident in Hungary. I do not know whether this is thought to be one of those exceptional cases (if it is, it would be improper for me to inquire D about the reasons for that conclusion) or whether an anxiety to retain by hook or by crook so large a sum as £2,000,000 has moved the authorities to seize on any technicality that will help towards that end. Their silence in the matter (for this is another point on which the Solicitor-General's instructions have not enabled him to shed any light) leaves their attitude open to either construction. Vast powers of this sort, which are almost quasi-judicial in character, are now- E days entrusted to government departments. In wielding them they might bear in mind the judicial maxim that justice should not only be done but should appear to be done. If this be a just and proper exercise of discrimination against the real enemies of Britain, it is, I think, unfortunate that it should come before the court as equally explicable as an attempt by the Board of Trade to collect the unexpected and profitable fruits of a vesting order made, perhaps, in error and F certainly for a different purpose.

- From the end of hostilities until July, 1948, the bank was under Dutch government control. On July 22, 1948, shortly after the control was removed, the bank's solicitors wrote to the Administration of Enemy Property Department requesting that the assets should be released. After a long delay, which I shall have to consider later, the request was refused, and on Apr. 6, 1950, the Administrator, G pursuant to art. (1) (5) (e) of the Treaty of Peace (Hungary) Order, 1948, required the Custodian to transfer the proceeds of the sales and of the bank balances to him. This was done and the total sum, less the fee of approximately £40,000, which the Custodian was authorised to deduct under art. 7 of the Trading with the Enemy (Custodian) Order, 1939, namely, £1,962,852 14s., was paid over to the Administrator. On May 19, 1950, the Netherlands government made an H order making restitution to the plaintiff bank of the property taken under the A.1 Decree and transferring and assigning such property to them. It is not disputed that under both Dutch and English law, subject to the effect of the trading with the enemy and treaty legislation, the ownership of the gold and the bank balances was vested in the bank from that date. On the same date the bank demanded from the Custodian and the Administrator that the property should be transferred to them, and, on that demand being refused, on June 12 1950, they issued the writ in this action.

The property is now in the hands of the Administrator. He obtained it by virtue of a demand made under the terms of the Treaty of Peace (Hungary) Order, 1948, and of a certificate issued in accordance with that order. Article 1 (5) (g) of the order provides as follows:

“a certificate by the Administrator that any property, rights or interests are subject to the charge shall be *prima facie* evidence of the facts stated in the certificate, and where any requirement or demand for payment by the Administrator as aforesaid is accompanied by such a certificate, the person in possession of the property transferable by delivery, or the person by whom a sum of money is due, shall comply with the requirement or demand and shall not be liable to any action or legal proceeding in respect of such compliance, but if it is subsequently proved that the property, rights or interests were not subject to the charge, the owner thereof shall be entitled to recover the same from the Administrator, or if it has been sold, the proceeds of sale, but not to any other remedy.”

Accordingly, no claim, except that authorised by this paragraph, can be made against the Administrator. The plaintiffs have undertaken the burden of proving that the property was not subject to the charge, and that is one of the two main issues which I have to try. The Administrator at one time contended that the bank could not in any event recover the property from him, since, because of the vesting order of July 3, 1940, the Custodian was “the owner” to whom, under art. 1 (5) (g) of the order of 1948, the property should be returned. The Solicitor-General has stated that in the particular circumstances of this case that contention will not be pressed. I presume that, if the property did go back to the Custodian free of the charge, it would eventually be restored to the plaintiffs by way of the Property Agreement.

The claim under the treaty order is against the Administrator and cannot be for more than the proceeds and, possibly, interest thereon. The plaintiffs' larger claim is in the alternative against the Custodian for conversion, and consists in the main of the present value of the gold bars. The value has increased since the sale in 1940 because of the de-valuation of sterling. This is the other main issue which I have to determine. The plaintiffs say that the orders made in July, 1940, under the Trading with the Enemy Act, 1939, were invalid because at that date the property was not enemy property, but, by virtue of the A.1 Decree, the property of the Netherlands government. The substantial question raised, therefore, is whether the A.1 Decree was effective to transfer property situate in this country. These two main issues have ramified into many contentions which have been fully developed before me. I shall deal, not, in what must necessarily be a long judgment, with each of them individually, but only with those points that lie directly in the path that I have taken towards my conclusions.

I shall take first the argument on the A.1 Decree. The Custodian submits that the English courts will not enforce it since they will treat it as having no extra-territorial effect. The plaintiffs' submission is that the general rule is to the contrary. They say that the legislation of a foreign State affecting the title of its nationals to movables in England will be applied by the English courts unless (i) the legislation is contrary to public policy, *e.g.*, confiscatory or penal legislation, or (ii) its application would infringe English legislation. Alternatively, the plaintiffs submit that, if it be the general rule that foreign legislation is not enforceable, then this decree falls within an exceptional category. I think it is convenient to begin by considering what is the general principle of our law with regard to foreign legislation affecting property within our territory. There is little doubt that it is the *lex situs* which as a general rule governs the transfer of movables when effected contractually. The maxim *mobilia sequuntur personam* is the exception rather than the rule and is probably to be confined to certain special classes of general assignments, such as marriage

settlements and devolutions on death and bankruptcy. On this basis the A.1 Decree, not being a part of English law, would not transfer the property in this case. Decrees of this character, however, have received in the authorities rather different treatment. Although there is not, as far as I am aware, any authority which distinguishes general legislation, such as part of a civil code, from *ad hoc* decrees, the effectiveness of such decrees does not appear on the authorities to be determined exclusively by the application of the *lex situs*. Apart from two

A recent cases on which the plaintiffs greatly rely, there has been no case in which such a decree has been enforced in this country, but the grounds for refusing effect to it have been variously put. Sometimes it is said that the decree is confiscatory. In the text-books it is said, sometimes, that, as a matter of public international law, no State ought to seek to exercise sovereignty over property outside its own territory, and, therefore, the principle of comity is against enforcement, and sometimes it is said that the principle of effectiveness is against enforcement, since no State can expect to make its laws effective in the territory of another State. In DICEY'S CONFLICT OF LAWS, 5th ed., p. 20, it is stated:

C "A State's authority, in the eyes of other States and the courts that represent them is, speaking very generally, coincident with, and limited by, its power. It is territorial. It may legislate for, and give judgments affecting, things and persons within its territory. It has no authority to legislate for, or adjudicate upon, things or persons (unless they are its subjects) not within its territory."

The Solicitor-General has argued on principle that no foreign legislation, whether confiscatory or not, can be allowed to affect property in this country. It is beyond dispute that confiscatory legislation will not be allowed to do so, and the Solicitor-General contends that the distinction between confiscatory and non-confiscatory is not a satisfactory one. In *A/S Tallinna Laevauhisus v. Tallinn Co., Ltd.* (1), legislation which provided for compensation amounting to twenty-five per cent. of the value was held to be confiscatory. Presumably, any decree which did not provide for full compensation would be held to be confiscatory. Now that decrees involving State acquisition and requisition are comparatively common, it may not be easy to ascertain whether full compensation is provided for or not. The Compensation (Defence) Act, 1939, places certain limits on the amount of compensation: *e.g.*, no account is to be taken of any appreciation in value due to the war. While that is, doubtless, a healthy rule for British nationals, it might well result in a neutral getting less than the full value of his goods. If a decree, such as the A.1 Decree, contemplates that the property taken is to be preserved for the benefit of its owners and to be returned to them at the conclusion of the war, but contains no legal obligation to that effect, is the hope and expectation that the subject will get his property returned to him sufficient to save it from being confiscatory?

G There are other considerations of principle which can be advanced in support of the defendants' argument. First, in the construction of our own statutory legislation we accept the principle that, unless the contrary is made clear, an Act of Parliament is not intended to have extra-territorial effect. Secondly, the principle, as submitted by the defendants, is in harmony with the principle which favours the *lex situs* generally. Thirdly, if extra-territorial effect is given to foreign property legislation, it can only be at the expense of English law affecting the same subject-matter. This seems to me a point worth detailed consideration. The plaintiffs do not suggest that such legislation could override the express provisions of an Act of Parliament. While, however, it is easy to concede that some limits would have to be imposed, it is not so easy to define what they should be. No foreign legislation could have any effect at all unless the common law, by which, ordinarily, rights of property are governed, is subordinated to it. I know of no authority for distinguishing in this respect between the common law and statute. Some codifying statutes are merely

declaratory of the common law. Moreover, a statute can be affected although its provisions are not expressly overridden. In *R. v. Paddington & St. Marylebone Rent Tribunal. Ex p. Bedrock Investments, Ltd.* (2) and *R. v. Fulham, Hammer-smith & Kensington Rent Tribunal. Ex p. Marks* (3), if I may pick out a recent example of this, the Furnished Houses (Rent Control) Act, 1946, was said to "affect" the Rent Restrictions Acts because they interfered with the scheme of control which the latter Acts set up.

For an example of the sort of interference of this type which foreign legislation might cause, it is unnecessary to go further than the present case. On May 20, 1940, the plaintiffs' gold became subject to the control imposed by the Trading with the Enemy Act, 1939. A vesting order might be made whenever the Board of Trade thought fit. Meanwhile art. 4 of the Trading with the Enemy (Custodian) Order, 1939, provided:

"No person shall, without the consent of the Board of Trade, save as directed by this order, transfer, part with or otherwise deal with the property of any enemy."

The A.1 Decree unwittingly snatched the gold from under the Custodian's hand. The conflict might not always be so direct as that. At the beginning of the war all goods were made subject to requisition by the British government. Should the courts allow that object to be defeated by the legislation of allied or neutral governments endeavouring to further their own war efforts or safeguard the property of their subjects? Could neutral legislation be allowed, for example, to nullify the prerogative right of angary? The plaintiffs submit that these problems can be solved by the application of some principle of public policy. I shall have to consider later that suggested solution. For the moment I say no more than that any rider of the "unruly horse" must feel himself very firmly in the saddle before he undertakes to drag any number of foreign decrees through the thickets of our domestic legislation.

There is one more consideration under this head. Our own statutes may sometimes conflict, but they are, at least, designed to fit in with each other. Foreign legislation cannot be so designed, and it will generally be founded on a basis of property law very different from our own. Our statute law has evolved rules of construction for settling differences as between instruments of equal efficacy, as, for example, *generalia specialibus non derogant*, but these would not help to decide how much room was to be given to subordinate legislation. In short, a principle of private international law that allows property legislation to operate in the territory of another country, so far from being a principle which resolves the conflict of laws, will create a conflict which it will require the formulation of a new system to settle. There seems to me to be every reason, if the authorities permit it, for giving effect to the simple rule that generally property in England is subject to English law and to none other.

There are three comparatively recent authorities in point. In *Lorentzen v. Lydden & Co., Ltd.* (4) ATKINSON, J., decided that a decree of the royal Norwegian government acquiring, in return for compensation, property of its subjects in England was effective to transfer such property to the Norwegian government. In *O/Y Wasa Steamship Co., Ltd. v. Newspaper Pulp & Wood Export, Ltd.* (5) MORRIS, J., followed this decision and applied it to the A.1 Decree which I have to consider in this case. In both these cases the property concerned was a claim for damages for breach of a charterparty. The latter case involved a great number of points and I am told by counsel concerned in the case that the principle in *Lorentzen v. Lydden & Co., Ltd.* (4) was not much debated. The main authority on which the plaintiffs rely is, therefore, *Lorentzen v. Lydden & Co., Ltd.* (4). I think that case is directly in point. I am unable to distinguish it on the ground suggested, viz., that the point that the decree was in conflict with the trading with the enemy legislation was not expressly taken in argument. The defendants rely mainly on *El Condado* (6), a decision

of the Inner House of the Court of Session, and, therefore, of high persuasive authority. The court was considering a claim by the government of the Republic of Spain to the possession of a Spanish ship which the Spanish consul had sought to requisition while she was at Glasgow in accordance with powers granted by a Spanish decree. It does not appear from those parts of the decree set out in the report whether it provided for compensation or not, but it is clear that it was not treated by the court as confiscatory. The Scottish court refused to enforce the decree. The plaintiffs are unable to distinguish *El Condado* (6) from *Lorentzen v. Lydden & Co., Ltd.* (4) or from the present case except by saying that different considerations of public policy are involved.

In *Lorentzen v. Lydden & Co., Ltd.* (4) ATKINSON, J., surveyed the earlier authorities to arrive at his conclusion that there was no general rule preventing him from enforcing the Norwegian decree. I do not find it entirely clear whether he held that all foreign property legislation was enforceable unless contrary to public policy, or that the general rule excluded all such legislation, subject to certain exceptional categories, within one of which the Norwegian decree fell. I shall examine the cases to see if any general rule can be extracted from them. It is, of course, true, as ATKINSON, J., pointed out, that these authorities did not necessarily involve a decision on the principle which I am here considering. Most of them could have been decided in the way in which they were decided either on that ground, or on the ground that the decrees under consideration were confiscatory. If any of these authorities were binding on me, it would be necessary to ascertain what was the *ratio decidendi* in each case, but, since none of them is, I do not think it is profitable to examine the judgments minutely to determine, if I can, which part of the reasoning was decisive. What I propose to do is to ascertain whether there are any *dicta*, *obiter* or otherwise, which clearly show that the author was relying as part of his reasoning on the principle of the *lex situs*, irrespective of the construction of the decree or of its confiscatory character. I think that there are. The *dicta* in *Lecouturier v. Rey* (7) are not conclusive, but they point in that direction. It is plain from LORD MACNAGHTEN'S speech ([1910] A.C. 265) that his statement of the principle was not dependent on the construction of the decree there under consideration. The decree, however, was confiscatory and it may be that the statement of principle should be treated as restricted to that type of decree, although there is nothing in the language which either he or LORD LOREBURN, L.C., used to suggest that. LORD MACNAGHTEN said (*ibid.*):

" . . . it must be beyond the power of any foreign court or any foreign legislature to prevent the monks from availing themselves in England of the benefit of the reputation which the liqueurs of their manufacture have acquired here or to extend or communicate the benefit of that reputation to any rival or competitor in the English market."

LORD LOREBURN, L.C., said (*ibid.*, 273):

" . . . this property (for property it is) which has come in question in this appeal is property situated in England, and must therefore be regulated and disposed of in accordance with the law of England."

In *Sedgwick Collins & Co. v. Russia Insurance Co. of Petrograd* (8) SARGANT, L.J., referring to Russian nationalisation decrees, said ([1926] 1 K.B. 15):

" Effective as such legislation may be within the limits of Russian territory, it cannot determine the ownership of property locally situate in this country, such as debts owing from debtors here: see DICEY, *CONFLICT OF LAWS*, 2nd ed., p. 310, and *Lecouturier v. Rey* (7) . . . "

The reference to DICEY is not to the passage cited earlier in this judgment, but in support of the contention that debts are locally situate in the country of the debtor. In *The Jupiter* (No. 3) (9) HILL, J., was dealing with confiscatory decrees which did not purport to have effect outside Russia, but his statement

of general principle can hardly be explained on either of the two alternative grounds. He said ([1927] P. 145):

"These circulars show that the R.S.F.S.R. recognises and enforces the general principle that the passing of chattels is governed by the law of the place where they are locally situate, and in particular recognises that the nationalising decrees do not operate upon property outside the territory of the R.S.F.S.R."

In the Court of Appeal no general principle was laid down, but ATKIN and LAWRENCE, L.JJ. (*ibid.*, 255), both referred with approval to the whole of the judgment of HILL, J.

In *Re Russian Bank for Foreign Trade* (10) MAUGHAM, J., was dealing with the same situation, *i.e.*, decrees which were confiscatory and which did not purport to have extra-territorial effect. He dealt ([1933] Ch. 767) with the point with which I am concerned and it is plain that he did not base his decision on the construction of the decrees. He laid down the principle in general terms that the decrees could not have the effect of extinguishing the debt, if locally situate here, or of transferring it to the Soviet Republic. While it is true that in all those cases there was confiscatory legislation, I think that it would be surprising if, in the judgments of so many masters of the law, all intending to restrict the statement of the principle to confiscatory legislation, no one of them had used in their statement of the principle some words of limitation. This consideration disposes me to think that the view of these *dicta* taken by the Court of Session in *El Condado* (6) is the right one. The Lord Justice-Clerk (LORD AITCHISON), having stated (63 Lloyd L.R. 333) that the principle clearly applied to confiscatory or penal laws, inquired (*ibid.*, 334) whether it applies equally to legislation which is not confiscatory or penal in the full sense. He treated *The Jupiter* (No. 3) (9) as being an authority in point and concluded that the decree could not apply to movable property outwith the territory and jurisdiction of the foreign sovereign State. LORD MACKAY said (*ibid.*, 338) that he found in the cases

"... a most emphatic train of eminent English judges in favour of the view that such 'decrees' of a foreign country as purport to have extra-territorial effect, and to attach property in a subject situated, and at a time when it is situated, in this country or its territorial waters, will not be recognised by our laws and courts."

LORD WARK reviewed (*ibid.*, 341) all the English authorities and concluded by adopting the passage in DICEY'S CONFLICT OF LAWS, 5th ed., p. 20, which I have cited. My recollection of the argument in *Lorentzen v. Lydden & Co., Ltd.* (4) is that ATKINSON, J., was referred to *El Condado* (6), but he does not distinguish it in his judgment. I recognise the force of the point that, if the principle is as wide as the Custodian says it is, there would be no need for any case to have been decided on the basis that the legislation was confiscatory. The *dicta* in the English cases, however, seem to me to be sufficient to support the conclusion in *El Condado* (6), and, for the reasons which I have given, I think that the rule there laid down is a sound one. If ATKINSON, J., is to be taken as deciding that the general rule was otherwise, I respectfully prefer the decision in *El Condado* (6).

The question next arises whether the A.1 Decree belongs to a special category which should form an exception to this general rule. The real ground stated by ATKINSON, J., in *Lorentzen v. Lydden & Co., Ltd.* (4) for regarding the Norwegian decree as exceptional is that, England and Norway being engaged together in a desperate war for their existence, public policy required that effect should be given to the decree. This reasoning at once gives rise to three comments. The first is that it amounts to the formulation of a new head of public policy and that is not a matter to be lightly undertaken. The second is that it is using public policy, not in accordance with precedent, as a restriction on acts which

are thought to be harmful to the community, but in a novel way as a positive force to give to an act validity which it would otherwise lack. The third is that it appears to cast on the court the duty of considering to some extent the political merits of the decree itself. The plaintiffs in their argument before me accept that it is not possible for the courts to judge of the expediency of any particular decree, and I think that they admit also that it would be beyond the wit of man to devise a principle which would admit the politically desirable decrees and exclude the undesirable. They, therefore, put their submission on this point in a form which seeks a middle way between these two extremities. They submit that the exceptional category consists of decrees of an allied Power in respect of the property of its nationals made in this country with the approval, or, at least, with the acquiescence, of His Majesty's government with a view to keeping property out of the hands of a common enemy. They claim that the approval or acquiescence of the government is to be inferred from the fact that the decree was promulgated in London without objection, and from the language of the Property Agreement, 1944.

I shall not set out the well-known authorities in which the application of rules of public policy have been considered. I shall refer only to the recent case of *Monkland v. Jack Barclay, Ltd.* (11), partly because ASQUITH, L.J., put the effect of the cases in a sentence, and partly because it has some similarity with some of the novel aspects of the plea of public policy in this case. The case was concerned with a scheme promulgated by the Motor Trade Association which sought to prevent by covenant a purchaser of a new car from re-selling the car within a certain period after purchase. In form, public policy was relied on negatively. It was said that any contract which did not contain a restrictive covenant as required by the scheme was void as contrary to public policy. In substance, it might be regarded as an attempt to use public policy as a positive force in support of the scheme. ASQUITH, L.J., after referring to the specific classes of contracts which had been ruled contrary to the policy of the law, said ([1951] 1 All E.R. 723):

"The courts have again and again said that, where a contract does not fit into one or other of these pigeon-holes but lies outside this charmed circle, the courts should use extreme reserve in holding a contract to be void as against public policy, and should only do so when the contract is incontestably and on any view inimical to the public interest . . . It was suggested by counsel for the defendant that the Motor Trade Association's covenant scheme had the approval of the government or of government officials and that this was in some way relevant to the question whether a contract which departed from it was or was not contrary to public policy. It could only be so relevant if the government's approval was some evidence that public policy called for the enforcement of the scheme. We think that this is an unfounded suggestion. What one government approves its predecessor or successor may condemn, and, if the suggestion were acted on, precisely the same contract might have to be held void when government A. was in and valid when government B. was in power. The distinction between political policy and public policy was firmly drawn in *Egerton v. Earl Brownlow* (12) where LORD TRURO said (4 H.L. Cas. 196): ' . . . ["public policy"] has been confounded with what may be called political policy; such as whether it is politically wise to have a sinking fund or a paper circulation, or the degree and nature of interference with foreign States; with all which, as applied to the present subject, it has nothing whatever to do.' For these reasons, in our view, the defendants' point on public policy is wholly unfounded . . . "

The distinction that is there drawn between public policy and political policy seems to me to be equally applicable here. No doubt, one could formulate a broad rule of public policy that allied governments should be assisted in time

of war, but the extent to which a particular decree serves that end seems to me to be entirely a matter for political decision by the government of the day, which would have to consider whether all its provisions or some or none of them fitted in with their war policy. A power at war is not bound to regard everything which its allies do as politically desirable.

There is another aspect of the matter with which I must deal because of the importance attached by the plaintiffs to the New York decision of *Anderson v. N.V. Transandine Handelmaatschappij* (13). In that case the A.1 Decree was enforced in the State of New York by SHIENTAG, J., on the ground (28 New York Supplement, 2nd series, 555) that

"... since the public policy of the decree is in harmony with the public policy of the forum, the decree should be upheld by our courts under the principles of comity."

This was the reasoning which ATKINSON, J., accepted and followed in *Lorentzen v. Lydden & Co., Ltd.* (4). In the Court of Appeals of New York, where the decision was upheld, the Attorney-General of the United States was allowed to file a statement of public policy in which the enforcement of the decree was approved with reservations. The court did not pronounce on the effect of that statement.

This calls attention to another aspect of the argument submitted by the plaintiffs. If the approval and acquiescence of the British government is relevant, I do not think it is a matter to be inferred from their conduct. The only way for the court to ascertain such a matter, when it is relevant, is by making inquiry of the appropriate Minister. There is no precedent for that course in a case of this sort and neither side has invited me to take it. I think it would be wrong and unnecessary. It is wrong because it would put it in the power of the Crown to legislate in a way which might affect the rights of British subjects, e.g., creditors of a foreign national, without the authority of Parliament. It is unnecessary because the government could in time of war swiftly and easily obtain from Parliament, if it had not already got them, such powers as Parliament thought necessary for enforcing as part of the law of England any foreign legislation which was in the common interest. It can then be fitted easily and with such modifications as may be expedient into the framework of our municipal law. This is the customary way of giving effect to international instruments such as treaties, and is in substance, if not in form, what was done by the Allied Forces Act, 1940. These considerations make *Anderson v. N.V. Transandine Handelmaatschappij* (13) appear to me to be a dangerous precedent to follow. Public policy appears to be a more flexible instrument in the hands of the New York courts than it is in this country. The reference by SHIENTAG, J. (28 New York Supplement, 2nd series, 552) to *United States v. Belmont* (14) suggests that the public policy of the United States, or of the State of New York, does not necessarily exclude even confiscatory legislation.

In my judgment, it would be unwise, in the light of these considerations and of the authorities, to propound as a new rule of public policy the principle for which the plaintiffs contend. I need hardly say that it is only after much thought that I have rejected the guidance given by the decision of ATKINSON, J., in *Lorentzen's case* (4), and I have done so only because, on reflection, I think that it cannot be made to conform with the authorities which regulate the use of public policy. In this respect I may say that I have had from the Solicitor-General the benefit of a much fuller and more able presentation of the relevant considerations than ATKINSON, J., had in the unsuccessful argument before him. I have been dealing with public policy as a force which has to be invoked by the plaintiffs in order to succeed. Many of these considerations would also apply on the first part of the argument. If foreign legislation is as a general rule to be admitted, it would have to be excluded when politically harmful, and

the difficulty of formulating any satisfactory principle of exclusion is, in my view, a formidable argument against the validity of the rule.

In my judgment, the claim against the Custodian fails, and I must turn to the other main issue involving the claim against the Administrator. I have to consider whether the gold and bank balances were subject to the charge imposed by the Treaty of Peace (Hungary) Order, 1948. If they were not, under art. 1 (5) (g) of the order the owner is entitled to recover them from the Administrator. What is subject to the charge is determined earlier on in the article. Article 1 opens by giving the effect of law to certain treaty provisions, including art. 29, and then continues:

“ . . . for the purpose of carrying out those provisions the following provisions shall have effect.”

Article 1 (2) imposes the charge and art. 1 (3) specifies to what property the charge is to apply and is in the following terms:

“ Paragraph (2) of this article applies to any property, rights or interests within His Majesty's dominions and protected territories (except the Dominions) belonging to or held or managed on behalf of the government of Hungary or a Hungarian national and shall include: (i) Any such property, rights or interests in the possession of a Custodian of Enemy Property under or by virtue of an order made by the Board of Trade under s. 7 of the Trading with the Enemy Act, 1939, and the net proceeds of the sale, liquidation or other dealings by a Custodian of Enemy Property with any such property, rights or interests that are or have been in his possession as aforesaid; (ii) property, rights or interests which have been subject to control by reason of a state of war existing between Hungary and His Majesty . . . ”

Article 1 (3), which contains the crucial definition of “ property, rights or interests,” is textually wider than art. 29 of the treaty from which it presumably derives, notably in adding the words “ or held or managed on behalf of ” after “ belonging to ” a Hungarian national. Whether art. 1 (3) of the order is merely being more explicit, or whether it is intended to enlarge the definition of Hungarian property, is one of the questions which have been discussed. If on its true construction it enlarges the definition of Hungarian property, the plaintiffs say that the order is *ultra vires* the Treaties of Peace, etc., Act, 1947. The Administrator answers that the order contains the Crown's interpretation of the treaty of peace with Hungary which cannot be challenged in any court of law. The plaintiffs, while disputing this, rejoin that, if the Crown has exclusive rights of interpretation and has exercised them by adding words to the definition in the treaty, the extended definition must be taken to be as comprehensive as the Crown desires and to be expressed in words which do not require to be stretched beyond their ordinary meaning seen in the light of ordinary English legal principles. The point is a shrewd one, for the Administrator, as will be seen, pleads for an exceptionally wide construction of art. 1 (3) of the order.

Before construing art. 1 (3) it is necessary to ascertain what classes of property, rights and interests are introduced therein by art. 1 (3) (ii) as having been “ subject to control.” The class is enemy property as defined in the Trading with the Enemy Act, 1939, s. 7 (8) (a), and that is

“ . . . any property for the time being belonging to or held or managed on behalf of an enemy or an enemy subject.”

Sub-paragraph (ii) of art. 1 (3) is, indeed, more comprehensive than the main paragraph (para. (3)). First, it includes the property of territorial enemies, if I may use that term to describe persons who, whether Hungarian nationals or not, were enemies because of their residence in Hungary. It includes, also, property of persons who are not Hungarian nationals in another respect, *i.e.*, property belonging to companies which were controlled by residents in Hungary. This is because of the wide definition of territorial enemies given in s. 2 (1) of

the Act of 1939. Secondly, whereas for the purpose of the main paragraph (art. 1 (3) of the order) the belonging, holding or managing would have to exist at the time when the order came into force, namely, Feb. 2, 1948, for the purpose of the sub-paragraph (art. 1 (3) (ii)) it can have existed at any time, so long as there was some moment in the past at which, by virtue of the belonging, holding or managing, the control attached. This enables the Administrator, as he claims, to dispense with any investigation into the nationality and interests of the baron's descendants, as he can say that it was sufficient that from 1941 to 1947 the property was subject to control by virtue of the baron's nationality. Lastly, it is said that the words ("belonging to or held or managed on behalf of") derive a wider meaning from their context in the trading with the enemy legislation than they might otherwise have. All these points of interpretation are contested by the plaintiffs. It is, however, plain that art. 1 (3) (ii) is at least as wide as, if not wider than, the main provision (in art. 1 (3)), and that the question which arises under each is whether the gold and bank balances were property "belonging to" the baron or "held or managed" on his behalf.

The Administrator's proposition is that for the purpose of the order property owned by a company belongs to its shareholders, or, alternatively, is held or managed by the company on behalf of its shareholders. I must say that, if the skilful contentions of the Solicitor-General and Mr. Upjohn had not proved the contrary, I should have thought this proposition beyond the reach of sustained argument. It seems to me to be contrary to all authority and principle, but the argument to which I have listened deserves, and the amount at stake justifies, a detailed consideration of the point. I shall look first at the authorities. *Salomon v. Salomon & Co. Salomon & Co. v. Salomon* (15) proclaimed the distinction between the "one-man" company and its principal shareholder, and, in particular, LORD HALSBURY, L.C. ([1897] A.C. 31), and LORD HERSCHELL (*ibid.*, 43), dealt with the notion that such a company was the agent of the shareholder. LORD HERSCHELL said (*ibid.*):

"In a popular sense, a company may in every case be said to carry on business for and on behalf of its shareholders; but this certainly does not in point of law constitute the relation of principal and agent between them . . ."

In *Macaura v. Northern Assurance Co.* (16) it was held that the sole shareholder in a company, who was also its main creditor, had no insurable interest in the property of the company. LORD BUCKMASTER said ([1925] A.C. 626):

"Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up."

In *E.B.M. Co., Ltd. v. Dominion Bank* (17) LORD RUSSELL OF KILLOWEN, giving the advice of the Privy Council, rejected the suggestion that the assets of a company might in substance be regarded as the assets of the three individuals who constituted its main shareholders. He said ([1937] 3 All E.R. 564) that it was

"... of supreme importance that the distinction should be clearly marked, observed and maintained between an incorporated company's legal entity and its actions, assets, rights and liabilities on the one hand, and the individual shareholders and their actions, assets, rights and liabilities on the other hand."

The fact that a company has an enemy character or that the property of the company is being dealt with for the purpose of the trading with the enemy or treaty legislation makes no difference. In *Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (Great Britain), Ltd.* (18) LORD PARKER OF WADDINGTON showed

that the considerations which endowed a company with enemy character at common law because of the character of its shareholders had nothing to do with property. He said ([1916] 2 A.C. 338):

A "No one can question that a corporation is a legal person distinct from its corporators; that the relation of a shareholder to a company, which is limited by shares, is not in itself the relation of principal and agent or the reverse; that the assets of the company belong to it and the acts of its servants and agents are its acts, while its shareholders, as such, have no property in the assets and no personal responsibility for those acts."

Dealing with the argument that, when the law is concerned with the artificial person, it is to know nothing of the natural persons who constitute and control it, he said (*ibid.*, 340):

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D "In questions of property and capacity, of acts done and rights acquired or liabilities assumed thereby, this may be always true. Certainly it is so for the most part. But the character in which property is held, and the character in which the capacity to act is enjoyed and acts are done, are not *in pari materia*. The latter character is a quality of the company itself, and conditions its capacities and its acts. It is not a mere part of its energies or acquisitions, and if that character must be derivable not from the circumstances of its incorporation, which arises once for all, but from qualities of enmity and amity, which are dependent on the chances of peace or war and are attributable only to human beings, I know not from what human beings that character should be derived, in cases where the active conduct of the company's officers has not already decided the matter, if resort is not to be had to the predominant character of its shareholders and corporators."

The distinction was again emphasised by LORD STERNDAL in *The Noordam* (No. 2) (19), in which the phrase "enemy property" was being considered for the purpose of prize law. LORD STERNDAL said ([1919] P. 259):

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G "Counsel for the American Express Co. argued that although it was technically a German registered company it was entirely American; that is to say, ninety-nine per cent. of its capital was held by Americans and one per cent. by British shareholders, and according to *Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (Great Britain), Ltd.* (18) the court should look behind the legal entity of the registered company, and discover who are the persons really interested. That case held that, for one purpose at any rate—and perhaps for some others—the court must look behind the legal entity, and determine who are the real controlling persons. How it is to be ascertained who the real controlling persons are, and whether they are composed of a bare majority or a two-thirds majority or whatever it may be, is not specified. But it is not necessary to look into that, because the judgment of LORD PARKER expressly excepted from the operation of that principle the question of property."

H It is worth noting, when a document of an international character is being indirectly construed, that these principles are not peculiar to English law. The point was considered by an international tribunal, the Permanent Court of International Justice, in *Standard Oil Co.'s Claim* (20), where the tribunal declared (British Year Book of International Law, 1927, p. 162) that

" . . . the decisions of principle of the highest courts of most countries continue to hold that neither the shareholders nor their creditors have any right to the corporate assets other than to receive, during the existence of the company, a share of the profits, the distribution of which has been decided by a majority of the shareholders, and, after its winding-up, a proportional share of the assets."

No authority containing any statement of principle has been cited to the opposite effect. The Administrator relied on the decision of the Court of Appeal in *Re Miller. Ex p. Official Receiver* (21) as showing the wide meaning which might in certain circumstances be given to the word "belonging." The Court of Appeal there held that for the purpose of the Friendly Societies Act, 1875, s. 15 (7), money which a treasurer of a friendly society had received for the society was "money or property belonging to the society" although it was not in his possession in *specie* and could not be traced. Once it was concluded, as the Court of Appeal concluded, that the money referred to in the sub-section could not mean coins physically in the possession of the holder, it was difficult to give an intelligent meaning to the sub-section without treating money had and received for the use of the society as money which belonged to it. I do not think that much assistance is to be derived from this. Nor do I think that the wide words of SIR ARCHIBALD SMITH, M.R. ([1901] 2 K.B. 427) in *Driefontein Consolidated Gold Mines, Ltd. v. Janson* (22), which were also relied on, are of much help. They were not measured to fit the sort of point which I have to consider, and may be contrasted with what LORD MACNAGHTEN said ([1902] A.C. 497) in the same case in the House of Lords. That is how the matter is dealt with generally in the authorities.

I shall consider next the word "belonging" in its place in art. 1 (3) of the order of 1948, and then the phrase "held or managed on behalf of." In construing the paragraph I do not think that the question is simply, as was argued for the Administrator, to give to the word "belonging" a meaning wide enough to include what was called the substantive owner as well as the person who is the owner in the eyes of the law. The word cannot be isolated from the "property, rights or interests" to which it appertains. When one talks about property loosely, one may mean a piece of property such as a specific chattel. If one speaks of a specific chattel, such as a chair, as belonging to Smith, there may be room for the admission of some looser connection between Smith and the chair than that which is ordinarily denoted by the conception of property, but "property, rights or interests" cannot be used in art. 1 (3) of the order in a loose sense to denote a concrete piece of property. If a chattel owned by a Hungarian is pledged to an Englishman, it is conceded that the Administrator takes the chattel subject to the pledge, *i.e.*, he does not take the chattel as a piece of property, but he takes the property which the Hungarian has in the chattel. That property can only be identified in relation to an owner, and has, therefore, no existence apart from the legal relationship which requires a legal owner to make it complete. All choses in action, such as debts and other rights and interests, can only be identified in relation to the person who has the legal rights. When, therefore, a legal document talks of "property, rights or interests" belonging to a person, it must mean belonging to the person who in law owns them. As LORD MACNAGHTEN said in *Heritable Reversionary Co. v. Millar* (23) ([1892] A.C. 621):

"The words 'property' and 'belonging to' are not technical words in the law of Scotland. They are to be understood, I think, in their ordinary signification. They are in fact convertible terms; you can hardly explain the one except by using the other. A man's property is that which is his own, that which belongs to him. What belongs to him is his property."

It is idle to seek to extend the meaning of the word "belonging" unless one can find some "property, rights or interests" to which it can attach, and the admission, which has to be made, that a shareholder has no "property, rights or interests" in any of the assets of the company is fatal to the Administrator's case.

If there be any doubt on the construction of art. 1 (3) taken by itself, it is legitimate to look at the order as a whole. Indeed, it is hardly possible for the

Administrator, in the light of the authorities, to insist on so unusual a construction of "belonging" unless the nature of the order is such as to compel its adoption. I find nothing in the scope of the treaty or of the order as a whole which suggests that any extraordinary meaning is to be given to art. 1 (3). On the contrary, if the property of a company is to be deemed to belong to its shareholders, I think that it would make the administration of the order almost impossible. The Administrator concedes—I think rightly, because in this

- A connection the argument is dealing with property and not with control—that the position is the same in the case of a one per cent. shareholder as in that of a hundred per cent. shareholder. I understand the argument to be that the property belongs both to the company, which is its owner in law, and to the shareholders. The shares in the company are, of course, property which belong to the shareholders. The Administrator can get all the property of a Hungarian company irrespective of its shareholders, and the appropriate fraction of the property of any other company. Since in ascertaining the appropriate fraction it is permissible to disregard the creditors—that is a point I shall have to consider later—it would obviously be to the advantage of the Administrator to take a fraction of the company's property rather than to vest in himself the corresponding shares. How does he attempt to charge, let us say, one per cent. of all the "property, rights or interests"—land, stock-in-trade, book debts and goodwill—of a large public company as they existed on Feb. 2, 1948? The ascertainment of them alone would be a herculean task. What has to be delivered to him if he exercises his powers under art. 1 (5) (e) of the order? Meanwhile, the company, if it knew that it had a Hungarian shareholder on the register, could hardly continue to trade, except by favour of the Administrator, without incurring criminal liability under art. 1 (5) (a). The question of what would in these circumstances happen to the shares was not fully explored. If the Hungarian had, for example, a ten per cent. shareholding in a company which enabled the Administrator to have a charge over, and perhaps to have vested in himself under art. 1 (5) (h), ten per cent. of the company's assets, would the shares still survive for the purpose of dividends, and would the Hungarian be entitled to ten per cent. of the remaining assets on the winding-up? The difficulties are obviously enhanced if, as the Administrator contends, the investigation has to be pursued down a chain of holding companies. What happens if a Hungarian owns shares in a foreign neutral company which owns shares in an English company, and so on?

- I turn now to the phrase "held or managed on behalf of," in art. 1 (3) of the order, which is to be construed on the assumption that the word "belonging" does not confer any rights of property on the shareholder. It is not contended that a company holds or manages property as agent for its shareholders. The authorities which I have cited are inconsistent with that notion, and, if any further authority be required, the judgment of TOMLIN, J. ([1924] 2 Ch. 38) in *British Thomson-Houston Co. v. Sterling Accessories, Ltd.* *British Thomson-Houston Co. v. Crowther & Osborn, Ltd.* (24) is in point. *Prima facie*, the words "on behalf of" are apt to denote agency, but the defence submits that they are not to be restricted to that. They are intended, it is argued, to add something substantial to the word "belonging," and, if they refer to agency only, they would not do that, because property which is held or managed on behalf of a principal must necessarily belong to the principal. In seeking for a wider meaning, it is conceded that it must still be a meaning that denotes some legal relationship. The door would be thrown open too wide if it let in property which A conceived of himself as holding on behalf of B out of some sense of moral duty or affection. The legal relationship, so it is argued, that is relevant for the purposes of this case is that which exists between a majority shareholder and the company. This creates a nexus consisting of the right of control which enables the shareholder by means of a winding-up to get the property of the company into his own hands. This nexus is sufficient, it is said, to justify the description of the company as holding the property "on behalf of" the shareholder. A

wide meaning, it is contended, must be given to this phrase because of its place in the Trading with the Enemy Act, 1939. Parliament cannot have intended for the purpose of the trading with the enemy legislation to catch the property of an enemy national, but to leave outside the scheme of control the one-man company through which he might operate.

The plaintiffs answer these points, I think satisfactorily, in three ways. First, they say that there is neither need nor justification for giving to the phrase "held or managed on behalf of" any meaning widely extensive of "belonging to," nor for assuming that it cannot refer to agency. It is not correct to assume that property held by an agent always belongs to his principal. A sub-agent has normally no relationship of agency with his principal's principal. A bank in London might, for example, hold property on behalf of a Hungarian bank, the Hungarian bank being only the agent of some principal unknown to the London bank. The fact that it was held for an enemy concern would be sufficient to taint it for the purpose of the trading with the enemy legislation, and, therefore, agency is sufficient to catch the property without its being necessary to prove that it was owned by the Hungarian bank or to ascertain (which might be difficult) the identity of the person to whom it really did belong. Moreover, one cannot escape from the fact that the object of the order of 1948 is to give effect to the treaty. If the intention had been to add a large new class of Hungarian property, a class not covered by the word "belonging," it is hardly likely that the order would have taken the form which it did. Article 1 of the order then almost becomes contradictory, since it opens by giving legal effect to the treaty itself, which is limited to the smaller class. The better interpretation is that the phrase "held or managed on behalf of" is intended as a slight expansion or elucidation of the words "belonging to," and not as introducing a new and independent addition.

Secondly, its place in the trading with the enemy legislation and the consideration of that legislation as a whole offer no encouragement to the construction suggested. The main object of the Act is to deal with territorial enemies. The power that is taken over the property of enemy subjects is one which I should infer was only intended to be exercised in exceptional cases, and I am told that in practice it has been used only in that way. If it had been exercised ruthlessly, a Hungarian subject in this country, who had resided here for many years and whose loyalty was above suspicion, might have been stripped of every asset which he here possessed. The same thing would have happened to refugees who had sought refuge from oppression in this country or in neutral territories. It is not, therefore, surprising if Parliament thought that a power of this sort need not be developed to the extent of including one-man companies. If in an exceptional case a Hungarian was found to be operating in England or in neutral territory through a one-man company to the national disadvantage, there are plenty of ways under the Act in which he might have been dealt with. If it was an English company, control of it could have been obtained by the vesting of all the shares in the Custodian. If it was a neutral company, its name could have been placed on the black list under s. 2 (2) of the Act of 1939, or a restriction order might have been made under s. 3A of the Act, as inserted by reg. 3A of the Defence (Trading with the Enemy) Regulations, 1940 (S.R. & O., 1940, No. 1092), as amended by S.R. & O., 1940, No. 1289. It would not, therefore, be startling to find that the one-man enemy subject company was not made a specific objective. What would be surprising is that, if such a company was intended to be covered, it was not done so in express words. The notion of the enemy character of a corporation was, of course, present to the mind of Parliament, and in s. 2 (1) of the Act of 1939 the conditions of control by a territorial enemy which give the corporation an enemy character are clearly laid down. It is most unlikely that, if Parliament had intended to give an enemy character to corporations controlled by an enemy subject, it would not have had recourse to the same formula. "Enemy subject" is defined in s. 15 (1) of the Act and it

includes, as well as an individual, a company incorporated in, or under the laws of, an enemy State, *i.e.*, it picks out s. 2 (1) (d) and omits s. 2 (1) (c) and s. 2 (1) (e), as inserted by the Defence (Trading with the Enemy) Regulations, 1940, reg. 3, as amended by S.R. & O., 1940, No. 1289. Nothing would have been simpler than to have included in the definition a reference to the apparatus of control devised in s. 2 (1) (c) and s. 2 (1) (e).

- A relationship which can be comprehended by the words "on behalf of." While the proposition might in loose talk pass muster in the case of the hundred per cent. shareholder, it will not, I think, bear analysis if there is any minority, however small. This is important, not only because the Administrator makes his argument wide enough to cover at least the majority shareholder, but because of the light it throws on the truth of the proposition itself. Take the case of a shareholder who holds fifty-one per cent. It does not matter for this purpose whether he has fifty-one per cent. or ninety-nine per cent., so long as his holding is sufficient to put the company into liquidation, so that his rights of control in relation to the property of the company are the same as those of a hundred per cent. shareholder. In such a case it can hardly be said that the company holds or manages all its property for the fifty-one per cent. shareholder, so it is argued that the company holds or manages fifty-one per cent. of its property for the fifty-one per cent. shareholder and forty-nine per cent. for the other shareholders. What property is in these circumstances subject to the charge I do not pause to inquire. If the true view be that the company holds its property proportionately as much for the minority as for the majority shareholder, what becomes of the special nexus of control which is said to constitute a peculiar relationship?
- D If two shareholders between them hold fifty-one per cent. of the company's shares and thus can obtain a winding-up if they want it, does the company hold $25\frac{1}{2}$ per cent. of the property for each of them? If so, then the company holds its property on behalf of any number of shareholders who may at any time constitute the majority, which is the same thing as saying that it holds the property on behalf of any or all of them. I cannot think that out of the conception of control of a company there can be derived anything which can be comprehended in the relationship created by "on behalf of."

In reviewing these arguments, I have so far ignored the formidable factor of creditors. The defendants say that the creditors of a company, whether they be debenture holders or otherwise, so long as they have no charge on any specific asset, must be ignored. The justification for this is said to be that it is what would

- F happen in the case of an enemy individual. In his case all his unsecured property would be taken and the creditors would be left with nothing. I do not think the interposition of a company can be obliterated by the use of this analogy. The whole argument for the Administrator is that "belong" is used to get at the person whom the man in the street would say the property really belonged to. If a company owed more than the value of its assets, I do not think that the man in the street would say that its property "belonged" to the shareholders—certainly not the man in any city street. Similarly, if property is held or managed on behalf of a hundred per cent. shareholder because he could obtain a liquidation, one cannot ignore that what he obtains on a liquidation is no more than the property after the creditors have been satisfied.

- H In the end it appears to me much as it did in the beginning. No doubt, the legislature can forge a sledge-hammer capable of cracking open the corporate shell, and it can, if it chooses, demand that the courts ignore all the conceptions and principles which are at the root of company law, but the phrase "belonging to or held or managed on behalf of" is too mild a weapon for that purpose. It is worth noting that in similar cases of the distribution of enemy property, where the legislature has required the sort of effect for which the Administrator is here contending, it has said so specifically. Out of several examples cited in argument I need refer only to the Distribution of German Enemy Property Act,

1949, and to the definition of "German enemy property" contained in s. 8 (1).

For these reasons the plaintiffs are entitled, in my judgment, to recover their property from the Administrator. The plaintiffs ask for interest on the sum awarded and the Administrator submits that the court has no power to give interest. It is not disputed that *prima facie* the court has a statutory discretion to award interest in this case, but it is submitted that it is excluded by the words "but not to any other remedy" in art. 1 (5) (g) of the order of 1948. These words are, I think, primarily directed to the exclusion of such remedies as damages for conversion. The power to award interest is not so much an independent remedy as a measure of compensation to a plaintiff for the time, much of which may be occupied by the lawsuit itself, during which he has been kept out of his money. It is now almost as much an incidental part of the relief granted by the court as are costs. It is not suggested that the power to award costs is excluded by art. 1 (5) (g) of the order of 1948, and, while interest is not quite in *pari materia*, I think that the same broad considerations apply to it and that it is relief ancillary to the remedy that is granted, and not a separate and additional remedy. I think, therefore, that I have a discretion. I doubt that I should use it in any case in which the issue depended on disputed fact, since the burden of proof is placed on the defendant. But in this case my judgment has depended on the law. If the Administrator had not taken what is, in my view, a quite erroneous view of the construction of the order, the plaintiffs would have had their money in July, 1948. Again, however, I should hesitate to award interest—at any rate, to an amount greater than had actually been earned while the money was in the hands of the Administrator—if the claim had been dealt with expeditiously. Claimants in the position of the plaintiffs must expect that time must be allowed for reasonable consideration before their claims can be met. I find it necessary, therefore, to consider (i) what the money was earning during the period when it was in the hands of the authorities, and (ii) whether payment of it has been postponed longer than was reasonably necessary to determine the matter.

The interest payable on the proceeds of the gold bars has not been separately earmarked, but the Custodian says that while it was in his hands it would have earned on the average from 1940 to 1950 about $\frac{3}{4}$ per cent. per annum. The Solicitor-General is willing to treat these fruits as part of the proceeds in the hands of the Administrator, and, accordingly, the judgment which I give will be for the amount which the Administrator actually received increased by that addition. A possible view of the duties which Parliament intended the Custodian to discharge is that he should accumulate this money so as to form as large a fund as possible for those who would be the ultimate beneficiaries, in the main, no doubt, British creditors. Whether it be consistent with that view, if it be the right one, that he should lend the money, presumably to the Treasury or some other government department, at such rate as the government found it convenient to pay, I need not consider. The claim against the Custodian has failed, so he cannot be made to pay interest. Since the money has been in the hands of the Administrator it has, for some reason which escapes the imagination, been lying entirely idle. The application for release was made on July 22, 1948. On Aug. 5 the Enemy Property Department not unreasonably required a statutory declaration that the bank was the sole beneficial owner of the assets. That was forthcoming on Aug. 26, 1948. On Sept. 8 the department asked for a further declaration setting out the beneficial ownership of the whole of the capital of the bank. That was supplied on Sept. 24, 1948, and showed that the baron was the sole ultimate shareholder. On Oct. 30, 1948, the Enemy Property Department in a letter, which erroneously described the baron's interest as beneficial ownership of the bank, refused to release the assets on the ground that he was a Hungarian national. On Nov. 19 the department was informed that the baron had always had a Swiss domicil. Thereafter a period of over thirteen months elapsed, during which, if the statements made on behalf of the department are to be credited, the matter was sometimes receiving active consideration

and sometimes not escaping attention. The decision ultimately conveyed on Jan. 4, 1950, was that the property was to be transferred to the Administrator of Hungarian Property. Thereafter, further unexpected, but unspecified, difficulties were said to have arisen which delayed the transfer until Apr. 6, 1950. If the money had been transferred to the Administrator in November, 1948, when all the relevant facts were known, the plaintiffs could have begun this action then. The "active consideration", which cost in interest several hundred pounds a day, might, I think, have been more compressed. No explanation of the delay has been offered. The defendants have submitted simply that interest is not payable. Against the Custodian there is no legal redress. While it is true that he and the Administrator are different legal entities, they are not disconnected. I think that in all the circumstances I can properly take the view that interest should run from the date on which the money reached the Administrator. If he did not choose to invest it, that is his concern. The plaintiffs have lost for an unreasonably long time the use of their money and I see no reason why they should not be compensated on that basis. Accordingly, I shall award interest on the sum due from the Administrator at the rate of four per cent. per annum from Apr. 6, 1950.

Judgment for the defendant Custodian of Enemy Property against the plaintiffs. Judgment for the plaintiffs against the defendant Administrator of Enemy Property.

Solicitors: *Hardman, Phillips & Mann* (for the plaintiffs); *Solicitor, Board of Trade* (for the defendants); *Lovell, White & King* (for the Royal Netherlands government).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

R. v. AGRICULTURAL LAND TRIBUNAL (SOUTH EASTERN AREA). *Ex parte* HOOKER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Pilcher, JJ.), October 10, 1951.]

Agriculture—Agricultural holding—Notice to quit—Decision of agricultural land tribunal—Certified copy sent to tenant—Mistake in certified decision—Subsequent service of "amended decision notice"—Validity of amended notice—Agriculture (Procedure of Agricultural Land Tribunals) Order, 1948 (S.I., 1948, No. 186), art. 15 (2).

The landlords of an agricultural holding appealed to an agricultural land tribunal against a decision of the Minister of Agriculture and Fisheries, acting through a county agricultural executive committee, refusing to consent to the operation of a notice to quit which the landlords had given to the tenant. The tribunal intended to grant their consent to the operation of the notice subject to a condition that the landlords should grant to the tenant a lease for five years of part of the holding, including about half of each of two orchards, at a rent not exceeding £80 per annum. In his certificate of the decision of the tribunal given on Mar. 22, 1951, the chairman by mistake certified that the whole of each of the orchards, instead of half, should be included in the lease, and seven days later a copy of this decision, certified by the secretary of the tribunal, was sent to the tenant. On May 22 an "amended decision notice," giving the decision of the tribunal as originally intended, and duly certified, was sent to the tenant.

HELD: under the Agriculture (Procedure of Agricultural Land Tribunals) Order, 1948, art. 15 (2), the certified copy of the decision originally sent to the tenant was "conclusive evidence of the decision of the tribunal," and, therefore, that decision was final and could not be superseded by a purported amending decision of the tribunal.

FOR THE AGRICULTURE (PROCEDURE OF AGRICULTURAL LAND TRIBUNALS) ORDER, 1948, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 1, p. 225.

MOTION for an order of *certiorari*.

The applicant was the tenant of a farm from year to year under an agreement, dated May 3, 1937, at a rental, after the first year, of £75 per annum. On Sept. 27, 1950, she received from the landlords twelve months' notice to quit, and on Oct. 13 she gave a counter-notice in accordance with s. 24 (1) of the Agricultural Holdings Act, 1948. On Oct. 31 the landlords applied for the consent of the Minister of Agriculture and Fisheries to the operation of the notice to quit. The application was heard by the Kent County Agricultural Executive Committee on Dec. 5, 1950, and on Jan. 10, 1951, notice that the Minister withheld his consent was given to the parties. On Jan. 12, 1951, the landlords gave notice of a desire to appeal to the agricultural land tribunal. On Mar. 22 the tribunal heard the appeal and decided to consent to the operation of the notice to quit subject to conditions. The chairman certified the decision of the tribunal, and a copy of the decision, certified by the secretary of the tribunal, was sent to the tenant seven days later. On May 22, 1951, an "amended decision notice," in which the conditions were varied, was sent by the tribunal to the tenant. The tenant contended that the tribunal had no jurisdiction to issue an amended decision, as under the Agriculture (Procedure of Agricultural Land Tribunals) Order, 1948, art. 15 (2), the certified copy of the decision already sent to her was conclusive evidence of the decision. For the tribunal it was submitted that their original intention was to arrive at the decision given in the "amended decision notice."

Karmel, K.C., and *Hanbury Aggs* for the tenant.

L. A. Blundell for the landlords.

Wishart for the land tribunal.

LORD GODDARD, C.J.: Counsel for the tenant moves for an order of *certiorari* to bring up and quash a document which purports to be an amended decision of the Agricultural Land Tribunal (South Eastern Area) on the ground that that document was issued without jurisdiction, the tribunal having previously made an order which had become conclusive. The tenant had for some years been tenant of an agricultural holding in the county of Kent. In September, 1950, her landlords gave her notice to quit.

By the Agricultural Holdings Act, 1948, s. 24 (1):

"Where notice to quit an agricultural holding or part of an agricultural holding is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this sub-section shall apply to the notice to quit, then, subject to the provisions of the next following sub-section, the notice to quit shall not have effect unless the Minister [of Agriculture and Fisheries] consents to the operation thereof."

Section 25 of the Act contains provisions as to consents for the purposes of s. 24. In this case the tenant served a counter-notice and the landlords applied to the country agricultural executive committee, to whom the Minister has delegated his powers in these matters, to consent to the operation of the notice to quit. The committee refused their consent, and the landlords appealed, under s. 25 (4) of the Act of 1948, to the agricultural land tribunal set up for the area in which the farm is situate. At the hearing before the land tribunal on Mar. 22, 1951, the landlords offered to leave the tenant in occupation of the farm and garden which she occupied, together with about half of each of two orchards comprised in her holding. They handed to the tribunal a plan taken from the ordnance survey which, they said, showed the land which they were willing

that the tenant should continue to occupy. After inspecting the land the tribunal gave the following decision:

A "I the undersigned, Leslie Kenneth Allen Block, barrister-at-law, being the chairman of the tribunal composed of Brigadier H. R. Norman, D.S.O., J.P., John Day, Esq., and myself duly appointed to hear the appeal of the landlord dated Jan. 12, 1951, and having heard the same at Maidstone on Thursday, Mar. 22, 1951, and inspected the land, do hereby certify that the decision of the tribunal is that it grants its consent to the operation of the notice to quit dated Oct. 27, 1950, subject to the following condition: that the landlord grants to the tenant a lease of the house and garden which she now occupies together with the orchards Ordnance Survey No. 81 (1.125 acres) and Ordnance Survey No. 80 (2.750 acres) for a term of not less than five years at a rental not exceeding £80 per annum, the terms of such lease, if not agreed between the parties, to be settled by a single arbitrator."

B It has not been suggested that the tribunal had no power to impose conditions. The decision is signed by Mr. Block, the chairman of the tribunal. The tenant received a copy of that document certified by the secretary of the tribunal as follows:

C "I hereby certify that the above is a true copy of the document signed by the chairman of the tribunal. (*Signed*)—secretary of the tribunal."

D That is dated seven days after the decision, so there was ample time to correct the mistake, if it had been realised that there had been one. On or about May 23 the tenant received another document from the tribunal, in which, after reciting the names of the same persons as constituting the tribunal, the chairman stated that it was thereby certified

E "... that the decision of the tribunal is that it grants its consent to the operation of the notice to quit dated Oct. 27, 1950, subject to the following condition: that the landlord grants to the tenant a lease of the house which she now occupies and the land coloured pink on the plan attached hereto, for a term of not less than five years at a rental not exceeding £80 per annum, the terms of such lease if not agreed between the parties, to be settled by a single arbitrator."

F That document was accompanied by a small plan, the original of which the landlords had put in as showing the land which they were offering at that time to grant to the tenant. In substance, the effect was to give her about half the land which the previous decision had given her at the same rent. Having been told in March that she had to comply with a notice to quit but was allowed to keep her cottage and garden and two parcels of land at a certain rent, she was now told, two months afterwards, that she was only to keep the cottage and garden and half the parcels of land, but that she was to pay the same rent.

G In his affidavit the chairman of the tribunal says:

H "My decision in the first instance was given because I made a mistake. I did not have the plan in front of me. What we meant to give the [tenant] was what the landlords had offered, and when I came to look at it, because my attention had been called to it by the solicitors for the landlords, I saw that we had given her more than the landlords had offered. In other words we had given her twice as much as we intended to."

He then says that, having found out the mistake, he issued the second document, which he headed "Amended decision notice." It is a great pity, in any circumstances, that he did not call the tenant and her advisers before him before issuing the amended decision notice, which was issued on the *ex parte* statement of the landlords' solicitors, but it would probably have made no difference, as he says: "That is really what our decision was."

The question is whether there is any power to issue the second decision, and the answer depends entirely on the Agriculture (Procedure of Agricultural Land Tribunals) Order, 1948, made by the Minister of Agriculture and Fisheries under s. 73 (3) of the Agriculture Act, 1947. I do not deny for a moment that, if a court gives a decision which is wrongly drawn up so that the decision of the court is not embodied in the document, then, even if the document has been passed and sealed, the court has an inherent jurisdiction to say that that is not its judgment. The judgment must be made out in accordance with the judgment which the court pronounced. There is, however, this great difference between a court and a tribunal of this kind, quite apart from the fact that courts are courts of record, and that is that the court gives its judgment in open court so that the parties know what the judgment is. If there is any mistake in the judgment, or any party thinks that there is a mistake, they or their representatives can tell the court there and then. In the present case, under art. 13 of the order of 1948, the tribunal has to give its decision in writing, certified by the chairman. By the Agriculture Act, 1947, s. 73 (1), agricultural land tribunals were to be established for different parts of the country, and s. 73 (3) provides:

"The Minister may by order make provision for the procedure of agricultural land tribunals, and in particular . . . (b) for the recording and proof of the decisions of the tribunals, and for enabling the tribunals to decide by a majority . . ."

In pursuance of s. 73 (3) the Minister made the Agriculture (Procedure of Agricultural Land Tribunals) Order, 1948, and art. 13 thereof provides:

"The decision of the tribunal which, in the event of disagreement between the members of the tribunal, shall be the decision of the majority of the members of the tribunal, shall be recorded in a document to be certified by the signature of the chairman of the tribunal as correctly recording the decision of the tribunal as aforesaid."

By art. 14:

"As soon as may be practicable after the certification of the said document, a copy thereof, certified as mentioned in the next succeeding article, shall be forwarded by the secretary of the tribunal to the Minister and . . . to the secretary of the committee."

By art. 15:

"(1) Copies of the said document referred to in art. 13 of this order shall be prepared as may be necessary by the secretary of the tribunal and shall be certified by him as true copies. (2) A copy of the said document certified as mentioned in the preceding paragraph shall be conclusive evidence of the decision of the tribunal on the matter to which that decision relates."

As I have said, the document certified by the chairman on Mar. 22 was certified seven days afterwards by the secretary, and presumably, therefore, a copy was sent, not only to the parties, but also to the Minister and to the committee from whose decision the appeal was brought, and thereupon it became conclusive evidence of the decision of the tribunal. Supposing that the tenant had at once asked for the appointment of an arbitrator to settle the terms of the lease, and the arbitrator had been told by the landlords: "This document recording the decision of the tribunal is not right. The parcels mentioned in it are not the parcels which the tribunal meant to give to the tenant." Could the arbitrator have gone behind the document when his attention was called to art. 15 of the order of 1948? He would say: "Here is a copy of a determination which, by art. 15 (2) of the order of 1948, is made conclusive evidence of the decision of the tribunal." I do not see how he could act. Moreover, if the tribunal could alter their decision, two months after it had been communicated to the parties, by saying: "That was not our real decision at all, although we said it was. Our real

decision was something else," I do not see any reason why they could not do so twelve months, or even two years, afterwards, by which time all kinds of things might have happened, quite apart from the lease. The tenant might, on the faith of the first document, have started to re-plan the orchards which had been given to her, and then she would have been suddenly told: "We never meant to give you that at all."

A In my opinion, the words of art. 15 (2) are too strong. This case may show the desirability of rules being made which will enable a tribunal, if they make a mistake, to rectify it within a stated time and subject to certain terms, but, as the matter now stands, it seems to me that the certificate is conclusive and that the tribunal had no power, once the decision had been certified in accordance with art. 15 (1) of the order of 1948, to issue some other decision. For these reasons I think that the order of *certiorari* must go, although I appreciate that it may be a hardship on the landlords.

B **HILBERY, J.:** Not without regret, I am of the same opinion. I say "not without regret" because it is clear on the evidence put before us by the members of the tribunal that the certified record of their decision, which became conclusive evidence of that decision, did not represent what they had intended to decide. But I agree with LORD GODDARD, C.J., in thinking that, as the tribunal is a statutory tribunal created under s. 73 (1) of the Agriculture Act, 1947, and is entirely bound in this matter by the order of 1948, made by the Minister under the power given to him by s. 73 (3) of the Act of 1947, there is no escape from the conclusion at which LORD GODDARD, C.J., has arrived.

D **PILCHER, J.:** I agree.

Order for certiorari.

Solicitors: *Biddle, Thorne, Welsford & Barnes*, agents for *Harris & Harris*, Sittingbourne (for the tenant); *Faithfull, Owen & Fraser*, agents for *Winch, Greensted & Winch*, Sittingbourne (for the landlords); *Crossman, Block & Co.* (for the tribunal).

E [Reported by F. A. AMIES, Esq., Barrister-at-law.]

JEFFREY v. JEFFREY.

Reversed. C.A. [1952] 1 All E.R. 790.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), June 27, July 4, October 10, 1951.]

F *Variation of Settlement—Application by guilty husband—Considerations to be applied.*

G In 1936 the parties entered into a deed of separation by which the husband covenanted to pay to the wife during their joint lives and *dum casta* the sum of £275 a year tax free. At the time he was earning £1,550 a year. The wife was not earning, and she contributed nothing towards the settlement. In 1946 the husband's income was reduced to £450 a year, his capital being some £2,500, but he continued the payments under the deed. On Jan. 9, 1950, the wife obtained a decree *nisi* against the husband on the ground of his adultery, which was not of a flagrant character and was the result, and not the cause, of the estrangement between the parties. On May 25, 1950, the husband applied to vary the deed of separation by extinguishing his liability to pay under it. Thereupon, the wife applied to the court to rescind the decree *nisi* and substitute for it a decree of judicial separation. PEARCE, J., held ([1950] 2 All E.R. 449) that the wife's application was actuated primarily by considerations of financial gain, refused the application, and, on the husband's application, made the decree *nisi* absolute. In April, 1951, the registrar recommended a variation of the terms of the deed by a reduction of the annual payments to £75 less tax.

HELD: bearing in mind the conduct of the parties, their respective pecuniary positions and contributions towards the settlement, and the fact that continued payment the original allowance provided by the deed would result in the ultimate impoverishment of the husband and consequent detriment to the wife, the husband was entitled to a variation and the registrar's report should be confirmed.

Observations of VAUGHAN WILLIAMS, L.J., in Constantinidi v. Constantinidi & Lance ([1905] P. 271), and of HILL, J., in *Prinsep v. Prinsep* ([1929] P. 236), applied. A

AS TO PRINCIPLES ON WHICH SETTLEMENTS WILL BE VARIED, see HALSBURY, *Hailsham Edn.*, Vol. 10, pp. 803-807, paras. 1280-1285; and FOR CASES, see DIGEST, Vol. 27, pp. 521-528, Nos. 5632-5703.

Cases referred to: B

- (1) *Wigney v. Wigney*, (1882), 7 P.D. 228; 51 L.J.P. 84; 47 L.T. 129; 27 Digest 520, 5615.
- (2) *Reid v. Reid*, [1926] P. 1; 95 L.J.P. 30; 134 L.T. 24; 27 Digest 503, 5384.
- (3) *Colclough v. Colclough & Fisher*, [1933] P. 143; 102 L.J.P. 87; 149 L.T. 287; Digest Supp. C
- (4) *Bowles v. Bowles*, [1937] 2 All E.R. 263; [1937] P. 127; 106 L.J.P. 68; 157 L.T. 45; Digest Supp.
- (5) *Garforth-Bles v. Garforth-Bles*, [1951] 1 All E.R. 308; [1951] P. 218.
- (6) *Johnson v. Johnson*, [1949] 2 All E.R. 247; [1950] P. 23; 2nd Digest Supp.
- (7) *Constantinidi v. Constantinidi & Lance*, [1905] P. 253; 74 L.J.P. 122; 93 L.T. 651; 27 Digest 522, 5641. D
- (8) *Prinsep v. Prinsep*, [1929] P. 225; 98 L.J.P. 105; 141 L.T. 220; *varied* C.A. [1930] P. 35; 99 L.J.P. 35; 142 L.T. 172; Digest Supp.
- (9) *Tomkins v. Tomkins*, [1948] 1 All E.R. 237; [1948] P. 170; [1948] L.J.R. 1028; 2nd Digest Supp.
- (10) *Chetwynd v. Chetwynd*, (1865), L.R. 1 P. & D. 39; 4 Sw. & Tr. 108; 34 L.J.P.M. & A. 65; 164 E.R. 1457; 27 Digest 472, 4963. E

APPLICATION by the husband, the respondent in a divorce suit, to vary a post-nuptial settlement and to confirm the registrar's report. For the wife it was contended that there should be no variation of the settlement in favour of the husband against whom a decree had been granted. F

Petrie for the husband.

J. B. Gardner (*Herd* with him) for the wife.

Cur. adv. vult.

Oct. 10. **COLLINGWOOD, J.**, read the following judgment. This is an application on the registrar's report as to the variation of a post-nuptial settlement under s. 25 of the Matrimonial Causes Act, 1950. The applicant is the respondent husband against whom a decree *nisi* was obtained by the wife on Jan. 9, 1950, on the ground of adultery, which decree was made absolute on July 7, 1950, on the husband's application. G

The husband is now sixty-two years of age, and the wife fifty-eight. The parties were married on Mar. 31, 1916, and there are three children of the marriage—two daughters, now aged thirty-four and twenty-eight respectively, and a son, aged twenty-four. Differences having arisen between them, on July 23, 1935, the wife presented a petition for judicial separation. The husband filed an answer, and on Apr. 29, 1936, the trial was begun before LANGTON, J. The parties then signed terms of agreement to compromise the suit by a deed of separation, the terms were filed and made a rule of court, and the petition was placed in the reserve list pending the execution of the deed, it being eventually dismissed on Dec. 23, 1936, on the wife's application. The separation deed was made on H

Dec. 1, 1936, and is the subject of this application for variation. After reciting unhappy differences, the institution of the suit for judicial separation and the compromise thereof, and the agreement to live apart, there follow a number of clauses usual in such deeds, and by cl. 4 the husband covenants to pay during the joint lives of the parties, and *dum casta*, an annual allowance of £275 per annum free of income tax, with a proviso for repayment to the husband of any rebate of income tax which the wife might obtain on her total income.

A On Oct. 14, 1949, the wife petitioned for divorce against the husband on the ground of his adultery and a decree *nisi* was pronounced on Jan. 9, 1950. There were unsuccessful negotiations regarding maintenance, for which the wife had applied on Dec. 9, 1949, and on May 25, 1950, the husband applied to vary the deed of separation by extinguishing or varying his liability to pay under cl. 4.

B Thereupon, on June 16, 1950, the wife applied to the court to rescind the decree *nisi* of dissolution and to substitute for it a decree of judicial separation. The husband put in a cross-application under s. 183 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, as added by s. 9 (3) of the Matrimonial Causes Act, 1937 (now s. 12 (3) of the Matrimonial Causes Act, 1950), to make the decree *nisi* absolute. The applications were heard before PEARCE, J. ([1950] 2 All E.R. 449). The learned judge took the view that the wife's application was actuated, not so much by religious scruples, as she contended, as by the fact that she was disappointed by the husband's financial state as revealed in the maintenance proceedings, and that she thought it would pay her better to remain his wife. He refused her application to rescind the decree *nisi* for divorce, and on the husband's application the decree *nisi* was made absolute on July 7, 1950.

D The application to vary the settlement came before the registrar on Apr. 17, 1951, after an adjournment for further applications to be filed. There were three affidavits by the husband and two by the wife. The husband's case was that whereas in 1936, when the deed was executed, he was in receipt of an income of £1,550 a year as secretary and director of Hadfields, Ltd., in Sheffield, since 1946, when he ceased to be so employed, his income had been reduced to some

E £450 a year which he earned by practising as a consulting accountant. His available capital was put at about £2,500. He had been paying £190* per annum free of tax to his wife, representing a gross annual liability of £345, and it was contended that in his reduced circumstances it was impossible for him to continue so to do. For the wife it was contended that there should be no variation and that the husband's obligation to pay under the deed continued. In his report

F the learned registrar said:

G "In the absence of any authority bearing directly on circumstances such as arise in this case I am in some doubt whether the principles which have been laid down in regard to variation of a settlement can be applied so as to afford the husband the relief he is seeking. Having regard, however,

H to the somewhat exceptional circumstances which arise in this case, I would submit that there should be a variation of the deed to the extent that the amount which the husband covenanted to pay be reduced to a sum equivalent to the notional income from his available capital, and I estimate that in this connection such an annual payment would amount to about £75 a year. This would leave the wife free to apply under s. 19 of the Matrimonial Causes Act, 1950, for an order based on his earned income, such order being variable at the instance of either party on a change of circumstances. Accordingly I submit: (i) That the post-nuptial settlement dated Dec. 1, 1936, be varied with effect from the date of the order to be made hereon by deleting in cl. 4 thereof all words after the word 'chaste' and substituting the words: 'pay to the wife the annual sum of £75, less tax,

* The annual allowance of £275 per annum free of income tax was reduced to £190 by reason of the provisions of s. 25 (1) of the Finance Act, 1941.

payable monthly.' (ii) The respondent to pay to the petitioner her costs of this application, including the costs of the appointment on Nov. 27, 1950. Certificate for counsel."

The application on the registrar's report came before me on May 30, 1951, when counsel for the husband objected to the wife seeking to vary the report in the absence of any notice setting out with sufficient particularity the variation sought, in accordance with the direction of the Divorce Registry, No. 40. The matter was, therefore, adjourned to enable the direction to be complied with, and by notice dated June 4, 1951, the wife stated that application would be made to vary the report as follows: (i) That in para. (i) of the submission of the report the sum of £275 a year free of tax be substituted for the words "£75 a year less tax," and (ii), in the alternative, that in the said paragraph the sum of £275 less tax be substituted for the words "£75, less tax." The hearing took place on June 27 and July 4, 1951. It was contended on behalf of the wife that it was contrary to the practice of the court to vary a settlement in favour of the guilty party, and a number of cases were referred to by counsel of which I think it is necessary to mention only three. They are *Wigney v. Wigney* (1), *Reid v. Reid* (2) and *Colclough v. Colclough & Fisher* (3). But that the court can, if the circumstances of the case warrant it, vary a settlement at the instance of, and in favour of, a guilty party is, I think, clear from the decisions in *Bowles v. Bowles* (4), *Garforth-Bles v. Garforth-Bles* (5) and *Johnson v. Johnson* (6). The general principles governing the exercise of the jurisdiction conferred on the court have been considered in a number of cases, notably in *Constantinidi v. Constantinidi & Lance* (7), *Prinsep v. Prinsep* (8) and *Tomkins v. Tomkins* (9).

In his judgment ([1905] P. 271) in *Constantinidi v. Constantinidi & Lance* (7), VAUGHAN WILLIAMS, L.J., referred to the considerations to be applied as laid down by LORD PENZANCE in *Chetwynd v. Chetwynd* (10) (L.R. 1 P. & D. 39), viz.: (i) The conduct of the petitioner. (ii) The conduct of the respondent. (iii) The pecuniary position of the petitioner. (iv) The pecuniary position of the respondent. (v) The relative sums contributed by each party. And (vi) the future of the respondent, and the available means which would be left to him to sustain his position in his home. With regard to this LORD PENZANCE says (*ibid.*, 45):

"If the reasonable needs of the wife did not demand it, the court could hardly feel justified in so reducing his income as to render his future residence on his property impossible."

In *Prinsep v. Prinsep* (8) HILL, J., said ([1929] P. 236), more generally:

"The main object of variation is to make proper provision for the injured spouse and the children of the marriage. And *prima facie*, settlements ought not to be interfered with further than is necessary for that purpose. But the court which has annulled the marriage must not only protect the injured party, but also be fair to the wrongdoing party."

In *Tomkins v. Tomkins* (9) LORD GREENE, M.R., pointed out ([1948] 1 All E.R. 240) that the power of the court to vary settlements is in no sense a penal jurisdiction, and no question of inflicting a penalty on a guilty husband can arise. There is no authority for excluding the possible destitution of a guilty husband from consideration; it is one of the relevant circumstances, all of which it is the duty of the court to take into account.

Applying these considerations to the present case, as to the conduct of the parties, the husband's adultery was not of a flagrant character and appears to have been the result, and not the cause, of estrangement between the parties. Further, he has paid throughout in accordance with his obligations under the deed, despite the change in his financial position. The wife alleged conduct against him as to which there was no proof, and her subsequent effort to get the decree *nisi* rescinded was actuated by motives which did not commend themselves

to PEARCE, J. With regard to their respective pecuniary positions, while it is true that the wife is not earning, it is also true that she contributed nothing towards the settlement, so that there is no question of the wife's fortune being used for the husband's benefit or for the benefit of the woman he has married. The husband's financial position has deteriorated considerably since the date of the deed. Such capital as he has is not readily realisable, and his income is less than one-third of what it was. As to the future, he could maintain the payments under the deed only out of capital, to the ultimate impoverishment of himself and consequent detriment to the wife.

For these reasons, I have come to the conclusion that the submission of the registrar is right, that it affords a fair provision for the wife having regard to the existing circumstances, and that the settlement should be varied in accordance with his submission. I accordingly confirm his report.

Order accordingly.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Neal, Scolah, Siddons & Co.*, Sheffield (for the husband); *Alfred Cox & Son*, agents for *Clarke & Nash*, High Wycombe (for the wife).

[*Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.*]

BARHAM v. CASTELL.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Slade, JJ.), October 16, 1951.]

Carriage of Goods—Carriage for hire—Public carrier's (contract) A licence—Condition to use vehicle for hauling goods of one firm—Use for haulage for other firms—Permit to use outside twenty-five miles radius—Effect of permit on conditions of licence—Road and Rail Traffic Act, 1933 (c. 53), s. 9 (1)—Transport Act, 1947 (c. 49), s. 52 (1).

The respondent was the holder of a public carrier's (contract) A licence entitling him to carry goods for hire or reward exclusively for the purpose of a contract entered into with a company named in the licence. He also obtained a permit from the Road Haulage Executive authorising the user of the licensed vehicle outside the twenty-five miles radius for the carriage of agricultural produce up to an amount of three thousand tons per annum. On several occasions he carried in the licensed vehicle goods for firms other than the firm named in the A licence.

HELD: the effect of a permit granted under s. 52 (1) of the Transport Act, 1947, was to extend the twenty-five miles operating radius specified in that sub-section, and not to enlarge the scope of an A licence. While, therefore, the respondent was entitled to carry goods for the firm named in the A licence more than twenty-five miles from his operating centre, he was not entitled to carry goods for a firm not named in the licence, and so he was guilty of an offence under the Road and Rail Traffic Act, 1933, s. 9 (1).

FOR THE ROAD AND RAIL TRAFFIC ACT, 1933, s. 8 (1) and s. 9, see HALSBURY'S STATUTES, Second Edn., Vol. 24, pp. 686 and 687 respectively; and FOR THE TRANSPORT ACT, 1947, s. 52 (1), see *ibid.*, p. 768.

CASE STATED by Suffolk justices.

At a court of summary jurisdiction sitting at Stowmarket on Apr. 25, 1951, informations were preferred by the appellant, a traffic examiner, against the respondent, a haulage contractor, alleging that he, as holder of a public carrier's (contract) A licence in respect of a motor lorry, had used the vehicle for an unauthorised purpose, contrary to s. 9 (1) of the Road and Rail Traffic Act, 1933. It was proved or admitted that the licence had been issued to the respondent to authorise him to use his motor lorry exclusively for the purposes of a haulage

contract with a named company, Munson & Fisher, Ltd., of Stowmarket, under which he undertook to haul agricultural produce to Burton-on-Trent. The respondent was also the holder of a Road Haulage Executive original permit relating to unspecified vehicles authorising him to carry goods for hire or reward in any motor vehicle authorised to be used under any A licence, B licence, or public carrier's (contract) licence when operating outside a radius of twenty-five miles from his operating centre, and subject to the condition that the vehicles, while so operated, were exclusively employed for the purpose of the following work: conveying agricultural produce and requisites—three thousand tons per annum, eighty miles radius of operating centre and to Burton-on-Trent. On the dates mentioned in the informations the respondent carried agricultural produce on the lorry in respect of which he held the A licence for firms other than Munson & Fisher, Ltd. All the journeys were within the radius of eighty miles.

It was contended for the appellant that the permit was effective only to remove, subject to the restrictions therein contained, the prohibition, imposed by s. 52 (1) of the Transport Act, 1947, against the carriage in the lorry of goods for hire and reward for more than twenty-five miles from its operating centre, and that the permit could not, and did not, make lawful anything which, but for such permit, constituted a breach of a condition of the A carrier's (contract) licence. For the respondent it was contended that there was no case to answer on the grounds that the permit constituted a modification of the licence and that any condition of the licence was abrogated and of no effect to the extent to which it was at variance with the expressed terms of the permit. The justices held that the contention of the respondent was correct and dismissed the information. The appellant appealed.

J. P. Ashworth for the appellant.

Boreham for the respondent.

LORD GODDARD, C.J.: This is a Case stated by Suffolk justices before whom the respondent, a haulage contractor in a small way of business, was summoned for that he

“being the holder of a public carrier's (contract) A licence . . . authorising the use of a goods vehicle . . . for the carriage of goods for hire or reward exclusively for the purpose of a contract entered into with Munson & Fisher, Ltd., unlawfully did fail to comply with condition 1 thereof in that he used the said vehicle for a purpose other than that for which it was authorised.”

In March, 1949, the respondent received an A licence to carry goods “exclusively for the purposes of the undermentioned contract:—Munson & Fisher, Ltd., Stowmarket.” He was summoned because on Jan. 9, 10, 15 and 16, 1951, he was found carrying goods for people other than Munson & Fisher. When he was summoned he produced a permit, granted by the Road Haulage Executive under the Transport Act, 1947, which authorised him to use his A licence for vehicles when operating outside a radius of twenty-five miles from the operating centre at Great Finborough subject to the condition that “the vehicles are, whilst so operated, exclusively employed for the purposes of the under-mentioned work.” There follows the heading: “Work for which the permit is granted: Agricultural produce and requisites—three thousand tons per annum, eighty miles radius of operating centre and to Burton-on-Trent. From Mar. 31 to Dec. 31, two thousand four hundred tons barley to Burton; from Mar. 31 to Dec. 31, five hundred tons London to and from.” It is not surprising that, when the justices saw that permit, they said: “You have told this man that, although he has a licence to work only for Munson & Fisher, under this permit he can, provided he does not take more than three thousand

tons a year, carry agricultural produce and requisites within a radius of eighty miles from his operating centre and also to Burton-on-Trent."

A I am of opinion that the Road Haulage Executive only meant to authorise him to carry the produce of Munson & Fisher outside the twenty-five miles radius on condition that he did not carry more than three thousand tons a year. On looking at s. 8 (1) of the Road and Rail Traffic Act, 1933, and s. 52 of the Transport Act, 1947, it is clear that that is all that the permit authorises him to do. Section 52 (1) of the Act of 1947 provides:

B "On and after the appointed day, it shall be a condition of every A licence and every B licence that, except under and in accordance with a permit granted by the commission, goods shall not be carried for hire or reward in any authorised vehicle if the vehicle, at any time while the goods are being so carried, is more than twenty-five miles from its operating centre, and the Road and Rail Traffic Act, 1933, shall have effect as if the said condition were included among the conditions specified in sub-s. (1) of s. 8 of that Act."

C The effect of that section, therefore, is that an A licence does not authorise the holder to carry goods for more than twenty-five miles from his operating centre unless he has a permit. The permit only allows him to carry goods more than twenty-five miles from his operating centre, and the provisions of s. 52 (1) have to be read into s. 8 (1) of the Road and Rail Traffic Act, 1933, which lays down the conditions of the licence. In other words, the effect of s. 52 (1) of the Act of 1947 is to add to an A licence the condition that the holder shall not carry goods outside a radius of twenty-five miles from his operating centre unless he obtains a permit to allow him to do so. The effect of these two sections is that, if the permit is to do particular contract work, it cannot authorise the grantee to use his lorry either within or without the twenty-five miles radius for anything else except that for which the licence is granted.

D The case should go back to the justices with a direction that an offence was committed, and it will then be open to the justices to say that it is a case in which an absolute discharge should be granted. It seems to me exactly the sort of case which should be treated in that way.

HILBERY, J.: I agree.

SLADE, J.: I agree.

Case remitted.

F Solicitors: *Treasury Solicitor* (for the appellant); *Tamplin, Joseph & Flux*, agents for *Gudgeons, Peacock & Prentice*, Stowmarket (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re KEHR (*deceased*). MARTIN AND ANOTHER *v.* FOGES
AND ANOTHER.

[CHANCERY DIVISION (Danckwerts, J.), October 16, 1951.]

Executor and Administrator—Attorney administrator—Intestate domiciled abroad—Appointment of trustees of infant's share—Powers of attorney administrator—Trustees' powers to maintain infant—Administration of Estates Act, 1925 (c. 23), s. 42 (1)—Trustee Act, 1925 (c. 19), s. 31 (1).

On Aug. 28, 1947, P.K. died in India, intestate and having a German domicile, and leaving personal estate in England. He was survived by his wife and a son, born on Jan. 28, 1937. On May 31, 1950, the plaintiffs, as attorneys, obtained letters of administration in England. It was desired that trustees should be appointed of the personal estate of the intestate to which the infant son was entitled, and that the income or corpus thereof should be available for his maintenance during infancy.

HELD: (i) the plaintiffs, as personal representatives, although attorneys, had power to appoint trustees under the Administration of Estates Act, 1925, s. 42 (1).

(ii) the trustees, when appointed, would have the powers conferred on trustees by the Trustee Act, 1925, s. 31 (1), to maintain the infant beneficiary out of the income.

AS TO POWERS OF PERSONAL REPRESENTATIVES TO APPOINT TRUSTEES OF INFANT'S LEGACY, see HALSBURY, Hailsham Edn., Vol. 33, p. 174, para. 301.

Case referred to:

(1) *Re Wilks*, [1935] Ch. 645; 104 L.J.Ch. 297; 153 L.T. 255; Digest Supp.

ADJOURNED SUMMONS to determine, *inter alia*, whether the attorney administrators in England of the English personal property of an intestate who died domiciled in Germany had power under the Administration of Estates Act, 1925, s. 42 (1), to appoint trustees of an infant's interest in the estate, and whether the trustees, when and if so appointed, would have powers of maintaining the infant under the Trustee Act, 1925, s. 31 (1).

R. J. T. Gibson for the plaintiffs, attorney administrators of the estate in England.

J. H. Lazarus for the first defendant, the widow of the intestate.

Boraston for the second defendant, the infant son.

DANCKWERTS, J.: In this case I have held that Peter Kehr, who was born in Germany and died in India on Aug. 28, 1947, was domiciled at that date in Germany, having retained his domicile of origin. He died intestate, and, therefore, the persons entitled to his estate are to be ascertained according to the law of Germany and not according to the municipal law of England. In those circumstances it is desired that trustees should be constituted in place of the plaintiffs who, as attorneys, obtained letters of administration in England on May 31, 1950, and it is also desired that the income or corpus of the property to which the second defendant, the child of the deceased's marriage, is entitled, should be available for the maintenance of that child during his infancy. The question is whether I have jurisdiction to authorise anything of that sort, and whether the personal representatives, or any trustees who may be constituted by them or by the court, will have power to provide maintenance for the infant defendant.

This is a matter on which there is very little authority, if any. It lies within that rather difficult subject, private international law. It is plain that the devolution of personal property belonging to a deceased who was domiciled outside England is regulated by the law of the country of domicile at the date of his death, that is to say in the present case, the law of Germany. It is also

well established that, as regards property which is situate locally in England, the law of England regulates the administration of that property on the death of the deceased, and the question which I have to decide is one which lies rather on the margin between those two considerations of law.

A In the decision which I have to reach I am assisted to a certain extent by a decision of FARWELL, J., in *Re Wilks* (1). In that case a testator who was domiciled in Ontario, Canada, died possessed of estates in Canada, the United States of America, France and England. He left wills disposing of his estates in Canada, the United States and France, but no will could be found disposing of his estate in England. Letters of administration were granted to his widow and the plaintiff. He left him surviving his wife and three infant children. Included in his English estate was a large block of shares in an English private company. B According to the law of Ontario the sale of the portion of these shares to which the infants were entitled could not be postponed by administrators appointed in Ontario. The English administrators were anxious to postpone the sale of the shares, and the plaintiff took out a summons asking whether they were entitled, by virtue of s. 33 of the Administration of Estates Act, 1925, to postpone the sale. C It was held that the English administrators were entitled to exercise the power to postpone given to them by s. 33 until they could get a good discharge for the money in their hands from the persons beneficially entitled to it. So far as the actual decision of FARWELL, J., goes, it was that, until the administration of the English assets was completed by the administrators, they continued to be administrators and had the powers which English law gives them as personal representatives, and they were not confined solely D to the powers which, in respect of the devolution of the estate, were given by the law of the domicile. FARWELL, J., did, however, discuss in the course of his judgment the Administration of Estates Act, 1925, s. 42 (1), which provides:

“Where an infant is absolutely entitled under the will or on the intestacy of a person dying before or after the commencement of this Act (in this sub-section called ‘the deceased’) to a devise or legacy, or to the residue of the estate of the deceased, or any share therein, and such devise, legacy, E residue or share is not under the will, if any, of the deceased, devised or bequeathed to trustees for the infant, the personal representatives of the deceased may appoint a trust corporation or two or more individuals not exceeding four (whether or not including the personal representatives or one or more of the personal representatives), to be the trustee or F trustees of such devise, legacy, residue or share for the infant, and to be trustees of any land devised or any land being or forming part of such residue or share for the purposes of the Settled Land Act, 1925, and of the statutory provisions relating to the management of land during a minority, and may execute or do any assurance or thing requisite for vesting such devise, G legacy, residue or share in the trustee or trustees so appointed. On such appointment the personal representatives, as such, shall be discharged from all further liability in respect of such devise, legacy, residue, or share, and the same may be retained in its existing condition or state of investment, or may be converted into money, and such money may be invested in any authorised investment.”

H The object of that section was to enable personal representatives to get a discharge from all further liability in respect of a legacy or share of the estate to which an infant beneficiary was entitled, having regard to the fact that he could not give a discharge while he was still under the age of twenty-one years. Of this sub-section FARWELL, J., in *Re Wilks* (1), says ([1935] Ch. 650):

“It is noticeable that that section appears to deal with a case of an infant becoming absolutely entitled on an intestacy of a person dying after the Act of 1925. If that section deals only with persons domiciled in this

country, it seems to be a curious provision, because under the Act it is no longer possible for an infant to become absolutely entitled on the intestacy of a person domiciled in this country, since the Act itself makes an infant's interest contingent upon his attaining twenty-one or marrying; therefore it looks as though this section is contemplating an intestacy in the case of a person dying domiciled abroad. Whether that be so or not, and I do not propose to found my judgment on that proposition, it appears to me that this is a matter of administration and that the administrators are entitled to exercise the power of postponement which is given them by the Act."

A

The last observation, of course, goes to s. 33 of the Administration of Estates Act, 1925, which he held applied in that case, but he does give reasons which seem to lead to the conclusion that s. 42 (1) applies not only to an estate regulated, as regards devolution, by the law of England, but also to one which is regulated by the law of some other country. I think, therefore, I am justified in concluding that s. 42 (1) of the Administration of Estates Act, 1925, does apply to the administration of the estate in the present case, and, accordingly, that the personal representatives, although attorneys, have power to appoint trustees under the provisions of s. 42 (1) of the Administration of Estates Act, 1925, and I so hold.

B

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The next question is: Assuming that they can appoint trustees under that section, what will be the powers of such trustees? Will they have the powers which are conferred on trustees by the Trustee Act, 1925, s. 31 (1), to maintain an infant beneficiary out of the income of the property of which they are trustees? I must confess it is a question of some difficulty, but it seems to me that, while there may be doubts whether trustees constituted by the law of a foreign country would have the powers conferred on trustees regulated by English law, including the powers conferred by the Trustee Act, 1925, it may be different in the case of trustees who are constituted under a provision of English law, that is to say, under the power to appoint trustees conferred on personal representatives by s. 42 (1) of the Administration of Estates Act, 1925. It seems to me that trustees constituted under that sub-section hold on trust for beneficiaries who are to be found according to the provisions of some foreign law, but that their powers and constitution depend on the provisions of English law. Therefore, I see no reason why they should not have the powers of other trustees constituted according to English law, and, accordingly, have the powers of maintaining infant beneficiaries conferred by the Trustee Act, 1925, s. 31. So, I hold that, if the trustees are appointed under the Administration of Estates Act, 1925, s. 42 (1), they will have the powers of maintenance conferred on trustees by the Trustee Act, 1925, s. 31.

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Order accordingly.

Solicitors: *Woodham Smith, Borradaile & Martin* (for all parties).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

MANNING v. HAMMOND.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Slade, JJ.), October 16, 1951.]

Street Traffic—Excessive speed—Goods vehicle—Motor van with pneumatic tyres—No carrier's licence issued in respect of vehicle—Road Traffic Act, 1930 (c. 43), sched. I, para. 2 (1) (a), as substituted by Road Traffic Act, 1934 (c. 50), s. 2 (1), sched. I—Motor Vehicles (Variation of Speed Limit) Regulations, 1950 (S.I., 1950, No. 1705), reg. 2.

On Mar. 24, 1951, the appellant was driving a motor vehicle at a speed of forty-five miles an hour on a road not in a built-up area. The vehicle, a van fitted with pneumatic tyres, was constructed as a goods vehicle, but was not used for the carriage of goods and no carrier's licence under Part I of the Road and Rail Traffic Act, 1933, had been issued in regard to it. The appellant was charged with driving the vehicle at a speed greater than thirty miles an hour, contrary to the Road Traffic Act, 1930, s. 10 (1) (as amended by the Road Traffic Act, 1934, s. 2 (2)), and sched. I, para. 2 (1) (a), to the Act of 1930 (as substituted by s. 2 (1) and sched. I of the Act of 1934).

HELD: the class of goods vehicles fitted with pneumatic tyres for which a maximum speed of thirty miles an hour was prescribed by sched. I, para. 2 (1) (a), to the Act of 1930 (as substituted by sched. I to the Act of 1934) had been narrowed by the amendment to para. 2 (1) (a) made by reg. 2 of the Motor Vehicles (Variation of Speed Limit) Regulations, 1950, and under the new para. 2 (1) (a) for a goods vehicle fitted with pneumatic tyres to be subject to a speed limit it must not merely be constructed or adapted for use as a goods vehicle, but must also be "authorised to be used under a licence granted under Part I of the Road and Rail Traffic Act, 1933"; no licence under Part I of the Act of 1933 had been issued in respect of the vehicle driven by the appellant; and, therefore, it was not subject to a maximum speed and no offence had been committed.

FOR THE ROAD TRAFFIC ACT, 1930, sched. I, as substituted by the Road Traffic Act, 1934, sched. I, see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 664.

CASE STATED by Devon justices.

At a court of summary jurisdiction sitting at Plympton, on Apr. 30, 1951, the respondent, a police inspector, preferred an information against the appellant charging him with having driven a goods vehicle, *viz.*, an Austin motor van, on the Exeter-Plymouth main road on Mar. 24, 1951, at a speed greater than thirty miles an hour (the speed specified in sched. I, para. 2 (1) (a), to the Road Traffic Act, 1930, as substituted by sched. I to the Road Traffic Act, 1934, as the maximum speed in relation to a vehicle of that class or description), contrary to s. 10 (1) of the Act of 1930, as amended by s. 2 (2) of the Act of 1934. At the material time the appellant was driving at an average speed of forty-five miles an hour. The unladen weight of the vehicle was under one ton, and it was fitted with pneumatic tyres. It was owned by the appellant's father and was used by him for social purposes and for visiting customers in connection with his business, but not for the carriage of goods, and it was not carrying goods at the material time. No A, B, or C licence (*i.e.*, no carrier's licence) had been applied for or issued in respect of the vehicle under the provisions of Part I of the Road and Rail Traffic Act, 1933.

The appellant contended that, by the Motor Vehicles (Variation of Speed Limit) Regulations, 1950, reg. 2, which varied sched. I, para. 2 (1) (a), to the Road Traffic Act, 1930, as substituted by sched. I to the Road Traffic Act, 1934, the vehicle was exempted from the speed limit of thirty miles an hour laid down in sched. I, para. 2 (1) (a), to the Act of 1930 as substituted by sched. I to the

Act of 1934, as it was not used for the purposes mentioned in s. 1 (1) of the Road and Rail Traffic Act, 1933, and there was thus no obligation to take out a licence under s. 2 (1) of the Act of 1933. The respondent contended that reg. 2 of the regulations of 1950 did not exempt the vehicle from the speed limit of thirty miles an hour laid down in sched. I, para. 2 (1) (a), to the Act of 1930, as substituted by sched. I to the Act of 1934, as, under s. 1 (1) of the Act of 1933, the vehicle should have been licensed under that Act.

The justices, being of the opinion that the respondent's contention was correct, found that the case was proved and convicted the appellant.

Molony for the appellant.

T. Dewar for the respondent.

SLADE, J.: The Road Traffic Act, 1930, s. 2 (1), classifies motor vehicles, and sched. I sets out maximum speeds for the various classes. Save in so far as maximum speeds are provided by the Act or regulations made thereunder, there is no maximum speed for any vehicle on a road not in a built-up area. If, therefore, there is to be a maximum speed, it must be found to have been prescribed for the particular class of vehicle.

Schedule I to the Act of 1930 was amended by the Road Traffic Act, 1934, s. 2 (1), which substituted sched. I to the Act of 1934 for sched. I to the Act of 1930. The new schedule deals with the maximum speed for various types of vehicles, the classifications having been changed to some extent between 1930 and 1934. Paragraph 1 deals with "passenger vehicles," which are "vehicles constructed solely for the carriage of passengers and their effects," the criterion being construction solely, and not user. Paragraph 2, which deals with "goods vehicles," refers to vehicles which are either "constructed or adapted," that is to say, originally constructed or subsequently adapted, "for use for the conveyance of goods or burden of any description," and in relation to that class of vehicle a maximum speed limit of thirty miles an hour is prescribed by para. 2 (1) (a) in respect of motor cars or motor cycles not drawing a trailer, "if the first condition as to tyres is satisfied," i.e., if all the wheels of the vehicle are fitted with pneumatic tyres, as they were in this case. It is conceded that, but for the Motor Vehicles (Variation of Speed Limit) Regulations, 1950, the vehicle which is the subject-matter of this case would have fallen within that classification and would have been liable to a speed limit of thirty miles an hour, and, as the justices found that the average speed of the vehicle on the occasion in question was forty-five miles an hour, that an offence would have been committed. On July 25, 1950, however, the Motor Vehicles (Variation of Speed Limit) Regulations, 1950, were made and came into operation on Oct. 25, 1950. They were made under the powers conferred on the Minister of Transport by s. 10 (4) of the Act of 1930 (which was amended by s. 2 (4) of the Act of 1934) and s. 30 of the Act of 1930. Regulation 2 of the regulations of 1950 provided that the provisions of sched. I to the Act of 1930, as substituted by the Act of 1934, and as varied by a number of regulations dealing with the variation of speed limits made in and between 1937 and 1940, should be further varied. The material variation, so far as this case is concerned, is to substitute for sched. I, para. 2 (1) (a), to the Act of 1930, as amended, a less wide specification, and, therefore, unless the vehicle in this case can be brought within the narrower limits of the description in reg. 2 of the regulations of 1950, as opposed to the wider terms of sched. I, para. 2 (1) (a), to the Act of 1930, as amended by the Act of 1934, which previously obtained, there is no statutory speed limit for it and the appellant committed no offence by driving it at forty-five miles an hour.

It becomes necessary to examine the new description to see whether the vehicle falls within either of the new sub-paragraphs to sched. I, para. 2 (1), to

the Act of 1930, as amended, which are now substituted by reg. 2 of the regulations of 1950. They are sub-para. (a) and sub-para. (aa). I can dispose of sub-para. (aa) at once because it applies to:

“ Motor cars not exceeding one ton in weight unladen and motor cycles, if the second condition as to tyres is satisfied.”

A The second condition as to tyres was not satisfied in this case because the first condition as to tyres was satisfied (*i.e.*, all the wheels of the vehicle were fitted with pneumatic tyres) and the second condition cannot be satisfied when the first condition is satisfied. There, therefore, remains sub-para. (a), which is divided into two parts. The first part of sub-para. (a), as amended by the regulation of 1950, is:

B “ Motor cars and motor cycles in the case of which the first condition as to tyres is satisfied and which are authorised to be used under a licence granted under Part I of the Road and Rail Traffic Act, 1933 . . . ”

C The justices found that the vehicle was owned by the appellant's father and that no A, B or C licence (*i.e.*, no licence under Part I of the Act of 1933) had been applied for, or issued to him, in respect of the vehicle under the provisions of the Act of 1933. That is not surprising, because, as the justices found, the vehicle was not used for the carriage of goods, and by s. 1 (1) of the Act of 1933 one is only required to apply for an A, B or C licence (*i.e.*, a carrier's licence), when one not only has a goods vehicle in the sense that it is constructed or adapted for the carriage of goods, but also when it is *de facto* used for the purpose of carrying goods.

D Sub-paragraph (a) then goes on to say:

“ . . . or which but for the provisions of s. 1 (7) of the [Act of 1933] or s. 59 of the Transport Act, 1947, or in the case of a vehicle in the public service of the Crown but for such service, would require such a licence.”

E It is unnecessary to consider the various provisions such as s. 1 (7) of the Act of 1933 or s. 59 of the Transport Act, 1947, because in no circumstances would a vehicle require a licence under the Road and Rail Traffic Act, 1933, if it were not in fact used for the purpose of the carriage of goods, and, therefore, the exemptions from such a requirement which are referred to in the latter part of sub-para. (a), have no application.

F In the result, therefore, on the facts as found by the justices, there was no statutory requirement in respect of the maximum speed at which the vehicle could have been driven at the material time, and, consequently, no offence against the appellant was proved. Therefore, the appeal must be allowed and the conviction quashed.

HILBERY, J.: I agree.

G LORD GODDARD, C.J.: I agree.

Appeal allowed.

Solicitors: *Amery-Parkes & Co.* (for the appellant); *Kinch & Richardson*, agents for *Carter, Fisher & Co.*, Torquay (for the respondent).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

EVERETT v. RIBBANDS AND ANOTHER.

[KING'S BENCH DIVISION (Devlin, J., with a Jury), October 11, 1951.]

Malicious prosecution—Plaintiff bound over by court of summary jurisdiction—Competency of action.

On the hearing of an information laid by a police officer at the instance of a third person the plaintiff had been ordered by the magistrate to enter into a recognizance and to find two sureties to keep the peace and be of good behaviour for twelve months or in default to serve one month's imprisonment. In an action by him against the police officer and the third person for damages for malicious prosecution,

HELD: the prosecution having been successful after the plaintiff had had an opportunity of being heard, no action for malicious prosecution lay even though the plaintiff was only bound over and not sentenced to imprisonment or ordered to pay a fine.

Basébé v. Matthews (1867) (L.R. 2 C.P. 684), applied.

Steward v. Gromett (1859) (29 L.J.C.P. 170), distinguished.

AS TO THE ESSENTIALS TO THE ACTION FOR MALICIOUS PROSECUTION, see HALSBURY, Hailsham Edn., Vol. 22, pp. 10-13, paras. 11-14; and FOR CASES, see DIGEST, Vol. 33, pp. 481-483, Nos. 167-181.

Cases referred to:

- (1) *Basébé v. Matthews*, (1867), L.R. 2 C.P. 684; 36 L.J.M.C. 93; 16 L.T. 417; 31 J.P. 391; 33 Digest 482, 179.
- (2) *Bynoe v. Bank of England*, [1902] 1 K.B. 467; 71 L.J.K.B. 208; 86 L.T. 140; 33 Digest 478, 120.
- (3) *Vanderbergh v. Blake*, (1662), Hard. 194; 145 E.R. 447; 33 Digest 479, 134.
- (4) *Steward v. Gromett*, (1859), 7 C.B.N.S. 191; 29 L.J.C.P. 170; 141 E.R. 788; 33 Digest 481, 164.
- (5) *Mellor v. Baddeley*, (1834), 2 Cr. & M. 675; 4 Tyr. 962; 3 Nev. & M. M.C. 137; 3 L.J.Ex. 217; 33 Digest 482, 176.
- (6) *Whitworth v. Hall*, (1831), 2 B. & Ad. 695; 9 L.J.O.S.K.B. 297; 109 E.R. 1302; 33 Digest 479, 140.

ACTION for damages for malicious prosecution.

The plaintiff had been ordered by a metropolitan magistrate to enter into recognizances and to find sureties to keep the peace and be of good behaviour on an information laid by the second defendant, a police officer, at the instance of the first defendant. A preliminary point was taken by the defendants that there was no case to go to the jury because the statement of claim disclosed no cause of action, the prosecution having been successful.

The plaintiff appeared in person.

Pearl for the first defendant.

G. Howard for the second defendant.

DEVLIN, J.: This is a claim by the plaintiff for damages for malicious prosecution against two defendants. Among other matters they have both pleaded in their defences that the statement of claim discloses no cause of action. That objection has been argued before me, and for the purpose of considering it, as it is a matter of law, I have to assume that all the facts alleged in the statement of claim are correctly alleged, and, therefore, that the plaintiff is in the position of having satisfied any jury or other court of fact that his case on the facts is made out. The contention is that even when he does that he cannot have any redress as a matter of law because he has not succeeded in showing any circumstances or any cause of action for which the law gives a remedy. The statement of claim alleges that the second defendant, a detective sergeant,

A at the instance or instigation of the first defendant, a Miss Ribbands, laid an information on July 8, 1950, before the North London magistrate against the plaintiff and was granted a summons. The summons alleged that between May, 1941, and June, 1950, the plaintiff sent offensive postcards and letters through the post to the first defendant, and further that he did unlawfully loiter at 76, Oldfields Road, with intent to cause a breach of the peace. The statement of claim next alleges that on July 21 at the conclusion of the hearing the magistrate ordered the plaintiff to enter into a recognizance and to find two sureties in £20 each within seven days to keep the peace and be of good behaviour for twelve calendar months, or, in default, to serve one month's imprisonment. The plaintiff found the sureties as is also alleged in the statement of claim. He applied to the Divisional Court for an order of *certiorari* to quash the order. The application was refused.

B It is in those circumstances that the plaintiff brings his action for malicious prosecution, and the contention of the defence is that the statement of claim itself sets out that the prosecution was successful and there can be no cause of action for malicious prosecution if the prosecution has turned out to be successful. The law on that matter has been laid down in several cases which are binding on me. Before I refer to them, I ought to say that an attempt was made at an early stage of the action to strike the statement of claim out as showing no cause of action, but the judge in chambers considered that the point was not so clear as to justify that extreme course being taken, and that the matter was one which ought to be argued and considered in open court. In arriving at that conclusion, the judge had much in mind an *obiter dictum* by BYLES, J., in one of the cases to which I shall later refer. The law on the matter I shall take from one of the more recent cases, *Basébé v. Matthews* (1), decided in 1867, which was followed and approved in 1902 by the Court of Appeal in *Bynoe v. Bank of England* (2).

D I think the essence of the decision in *Basébé v. Matthews* (1) is sufficiently set out in the headnote, which is in these terms:

E “The rule that, in an action for maliciously and without reasonable or probable cause putting the law in motion to the plaintiff's damage, it is essential to aver that the proceeding alleged to have been instituted maliciously and without reasonable or probable cause, has terminated in favour of the plaintiff, if from its nature it be capable of such a termination, applies to a case in which the plaintiff has been summarily convicted under a statute giving no power of appeal.”

F The reason for the rule is laid down in all the judgments, and I can take it, I think, from the judgment of BYLES, J., in the following terms (L.R. 2 C.P. 687):

G “I think we should be disturbing foundations if we were to admit that there is any doubt that the criminal proceeding must be determined in favour of the accused before he can maintain an action for a malicious prosecution. If this were not so, almost every case would have to be tried over again upon its merits. In my judgment it makes no difference that the party convicted has no power of appealing. This doctrine is as old as the case of *Vanderbergh v. Blake* (3), where HALE, C.J., says that, ‘if such an action should be allowed,’—that is, an action against a custom-house officer for seizing goods, which were afterwards condemned as forfeited by judgment of the proper court,—‘the judgment would be blown off by a side-wind’.”

H That, therefore, is the basis of the rule. I suppose it is part of the general doctrine that there must be an end to litigation, and, a judgment having been given, it is not permissible to attack it indirectly in proceedings of this sort. That holds good whether or not it can be attacked directly by way of appeal.

Those cases the plaintiff has sought to distinguish on the ground that what the present case is concerned with is a decision by a magistrate not to impose

any penalty on him but to cause him to find sureties and be bound over to keep the peace. The basis of that contention rests on *Steward v. Gromett* (4), a case earlier than the cases to which I have referred. In that case the defendant applied to the magistrate by way of a proceeding which was then *ex parte* to require the plaintiff to enter into a recognizance and give sureties to be of good behaviour. It was argued that the general rule could not apply to a case where the plaintiff had had no right to be heard, but the matter had been determined against him *ex parte*. That distinction was accepted by the court. It is a little important to see the grounds on which the distinction was found acceptable. ERLE, C.J., said (29 L.J.C.P. 175):

A

"The question is, whether the plaintiff had an opportunity of obtaining a determination in his favour on the demand for sureties of the peace. Could the information have been controverted so that he might have demanded a judgment in his favour?"

B

Then he held that he could not. He had no such opportunity, and, that being so, the court held that the general rule that where proceedings are determined against a person the action does not lie ought not to cover the facts of that exceptional case. WILLIAMS, J., although he applied a rather different principle as being at the root of the law on this matter, distinguished the earlier cases on the same ground. He said (*ibid.*):

C

"In the case of exhibiting articles of the peace, or in the precisely analogous case of demanding sureties of the peace, the proceedings must end against the plaintiff, because he is not allowed to answer; and it is manifestly impossible to say, under those circumstances, that the existence of the proceedings, and the fact that they have not ended favourably to the plaintiff, is evidence of reasonable and probable cause for the defendant's instituting them."

D

CROWDER, J., said (*ibid.*, 176):

"The question is, whether the plaintiff had the opportunity of controverting the oath of the defendant before the magistrates? If he had, the rule applies that it is necessary for the plaintiff to show a termination of the proceedings in his own favour."

E

BYLES, J., said (*ibid.*):

"The only objection made on behalf of the defendant, as I understand it, is, that the inquiry here had terminated unfavourably to the plaintiff. Whether that objection is of any force depends upon whether the plaintiff had the opportunity of being heard in his own defence."

F

If the procedure in courts of summary jurisdiction was still the same as it was in 1860, that decision and the reasoning behind it would be binding on me, but the procedure has been altered by the Summary Jurisdiction Act, 1879, s. 25 of which provides:

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"The power of a court of summary jurisdiction, upon complaint of any person, to adjudge a person to enter into a recognizance and find sureties to keep the peace or to be of good behaviour towards such first-mentioned person, shall be exercised by an order upon complaint, and the Summary Jurisdiction Acts shall apply accordingly, and the complainant and defendant and witnesses may be called and examined and cross-examined, and the complainant and defendant shall be subject to costs, as in the case of any other complaint."

H

That means that the proceedings are no longer *ex parte*, but before any order is made both sides are to be heard or to have an opportunity of being heard. It appears to me that that alteration in the law is vital, because the extracts I have read from the judgments in *Steward v. Gromett* (4) show plainly that the

basis of all the judgments, with the possible exception of that of BYLES, J., was that there had been no opportunity for the plaintiff to be heard or put his side of the case.

Apart from the argument of principle, there are two matters on which the plaintiff in his argument before me has relied. The first is the statement of the law in STONE'S JUSTICES' MANUAL, 1951, vol. 1, p. 302, where it says:

A "An action will lie for falsely and maliciously causing a person to be required to enter into sureties (*Steward v. Gromett* (4))."

On any view that appears to me to be an incorrect statement of the law. Whether the proposition be right or wrong, it seems to me that *Steward v. Gromett* (4), can no longer be cited as authority for it. When considering an authority one must always look at the reasoning behind the judgment, and, having regard to the change in the law occasioned by the Act of 1879, it seems to me clear that the reasoning in *Steward v. Gromett* (4), can no longer apply.

B The second ground—perhaps it comes first in order of importance—was the qualification which was contained in the judgment of BYLES, J. That judge, having said in the passage I have already cited that the question whether the objection had any force depended on whether the plaintiff had an opportunity of being heard in his own defence, continued later on in his judgment to say this (29 L.J.C.P. 176):

C "If it was *ex parte*, then this action is maintainable; but it by no means follows that the converse of that proposition is true—that if the plaintiff had the opportunity of defending himself the action is not maintainable."

D Pausing there, that is contrary to the view of CROWDER, J., who had held that in such circumstances the action would not be maintainable. Then, having referred to the procedure under the writ of *capias*, BYLES, J., went on to say (*ibid.*):

E "However, it is unnecessary to express any opinion on this point, and I refrain from doing so."

There is not, therefore, any *obiter dictum* on which the plaintiff can rely as being of persuasive authority. There is merely a statement by BYLES, J., that it is a point which he would desire to consider further and on which he reserves his opinion. It is not without significance, that he was the judge who eight years later gave the first judgment in *Basébé v. Matthews* (1) and there laid down the law in the terms which I have read.

F There is, therefore, no authority which the plaintiff can invoke in his aid once *Steward v. Gromett* (4), is distinguished, but that still leaves the argument on principle which I have to consider and determine. I have to do so within well-established limits. I am bound by *Basébé v. Matthews* (1), and also by *Bynoe v. Bank of England* (2). It would be improper for me to speculate as to what might have been in the mind of BYLES, J., when he made the reservation to which I have referred. It may have been that he thought the propositions of which those later cases are an illustration might be considered in some higher court, or it may be that he was contemplating a different set of circumstances from that brought about by the change (some time later) as a result of the Summary Jurisdiction Act, 1879. I take the principle from the two cases I have mentioned, and I have to ask myself whether the present case falls within that principle or not. Taking the principle as it was put by HALE, C.J., as being that the judgment would be "blowed off by a side-wind," it seems to me to be equally applicable to a case where the penalty imposed—if "penalty" be the right word—or, at any rate, the decision of the magistrate, is a binding-over, as it would be in the case of any other form of penalty. I can follow the distinction in the case of an *ex parte* judgment. *Ex parte* judgments are always treated differently from other judgments in the eyes of the law when it comes to consider

whether they ought or ought not to be "blowed off by a side-wind," but I can see no application of that principle on the ground that the proceedings before the magistrate resulted in the plaintiffs being bound over rather than sentenced to imprisonment or ordered to pay a fine. There is an alternative way of stating the matter, which was accepted by WILLIAMS, J., in *Steward v. Gromett* (4), where he said (29 L.J.C.P. 175):

"The principle upon which it is necessary is stated in *Mellor v. Baddeley* (5) and *Whitworth v. Hall* (6), viz., that the termination of the proceedings unfavourably to the plaintiff is some evidence of the defendant having had probable cause for taking them."

If that be the right test and the fact that the proceedings have been determined unfavourably to the plaintiff is evidence of probable cause, that is not affected by the fact that the magistrate bound the plaintiff over rather than imposed on him some more severe form of penalty.

On these grounds it seems to me that the objection is well taken, and that it ought to be sustained. The point I have decided substantially disposes of all the matters in dispute, and I shall give judgment for the defendants.

Judgment for defendants.

Solicitors: *Gale & Phelps* (for the first defendant); *Solicitor, Metropolitan Police* (for the second defendant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

BUCKINGHAMSHIRE COUNTY COUNCIL v. CALLINGHAM AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Pilcher, JJ.), October 11, 12, 1951.]

Town and Country Planning — Development — "Building" — "Building operations" — Construction of model village, railway and racecourse — Town and Country Planning Act, 1947 (c. 51), s. 12 (2), s. 119 (1).

Town and Country Planning — Enforcement of planning control — Land subject to resolution to prepare planning scheme — Development carried out, without permission, before interim development order made — Town and Country Planning Act, 1947 (c. 51), s. 75 (9).

The occupier of a piece of land adjoining his house and garden constructed thereon a model village, a toy railway, a miniature racecourse, and other features. The buildings were from two feet to four feet high and were constructed mainly of stone or brick and fixed to concrete bases in the ground. By August, 1929, part of the village was completed and the site was opened to the public on payment of a charge for admission. On Sept. 24, 1929, the local authority passed a resolution to prepare a town planning scheme for the district under the Town Planning Act, 1925, the resolution being registered as a local land charge on Sept. 30, 1929. The village was substantially completed between that date and Apr. 1, 1933, when the Town and Country Planning (General Interim Development) Order, 1933, made under s. 10 (1) of the Town and Country Planning Act, 1932, came into force. After Apr. 1, 1933, the model railway was extended and further buildings were added. In October, 1950, the local planning authority served an enforcement notice, under the Town and Country Planning Act, 1947, s. 23 and s. 75 (9), on the occupier, requiring him to demolish or remove building, engineering and other operations on the land.

HELD: (i) the model houses, railway and other features of the model village were structures or erections, and, therefore, "buildings," within the definition in s. 119 (1) of the Act of 1947, and the works, being building

operations, were "development" within the meaning of s. 12 (2) of the Act, and, therefore, they came within the ambit of the Act.

(ii) as the land was subject, from Sept. 30, 1929, to a resolution to prepare a planning scheme and as the works were "carried out . . . otherwise than in accordance with permission granted . . . by or under the interim development order" (*i.e.*, the order of 1933), by s. 75 (9) of the Act of 1947 the works were to be deemed to have been carried out in contravention of previous planning control, and, therefore, the enforcement notice applied, not only to the works carried out after Apr. 1, 1933 (when the general order relating to interim development came into force), but also to the works carried out after Sept. 30, 1929.

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FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 12, s. 75 (9) and s. 119 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 25, pp. 506, 585 and 635.

CASE STATED by Buckinghamshire justices.

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At a court of summary jurisdiction sitting at Beaconsfield the respondents preferred a complaint that the appellant county council had wrongly served on them an enforcement notice under s. 23 and s. 75 of the Town and Country Planning Act, 1947, requiring them to discontinue the use of certain land as a public exhibition and to demolish or remove building, engineering and other operations on the land. The first respondent, who lived at Chiltern Lodge, Ledborough Lane, Beaconsfield, admitted members of the public to his garden on certain days of the year, charging them a fee under a scheme for assisting the district nursing association. By 1928 he had acquired certain areas of land on the opposite side of the lane to his house, and by August, 1929, he had carried out considerable development on this land for the purpose of forming a model village. The development included preparatory excavations and work and the formation of rockeries, the foundations for a model railway were laid, some model buildings, including a church, school, post office and council offices, were in course of erection, and the general lay-out of the model village and railway was fixed. Early in August, 1929, the public were admitted for payment and the user of the garden for its ultimate purpose was established. On Sept. 24, 1929, under the Town Planning Act, 1925, s. 2, Beaconsfield Urban District Council passed a resolution to prepare a town planning scheme for Beaconsfield urban district. The resolution was entered on the register of local land charges on Sept. 30, 1929. No application for planning permission was received in respect of the first respondent's land. Between the end of September, 1929, and Apr. 1, 1933, the village and model railway were substantially completed. After Apr. 1, 1933, the model railway was extended and further model buildings were erected. The model buildings were constructed to a scale of one inch to the foot and in general stood from two feet to four feet high. Most of them were constructed of stone or brick and were fixed to concrete bases formed on the ground. Some were built of wood. Most of the buildings found in a village or town were represented. From August, 1929, to the summer of 1931 the land was opened as a public exhibition from time to time. Thenceforward it was opened regularly to the public every Sunday afternoon with the railway running and every Tuesday, Thursday and Saturday afternoon without the railway running. Since 1934 it had been operated by the Bekonscot Model Railway and General Charitable Organisation, of which the second respondent was a trustee, profits being devoted to various charities.

The enforcement notice was dated Oct. 24, 1950, and the respondents' complaint was heard by the justices on Mar. 9, 1951. The county council contended that the use of the land as a public exhibition and the erection of the buildings comprising the model village were a contravention of planning control within the meaning of s. 75 (9) of the Town and Country Planning Act, 1947, both in the establishment of the village in a corner of the land and in its extension to the remainder of the garden after April, 1933. The respondents contended, *inter*

alia, (i) that the user was not in contravention of previous planning control as (a) it was established before the resolution of Sept. 24, 1929, and (b) control of the user of land was not introduced until the Town and Country Planning Act, 1932, by which date the model village and railway were in full operation and open to the public; and (ii) that the model buildings had not been erected in contravention of previous planning control, because their erection did not constitute operations for which planning permission was required by the Town Planning Act, 1925, the Town and Country Planning Act, 1932, and the Town and Country Planning Act, 1947. The justices held that the use of the whole area of land for the purposes of a public exhibition had been established by August, 1929, and that the constructional work was not such as to come within the ambit of the Acts of 1925, 1932 and 1947. They, accordingly, quashed the enforcement notice. The county council appealed. At the hearing before the Divisional Court it was conceded on behalf of the county council that no question of change of user arose.

W. L. Roots for the appellants.

H. I. Willis for the respondents.

LORD GODDARD, C.J.: This is a Case stated by justices of the county of Buckingham sitting at Beaconsfield, to whom an appeal was brought by the respondents against an enforcement notice served on them under the Town and Country Planning Act, 1947, s. 23 and s. 75. Before August, 1929, the respondent, Mr. Callingham, had a garden at the house where he lived, and still lives, at Beaconsfield, which was beautifully kept and of considerable horticultural interest, and he conceived the plan, which nobody would describe as otherwise than charitable and praiseworthy, of laying out the grounds so as to represent a model village with a toy railway with lines and so forth, permanently laid out. The place, which has become known as the Bekonscot Model Village and Railway, now shows a model village with a little racecourse and other attractive features in which most of the buildings found in a village or town are represented. The buildings are not very large, some being two feet high and some as high as four feet. They are constructed of stone or brick and are fixed to concrete bases in the ground. The enforcement notice was served because the county council maintain that these buildings, which were erected without any previous planning permission under the Town and Country Planning Acts, offend against the Town and Country Planning Act, 1947. It is not for this court to form any opinion except whether or not the buildings offend against the Act. Whether it is the sort of lay-out or development which Parliament had in mind when the Act was passed is not a matter for this court. Whether or not the county council were acting reasonably in seeking to apply the enforcement provisions of the Act is, again, not a matter which this court can take into account, because whether a thing offends against amenities and so forth is a matter for the decision of the county council.

The matters with which the case is concerned can be divided into three parts:— (i) Structures and buildings put up before Sept. 30, 1929; (ii) buildings, etc., put up between 1929 and Apr. 1, 1933; and (iii) buildings put up or development taking place between Apr. 1, 1933, and the present time. The justices decided that the work or development which has taken place at Bekonscot does not come within the ambit of the Town and Country Planning Acts. It may be that such a state of affairs as exists at Bekonscot was not in the contemplation of Parliament when the Acts were passed. Acts of this nature necessarily deal with the control of building, planning, and laying out of the countryside in a general way, and it cannot be expected that every conceivable state of affairs could have been contemplated. When Parliament has passed Acts which are of general application, using general words, we have to see in any particular case whether the development or use of a building comes within the words of the Acts, having

regard to the language of the definitions, etc. If it does, they apply. If permission was required for certain things and has not been granted, the local planning authority, the county council, are entitled to serve an enforcement notice, irrespective of whether permission might or should have been granted if applied for or of whether Parliament could have thought of a matter of this kind when passing the Act.

A Town and country planning was first introduced by the Housing, Town Planning, etc., Act, 1909, and, as clearly appears from that Act, its main object was to ensure that estates were developed and building operations were carried out with due regard to sanitary matters, public health, and so forth. But the Town and Country Planning Acts have been very much extended, and the legislation which now applies to the whole of England has many objects other than merely sanitary considerations. Amenities are now one of the considerations. The county council may have taken the view that the respondent, although actuated by praiseworthy motives, had created in a residential district what might be called an exhibition to attract people who were willing to pay for admission, and they may have thought that it was not desirable to have a place of that kind in the middle of a residential district. But those are not matters which move the court. We have merely to consider what is the scope of the legislation.

C The Town Planning Act, 1925, s. 4, provided:

D "The Minister may by special or general order provide that where a resolution to prepare or adopt a town planning scheme has been passed, or where before July 31, 1919, or by virtue of any of the provisions of this Act, the preparation, adoption or making of a town planning scheme has been authorised, the development of estates and building operations may be permitted to proceed pending the preparation, adoption or making and approval of the town planning scheme, subject to such conditions as may be prescribed by the order."

E On Sept. 24, 1929, Beaconsfield Urban District Council passed a resolution to prepare a town planning scheme for the district, and the resolution was entered on the register of local land charges on Sept. 30, 1929. It is conceded that anything that was done at Bekonscot, including the putting up of the model houses and so forth, before Sept. 30, 1929, cannot be touched and must be left as it is, because it was not in breach of town planning at that date. The justices have found that:

F "By August, 1929, the general lay-out of the model village and railway . . . and of the garden . . . had been fixed and the user of the area for its present user had been established."

That means that by 1929 the land had been used for pleasure or exhibition purposes, and it is conceded by the county council in this court that no question of change of user arises. The questions for our decision relate to the constructional work on the site. The justices then say:

G "During the period from the end of September, 1929, to Apr. 1, 1933, the village in the south-west of the area . . . had been substantially completed, together with the model railway on the said land, and the development had become known as 'The Bekonscot Model Village and Railway'."

H It is, therefore, obvious that between Sept. 30, 1929, and Apr. 1, 1933, a considerable amount of work had been done in constructing the model village. The justices continue:

"Small replacements to the model buildings in the village were carried out from time to time. After Apr. 1, 1933, the railway was extended and further model buildings were erected outside the area of the original village."

The plan annexed to the Case shows the lay-out of the site generally. A comparatively small part of the site is bounded by a red line, and it is within that area

that work had been done before April, 1933, some of it before the end of September, 1929. After 1933 the work was extended throughout the site in question.

By s. 1 of the Town and Country Planning Act, 1932:

"A scheme may be made under this Act with respect to any land, whether there are or are not buildings thereon, with the general object of controlling the development of the land comprised in the area to which the scheme applies, of securing proper sanitary conditions, amenity and convenience, and of preserving existing buildings . . ."

By s. 10 (1):

"The Minister shall make a general order with respect to the interim development of land within the areas to which resolutions to prepare or adopt a scheme apply and may make special orders with respect to the interim development of any such land in any particular area."

I pause there to say that this is a considerable extension of s. 4 of the Act of 1925. Under s. 10 (1) the Minister of Health made the Town and Country Planning (General Interim Development) Order, 1933 (S.R. & O., 1933, No. 236), which came into force on Apr. 1, 1933. Section 10 (1) of the Act of 1932 provides:

"For the purposes of this section the expression 'interim development' means development between the date on which the resolution takes effect, and the date of the coming into operation of the scheme."

Section 13 of the Act of 1932 gave power to enforce the schemes:

"(1) Subject to the provisions of this section, the responsible authority may at any time . . . (b) remove, pull down or alter, so as to bring into conformity with the provisions of the scheme, any building or other work, not being an existing building or an existing work, which does not conform to those provisions . . . (c) where any building or land is being used in such a manner as to contravene any provision of the scheme, prohibit it from being so used; or (d) where any land has since the material date been put to any use which contravenes any provision of the scheme and is not an existing use, reinstate the land . . . (2) Before taking any action under this section the responsible authority shall serve a notice in the prescribed manner on the owner and on the occupier of the building or land in respect of which the action is proposed to be taken and on any other person who, in their opinion, may be affected thereby, specifying the nature of, and the grounds upon which they propose to take, that action."

That is the beginning of the history of the enforcement notice, a notice which is mentioned for the first time in that section, and is subsequently dealt with by the Act of 1947. Section 13 of the Act of 1932 replaced s. 7 of the Act of 1925. By s. 53 of the Act of 1932:

"'Buildings' includes structures and erections; 'Building operations' includes any road works preliminary, or incidental, to the erection of buildings."

I pause there to say that, if a person puts up a building, it seems to me he carries on a building operation. Then, by s. 53:

"'Development,' in relation to any land, includes any building operations or re-building operations . . ."

The Town and Country Planning Act, 1947, is the Act under which the enforcement notice in this case was served. Section 12 (1) provides:

"Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day."

By the Town and Country Planning Act, 1947 (Appointed Day) Order, 1948 (S.I., 1948, No. 213), the appointed day was July 1, 1948. By s. 12 (2):

“ . . . the expression ‘ development ’ means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.”

Therefore, any building operation comes within the word “ development,”
A but by a proviso to the sub-section certain operations shall not be deemed to involve development. Two of those are:

“(d) the use of any buildings or other land within the curtilage of a dwelling-house for any purpose incidental to the enjoyment of the dwelling-house as such . . . (f) in the case of buildings or other land which are used
B for a purpose of any class specified in an order made by the Minister under this section, the use thereof for any other purpose of the same class.”

Section 75 deals with existing development which contravenes previous planning control, and provides that, if something has been done for which planning permission was required but has not been obtained, an enforcement notice can be served in respect of it.

C The question for our decision is whether the work which was done between 1929 and 1933 and after 1933 can be affected by the enforcement notice. Counsel for the respondents contended that s. 75 (9) (a) exempts from any planning control work which had been done between 1929 and 1933. At first I was much attracted by his argument, but I think, when one reads the sub-section more carefully, it will be found that he is not right. Section 75 (9) provides:

“ For the purposes of this section, works on land shall be deemed to have been carried out, and uses of land to have been begun, in contravention of previous planning control—(a) where at the material time the land was subject to a resolution to prepare a planning scheme if carried out or begun otherwise than in accordance with permission granted in that behalf by or under the interim development order.”

E At the material time the land in question was subject to a resolution to prepare a planning scheme. “ Interim development order ” is defined in s. 119 (1) as meaning “ an order made under s. 10 (1) of the Act of 1932,” with effect from Apr. 1, 1933. Read carefully, s. 75 (9) (a) seems to mean that, unless permission has been obtained, the work is to be deemed to be carried out in contravention of planning control. The paragraph might have been drafted much more simply, because it uses the negative expression

“ . . . if carried out or begun otherwise than in accordance with permission granted in that behalf by or under the interim development order.”

None of this work was carried out in accordance with permission given by or under the development order. Therefore, it seems to me that any work that was carried out after Sept. 30, 1929, is in exactly the same position as the work which has been carried out since Apr. 1, 1933.

G The remaining question is whether the model houses, the railway, etc., come within the Acts at all. The finding of the justices on that point is this:

“ We decided that, so far as the enforcement notice related to the use of land, the use of the whole area for the purposes of a public exhibition had been established by August, 1929, and that, so far as the said notice related to building, engineering and other operations in and on the said land, the constructional work involved in the development of Bekonscot was not such as to come within the ambit of the Town Planning Act, 1925, the Town and Country Planning Act, 1932, or the Town and Country Planning Act, 1947.”

H Whether Bekonscot comes within the ambit of the Acts must depend on the definitions in the Acts, and we cannot say that, because this model village is

really a sort of toy or because the houses, etc., are merely permanent models the Acts do not apply. On the question whether these model houses are buildings, I do not feel any doubt. By s. 119 (1) of the Act of 1947 the expression "building" includes a structure or erection. As these models are constructed of stone and brick on concrete bases, I cannot say that they are not structures merely because they are small. I think that they clearly are structures. The justices have said that they do not think the Act applies. By s. 12 (2) "development" means the carrying out of building and engineering operations, and, therefore, the Act applies if the model houses, etc., are buildings. I cannot see any escape from holding that they are structures or erections, and, therefore, buildings. In fact, I think they are buildings in the ordinary sense. If a small building, or a little model house of brick or stone, is put up, it is none the less a building whether it is two feet high and one foot wide or four feet high and two feet wide. Similarly, I cannot see how it can make any difference if it is made of wood, provided it is there as a fixture and is intended to be part of the exhibition.

The railway is a structure, although not a building in the ordinary sense. It can, perhaps, be dignified by the term "engineering work," because probably there are embankments and so forth. I think that we must answer the question submitted to us by saying that the Town and Country Planning Acts apply to all the model houses and other things which can be called structures or engineering works, building constructions, or erections on this site, and which have been made since Oct. 1, 1929. Accordingly, this case must go back to the justices with a direction that they are to find which of these buildings come within this class and to hold that the enforcement notice applies to all the things constructed after Sept. 30, 1929.

HILBERY, J.: I agree.

PILCHER, J.: I agree.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *G. R. Crouch*, clerk of Buckingham County Council (for the appellants); *Callingham, Griffith & Bate* (for the respondents).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

R. v. NATIONAL ARBITRATION TRIBUNAL AND ANOTHER. *Ex parte* SOUTH SHIELDS CORPORATION.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Pilcher, JJ.), October 3, 4, 12, 1951.]

Master and Servant—Trade dispute—Dispute between employer and one workman—Local authority and town clerk—"Workman"—Conditions of Employment and National Arbitration Order, 1940 (S.R. & O., 1940, No. 1305), art. 7—Industrial Disputes Order, 1951 (S.I., 1951, No. 1376), art. 12 (1).

A municipal corporation, who were members of the Association of Municipal Corporations, refused to adopt the recommendations of a joint committee of the association and the Society of Town Clerks on the conditions of service and salaries of town clerks, and the society, on behalf of the town clerk employed by the corporation, reported to the Minister of Labour and National Service that a trade dispute had arisen as to the conditions of service of the town clerk. On Mar. 31, 1951, acting under the Conditions of Employment and National Arbitration Order, 1940, the Minister referred the dispute to the National Arbitration Tribunal as a trade dispute between the corporation and the town clerk arising out of

the claim of the town clerk that the recommendations as to conditions of service should be applied to him. On Apr. 23, 1951, a second reference to the tribunal was made in the same terms except that the trade dispute was stated to be whether the joint committee's recommendations as to salary should be applied to the town clerk. On Aug. 1, 1951, the Industrial Disputes Order, 1951, revoked the order of 1940, and substituted the Industrial Disputes Tribunal for the National Arbitration Tribunal. On a motion for prohibition to prohibit the tribunal from proceeding on the two references,

HELD: (i) the town clerk was a "workman" for the purposes of the two orders, which, therefore, applied to him.

National Association of Local Government Officers v. Bolton Corpn. ([1942] 2 All E.R. 425), applied.

(ii) while the dispute was a "trade dispute" within the meaning of the order of 1940, art. 7, because, by virtue of the Interpretation Act, 1889, s. 1 (1), a "dispute or difference between employers and workmen" included a dispute between one employer and one workman, and, therefore, there was power to refer the dispute to the National Arbitration Tribunal, the dispute was not a trade dispute within the meaning of the order of 1951 because the definition in art. 12 (1) thereof did not contemplate the reference of a dispute arising between an employer and a single workman, and, therefore, prohibition would issue against the Industrial Disputes Tribunal.

FOR THE CONDITIONS OF EMPLOYMENT AND NATIONAL ARBITRATION ORDER, 1940 (S.R. & O., 1940, No. 1305), see BUTTERWORTH'S EMERGENCY LEGISLATION SERVICE, Second Binder, Title Employment [14], p. 19.

D Cases referred to:

- (1) *National Association of Local Government Officers v. Bolton Corpn.*, [1942] 2 All E.R. 425; [1943] A.C. 166; 111 L.J.K.B. 674; 167 L.T. 312; 106 J.P. 255; 2nd Digest Supp.
- (2) *Conway v. Wade*, [1909] A.C. 506; 78 L.J.K.B. 1025; 101 L.T. 248; 43 Digest 120, 1237.

E MOTION for prohibition.

The applicants, South Shields Corporation, had refused to adopt the recommendations with respect to the conditions of service and the salary of their town clerk made by a joint committee set up by the Association of Municipal Corporations and the Society of Town Clerks of which respectively the corporation and the town clerk were members. The society reported to the Minister of Labour and National Service that a trade dispute had arisen as to the town clerk's conditions of service and salary and the Minister referred the dispute to the National Arbitration Tribunal under the Conditions of Employment and National Arbitration Order, 1940, art. 2. The applicants sought to prohibit the tribunal, and the Industrial Disputes Tribunal which superseded it under the Industrial Disputes Order, 1951, from proceeding with the reference which, they contended, was invalid since a "trade dispute", as defined by the order of 1940, and "dispute", as defined by the order of 1951, contemplated a dispute between an employer and more than one workman.

Scott Henderson, K.C., and *Molony* for the corporation.

S. B. R. Cooke for the Minister of Labour and National Service.

Pennycuik, K.C., and *Threlfall* for the town clerk.

Cur. adv. vult.

Oct. 12. **LORD GODDARD, C.J.**, read the following judgment of the court. Counsel moves on behalf of the corporation of the county borough of South Shields for an order prohibiting the National Arbitration Tribunal and the Industrial Disputes Tribunal, which has taken the place of the former body, from proceeding on two references by the Minister of Labour and National Service of certain alleged trade disputes between the corporation and Mr.

Harold Ayrey, the town clerk of the borough. The ground on which the prohibition is sought, concisely stated, is that no trade dispute exists within the meaning of the Defence (General) Regulations, 1939, reg. 58AA, and two statutory rules and orders made thereunder. The first of these orders is the Conditions of Employment and National Arbitration Order, 1940, and the second, the Industrial Disputes Order, 1951.

The facts which it is necessary to state are that the corporation are members of the Association of Municipal Corporations and the town clerk is a member of the Society of Town Clerks. In September, 1949, a joint committee was set up representing these two bodies and a number of other local government authorities and it made certain recommendations as to the conditions of service and salaries which should be paid to town clerks. The function of the committee was merely to make recommendations, and it is not suggested that either the municipal corporations who were members of the association or the town clerks who were members of the society were bound to adopt or accept the recommendations which were made. The South Shields Corporation were not willing to adopt them and were only willing to continue the employment of the town clerk on the same terms as he had been originally engaged. On Sept. 29, 1950, solicitors instructed by the executive council of the Society of Town Clerks and acting on behalf of the town clerk reported to the Minister that a dispute had arisen as to the conditions of service of the town clerk arising out of the recommendations of the joint negotiating committee as set out in the memorandum of recommendations which had been drawn up. On Mar. 31, 1951, the Minister, purporting to act under the powers conferred on him by art. 2 of the order of 1940, referred the dispute to the National Arbitration Tribunal. The reference stated that the parties to the dispute were the corporation, as employers, and the town clerk, a member of the Society of Town Clerks in the employment of the above-mentioned employers, as the workman. Particulars of the dispute were said to be

“that the dispute arises out of a claim made by the workman that the corporation should apply to him the recommendations of the joint negotiating committee for town clerks and district council clerks in relation to conditions of service.”

The second reference, which was made on Apr. 23, 1951, is in exactly the same terms except that the particulars of the dispute are said to be a claim that the corporation should apply to the workman the recommendations of the joint negotiating committee in relation to salary scales.

Regulation 58AA of the Defence (General) Regulations, 1939, which was made under the Emergency Powers (Defence) Act, 1939, and was continued in force by the Supplies and Services (Transitional Powers) Act, 1945, is stated by the marginal note to be for the avoidance of strikes and lock-outs. By para. (1) it provides:

“With a view to preventing work being interrupted by trade disputes, the Minister of Labour and National Service may by order make provision—
(a) for establishing a tribunal for the settlement of trade disputes, and for regulating the procedure of the tribunal; (b) for prohibiting, subject to the provisions of the order, a strike or lock-out in connection with any trade dispute; (c) for requiring employers to observe such terms and conditions of employment as may be determined in accordance with the order to be, or to be not less favourable than, the recognised terms and conditions.”

Prima facie, one would suppose that the intention of the regulation was to deal with disputes which might arise between employers and a body of workmen which, if not settled, might lead to the interruption of work by strikes or lock-outs, and by the order of 1940 the National Arbitration Tribunal was set up to whom the Minister could refer disputes. By art. 2 (5) of the order provision

was made for the decisions of the tribunal becoming binding on both employers and workmen and for the terms and conditions which they decided to become part of the contract of employment. For the purposes of that order a "trade dispute" was defined by art. 7 as

A " . . . any dispute or difference between employers and workmen, or between workmen and workmen connected with the employment or non-employment, or the terms of the employment or with the conditions of labour of any person."

"Workman" is defined as

B " . . . any person who has entered into or works under a contract with an employer, whether the contract be by way of manual labour, clerical work or otherwise, be expressed or implied, oral or in writing and whether it be a contract of service or of apprenticeship or a contract personally to execute any work or labour."

C In our opinion, the decision of the House of Lords in *National Association of Local Government Officers v. Bolton Corpn.* (1) makes it clear that all persons employed by a local authority, whether they would ordinarily be called officers or servants and in whatever capacity they are employed, are "workmen" for the purposes of the order. Accordingly, for the purposes of the order, a town clerk is a "workman" and its provisions could be applied to a contract between him and the local authority notwithstanding s. 106 (2) of the Local Government Act, 1933, which provides that the council pay to an officer appointed under this section such reasonable remuneration as they may determine and subject as aforesaid every such officer shall hold office during the pleasure of the council.

D It was argued on behalf of the corporation that the two references were invalid because it was said that, as the definition of trade dispute was, by the order of 1940, a "dispute or difference between employers and workmen," a dispute between an employer and one workman was not within the order. In effect, the argument was that the order and reg. 58AA were designed to prevent concerted action among workmen or employers which would lead to a strike or a lock-out and that a dispute simply between an employer and one workman was not within the order at all. The answer to that contention was that the Interpretation Act, 1889, applies to these regulations and orders, as no doubt it does. Section 1 (1) of that Act provides that

E " . . . unless the contrary intention appears . . . (b) words in the singular shall include the plural, and words in the plural shall include the singular."

F It cannot, we think, be contended that the wording of the order of 1940 indicates any intention to exclude the application of the words of s. 1 of the Interpretation Act set out above. We, therefore, conclude that a dispute between one employer and one workman was within the order of 1940 and in this respect some reliance was placed on the opinion of LORD ATKINSON in *Conway v. Wade* (2), where he said ([1909] A.C. 517):

"In order that a dispute may be a trade dispute at all, a workman must be a party to it on each side, or a workman on one side and an employer on the other . . ."

H His Lordship was there considering a matter arising under the Trade Disputes Act, 1906, in which the definition of trade dispute is in the same words as in the order although the punctuation is different. In fact, in the Industrial Courts Act, 1919, the definition of trade dispute is in the same words as in the Act of 1906, and in that Act the punctuation is the same as in the order we are now considering. In our opinion, this question whether the references were validly made under the order of 1940 is not to be determined by any nice question as to the presence or absence of a comma, but we think that the application of the

Interpretation Act, 1889, concludes the matter. In our opinion, therefore, there was power, when the references were made, to refer the dispute, which was a dispute between an employer and a workman, to the tribunal and the tribunal had authority to deal with it.

The order of 1940 was, however, revoked on Aug. 1, 1951, by the Industrial Disputes Order, 1951, and, had the revoking order not contained the provisions which it did, it is clear that the operation of s. 38 (2) of the Interpretation Act, 1889, would have preserved the reference and would have enabled it to be dealt with in spite of the revocation. The order of 1951, however, substituted the Industrial Disputes Tribunal for the National Arbitration Tribunal and in sched. II there are provisions relating to trade disputes and questions reported to the Minister under the former order before its revocation. By para. 1 of sched. II it is provided:

"The following provisions shall apply with respect to any trade dispute reported to the Minister under the Conditions of Employment and National Arbitration Orders, 1940 to 1950, before the date on which those orders were revoked: . . . (b) where such trade dispute has before that date been referred by the Minister under those orders to the National Arbitration Tribunal for settlement . . . (ii) if the matter has not before that date been the subject of any hearing by the [tribunal] and concerns a dispute as defined in this order it shall be deemed to have been referred by the Minister to the tribunal constituted under this order and the provisions of this order shall apply thereto accordingly."

This dispute had not been heard by the tribunal before Aug. 1, 1951, and, accordingly, the position must be regulated by the second order and not by the first.

This second order does not purport to amend the first order. It is a new order complete in itself and in many respects very different from the first order. Among other things, it no longer contains a prohibition of lock-outs and strikes, and we have, therefore, to see whether the dispute between the corporation and the town clerk is a dispute as defined in the new order. The definition in art. 12 (1) is this:

"'Dispute' does not include a dispute as to the employment or non-employment of any person or as to whether any person should or should not be a member of any trade union but, save as aforesaid, means any dispute between an employer and workmen in the employment of that employer connected with the terms of the employment or with the conditions of labour of any of those workmen."

In the opinion of the court, this case resolves itself into a question of the true construction of that definition and it is to be observed that there are new provisions for the reporting of disputes. By art. 1 of the order of 1951 a dispute now can only be reported to the Minister by

"(i) an organisation of employers, on behalf of employers who are parties to the dispute; (ii) an employer, where the dispute is between that employer and workers in the employment of that employer; or (iii) a trade union, on behalf of workers who are parties to the dispute [with their employer]."

By art. 10 it provides for the award to be an implied term of the contract between the employer and workers to whom the award applies and to be observed

" . . . until varied by agreement between the parties or by a subsequent award of the tribunal or until different terms and conditions of employment in respect of the workers concerned are settled through the machinery of negotiation or arbitration for the settlement of terms and conditions of employment in the trade or industry or section of trade or industry or undertaking in which those workers are employed."

When, therefore, we find in the definition of a dispute that it means a dispute between an "employer" in the singular and "workmen" in the plural it seems to us to be clear that the order is not contemplating the reference of a dispute which may arise between an employer and a single workman employed by him in connection with the terms of his employment, but is dealing with workmen as a class or body. The order of 1951 is, in our view, intended to deal with disputes which affect either all the workmen in the service of an employer or a particular section of workmen in his employment. In our view, the whole tenor of the order of 1951, and the fact that throughout the order the word "employer" in the singular is used in conjunction with the word "workers" in the plural, indicates an intention that these words should be interpreted literally, and, in consequence, that s. 1 (1) of the Interpretation Act, 1889, to which we have referred above, should not apply. Support for this construction is, we think, to be found in the fact that a single workman cannot report a dispute, but the report must be by a trade union who normally act for workers as a body or for a class of workers.

It was argued for the town clerk that, if this contention were adopted, it would apply equally to the word employer, and, accordingly, if the employer were a firm the order could not apply because, strictly, they would be employers, but we do not think that would be a proper construction. The term "employer," we think, could be applied quite properly to a firm as it can be to a company. It has been pointed out and is in evidence that other town clerks in the service of their corporations are making the same claims as the town clerk in the present case, but that we do not think affects the question. It is quite clear from the order that an award made in favour of one town clerk could not affect a dispute between another corporation and its town clerk because the dispute must be between an employer and workmen in the employment of that employer. It was also said that, if effect were given to the corporation's contention, it would mean that, whereas the dispute could not be referred if the town clerk alone was a party, if, for instance, the deputy town clerk joined with him the matter would be in order and that that would be an absurd result. As neither the deputy town clerk nor anyone else has become a party to the dispute, this point is really immaterial, but we must not be taken to be assenting to that proposition. It may well be that this definition is contemplating all along a class of workmen. Industrial disputes do arise because a large number or class of workmen support a particular workman who may be dismissed or down-graded by the employer, or sometimes because some particular workman is promoted and in the opinion of the body of workmen someone ought to have been preferred in his place. It may be that it is such matters as that that the order is contemplating in its definition of "dispute." That point we need not decide. What we do decide is that there must be a dispute between an employer and more than one workman in his employ though it may be that the dispute originates with a single workman, and that the others only become parties to the dispute in support of one member of their body. For these reasons we think the order of prohibition must go.

Order of prohibition.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Patterson, Glenton & Stracey* South Shields (for the corporation); *Solicitor, Ministry of Labour and National Service* (for the Minister); *Clifford-Turner & Co.* (for the town clerk).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

FAIRCLOUGH v. WHIPP.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Slade, JJ.), October 17, 1951.]

Criminal Law—Indecent assault on female—Child invited to commit indecent act.

While making water on the bank of a river, the respondent, with his person exposed, said to a girl of nine who was passing, "Touch it," and she did so.

HELD: an invitation to someone to touch the invitor could not amount to an assault on the invitee, and, therefore, there had been no assault, and, consequently, no indecent assault on the girl by the respondent.

AS TO THE OFFENCE OF INDECENT ASSAULT, see HALSBURY, Hailsham Edn., Vol. 9, p. 486, para. 837. FOR THE OFFENCES AGAINST THE PERSON ACT, 1861, s. 52, see HALSBURY'S STATUTES, Second Edn., Vol. 5, p. 806.

Case referred to:

- (1) *R. v. Lock*, (1872), L.R. 2 C.C.R. 10; 42 L.J.M.C. 5; 27 L.T. 661; 15 Digest 753, 8121.

CASE STATED by Clitheroe justices.

At a court of summary jurisdiction sitting at Clitheroe on May 24, 1951, an information was preferred by the appellant, a police inspector, under the Offences against the Person Act, 1861, s. 52, charging the respondent with having unlawfully and indecently assaulted a female under sixteen years of age, *viz.*, nine years of age, contrary to the statute. For the respondent it was contended that the facts did not constitute an indecent assault. The justices dismissed the information. The appellant appealed.

Openshaw for the appellant.

The respondent did not appear.

LORD GODDARD, C.J.: This is a Case stated by Clitheroe borough justices before whom the respondent was charged with committing an indecent assault on a child of the age of nine. The question is whether there was an assault. The respondent was making water by the bank of a river where there were some four young girls varying in age from six to nine. As he did so one of the girls passed him. He, with his person exposed, said to her, "Touch it," and she did so. He then went away. The question for decision is whether that conduct amounts to an indecent assault.

An assault can be constituted, without there being battery, for instance, by a threatening gesture or a threat to use violence against a person, but I do not know any authority which says that where one person invites another person to touch him that can be said to be an assault. The question of consent or non-consent only arises if there is something which can be called an assault and, without consent, would be an assault. If that which was done to this child was of an indecent nature and would have been an assault if done against her will, it would also be an assault if it was done with her consent because she could not consent to an indecent assault. Before we decide whether there has been an indecent assault we must decide whether there has been an assault, and I cannot hold that an invitation to somebody to touch the invitor can amount to an assault on the invitee. It might be a very good thing if Parliament passed an Act providing that any indecent conduct done in the presence of, or in relation to, a child should be punishable, but at present the law has not gone beyond saying that an indecent assault on a child is punishable whether the child consents or not. It is obvious, therefore, that the offence must be one which can amount to an assault in law.

Counsel for the appellant called our attention to *R. v. Lock* (1), which was a very different case on the facts. It was an assault on boys and there is no question

that there was an assault because the prisoner had been handling their private parts. KELLY, C.B., said (L.R. 2 C.C.R. 12):

“ . . . the question is, whether such an act as that of the prisoner done to a person who does not actively consent, but merely submits to the act under circumstances in which he cannot exercise his will either one way or the other does not, even in the absence of fraud, amount to an assault.”

A It seems to me there must be an act done to a person. In all the circumstances and with the same regret which, I have no doubt, the justices felt, I am bound to say that I think they came to a right decision and this appeal must be dismissed.

HILBERY, J.: I agree.

B SLADE, J.: I agree.

Appeal dismissed.

Solicitors: Norton, Rose, Greenwell & Co., agents for Sir Robert Adcock, clerk of Lancashire County Council, Preston (for the appellant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

C
BIDDLE v. TRUVOX ENGINEERING CO., LTD.
GREENWOOD & BATLEY, LTD., Third Party.

[KING'S BENCH DIVISION (Finnemore, J.), October 15, 16, 1951.]

D *Factory—Sale of dangerous machinery—Lack of effective guard—Liability of seller to injured workman—Factories Act, 1937 (c. 67), s. 17 (2).*

E A manufacturer sold to the occupier of a factory a machine containing toothed gearing not completely encased as required by s. 17 (1) of the Factories Act, 1937, and thereby rendered himself liable to a fine of £100 under s. 17 (2). In consequence of the lack of casing a workman at the factory was injured. In an action by the workman against the occupier of the factory for damages for breach of the duty imposed on him by s. 17 (1), the occupier brought in the manufacturer as third party, claiming contribution towards the damages on the ground that the workman's injury was attributable to the breach of the manufacturer's duty under s. 17 (2) not to sell the machine with the parts not encased.

F HELD: in view of the terms of s. 17 (2), the manufacturer owed no duty to the workman, and was, therefore, not liable to contribute to the damages.

FOR THE FACTORIES ACT, 1937, s. 17 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 1011.

Cases referred to:

- G (1) *Buller (or Black) v. Fife Coal Co., Ltd.*, [1912] A.C. 149; 81 L.J.P.C. 97; 106 L.T. 161; 5 B.W.C.C. 217; 34 Digest 218, 1809.
- (2) *Cutler v. Wandsworth Stadium, Ltd.*, [1949] 1 All E.R. 544; [1949] A.C. 398; [1949] L.J.R. 824; 2nd Digest Supp.
- (3) *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 42 Digest 759, 1858.
- (4) *Badham v. Lambs, Ltd.*, [1945] 2 All E.R. 295; [1946] K.B. 45; 115 L.J.K.B. 180; 173 L.T. 139; 2nd Digest Supp.
- H (5) *Pasmore v. Oswaldtwistle Urban District Council*, [1898] A.C. 387; 67 L.J.Q.B. 635; 78 L.T. 569; 62 J.P. 628; 42 Digest 752, 1758.
- (6) *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K.B. 832; 93 L.J.K.B. 5; 129 L.T. 777; 42 Digest 870, 197.

ACTION for damages for breach of statutory duty.

The plaintiff, a workman employed by the defendants, in the ordinary course of his duties was on the platform of a truck when a lever controlling the platform

was pressed by somebody so that the platform was caused to rise. The plaintiff clutched the nearest thing available to save himself, which was one of two chains working over two cogwheels, and his hand was caught between the chain and a cogwheel and he was injured. He claimed damages for breach of statutory duty, contending that the chains and cogwheels were a "dangerous part of machinery" which was not securely fenced, contrary to s. 14 (1) of the Factories Act, 1937, or, in the alternative, that they were "toothed or friction gearing" of a machine which was not completely encased, contrary to s. 17 (1). The defendants contended that the chain and cogwheels were not gearing and that the cause of the accident was *novus actus interveniens* in the unauthorised act of the person who pressed the lever. They brought in as third parties the manufacturers who had sold them the truck, claiming contribution towards any damages awarded to the plaintiff on the ground that these third parties had been guilty of a breach of statutory duty under s. 17 in supplying the machine not encased.

R. E. Hopkins for the plaintiff.

Quass for the defendants.

Winn for the third party.

FINNEMORE, J., stated the facts, found that the chain and cogwheel were dangerous parts of machinery which had not been securely fenced contrary to s. 14 (1) of the Factories Act, 1937, and that they were toothed or friction gearing of a machine which was not completely encased contrary to s. 17 (1) (b) of the Act, and held that the accident was due to the defendants' breach of duty under the two sections. With regard to the claim against the third parties, he continued: Counsel for the defendant says that he is entitled to a contribution of fifty per cent. of the damages from the manufacturers and suppliers of this truck and counsel for the manufacturers resists that claim. By s. 17 (2) of the Factories Act, 1937:

"Any person who sells or lets on hire, or as agent of the seller or hirer causes or procures to be sold or let on hire, for use in a factory in the United Kingdom any machine intended to be driven by mechanical power which does not comply with the requirements of this section shall be guilty of an offence and liable to a fine not exceeding £100."

On that counsel for the defendant argues that the workman would be entitled, if he so wished, to sue, not only his employers, but also the manufacturers who sold this machine to his employers. It is not disputed that the manufacturers sold the machine, sold it for use in a factory, and did not completely encase the gearing. I have already said I am satisfied it is a gearing which ought to have been encased. I am also satisfied that s. 17 (2), which is a general provision, does create a new offence. It is not merely an operative clause or a definitive clause carrying out s. 14. I think it is something special and distinct.

The real question is: As a result of this sub-section are the manufacturers liable to a fine of £100 only, or are they also liable to be sued in an action for damages by a workman who is injured as a result of the non-encasing of the gearing? Before any person can be held to be liable to another person in an action which, in principle anyhow, is for tort, it must be shown that there is a duty which is owed by the one person to the other. As a very general principle, subject to important exceptions, if a statute is passed which forbids an act and provides a penalty for doing it, there does not arise in persons who may be affected thereby a right to pursue a civil action for damages.

But there are, as I say, considerable exceptions to that principle. The mere fact that a penalty is imposed and may be exacted does not of itself prevent a person also being responsible civilly. That was laid down clearly in the speech of LORD KINNEAR in *Butler (or Black) v. Fife Coal Co., Ltd.* (1). His words were cited comparatively recently by LORD SIMONDS ([1949] 1 All E.R. 548) in

Cutler v. Wandsworth Stadium, Ltd. (2). LORD KINNEAR said ([1912] A.C. 165):

"If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. . . . We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention."

In *Groves v. Lord Wimborne* (3), which is the classical case under factory legislation and was decided before *Butler (or Black) v. Fife Coal Co., Ltd.* (1), the principle was laid down by A. L. SMITH, L.J., who referred ([1898] 2 Q.B. 406) to the Factory and Workshop Act, 1878, as:

" . . . a public Act passed in favour of the workers in factories and workshops to compel their employers to do certain things for their protection and benefit."

For that reason it has been said that factory employers who commit breaches of the Act are liable, not merely to a fine, but also to be sued by their employees. Under the Factory Acts a duty has been established between the employer and the employed in favour of the employed, and, if the employer commits a breach of that duty, he is committing a tort, or something akin to a tort—a breach of statutory duty which he owes to those employed by him. The Factory Acts were plainly passed for the benefit of the employed and a duty was placed on the shoulders of employers, and, therefore, an employer is liable in a civil action if he is sued. The argument of counsel for the defendants, put at its simplest, and, I think, at its best, is this. He says that s. 17 (2) introduced something quite new to our factory legislation and brings in for the first time the man who sold the machine without the proper guard or the proper safety precaution. Assuming an analogy between his position and that of the employer, he (the vendor), therefore, is not only liable for the penalty which is prescribed (says counsel) but he is also liable in an action for damages in consequence of injury, brought by an employee of any employer to whom he sold one of these machines. This appears to be a novel point which has not yet been decided, and, if I understand the matter aright, what I have to decide is whether, when Parliament passed s. 17 (2) placing this penalty on the seller of a machine not complying with the requirements of the section, and making it, therefore, an offence to sell such a machine, Parliament also put on his shoulders a duty, not to the person to whom he sold the machine, but to those employed in the factory of the person to whom he sold it.

Badham v. Lambs, Ltd. (4), a decision of DU PARCQ, L.J., sitting as a judge of first instance, is the only case which appears to come anywhere near this matter. It was a decision under the Road Traffic Acts, 1930 and 1934, and regulations made under those Acts, and, in particular, a regulation which made it unlawful to sell a motor car with a deficient braking system. The defendants sold such a car to the plaintiff, without any special default on their part, but in breach of the statutory duty laid on them. The plaintiff thereby became involved in an accident. Apparently, he had no warranty or guarantee which enabled him to sue them, and he brought an action against them for breach of the statutory duty which, he said, they owed to him. The case was clearly based on the fact that the defendants had committed a breach of statutory duty in that they had sold a car with defective brakes, for which they were liable to a penalty of £20. The plaintiff's claim failed, because, in the opinion of the learned lord justice,

on a true construction, the Acts and regulations in question were intended to make the sale of a car with a deficient braking system an offence so that a person who sold such a car could be punished, but he was satisfied that there was no indication that the legislature had any idea of protecting a purchaser who bought the car so as to give him a right of action for damages if he used the vehicle on the highway and became involved in an accident. *DU PARCQ, L.J.*, dealt with this matter in some detail, remembering that *prima facie*, if there is a penalty provided for the breach of a prohibition in a statute, the principle is that that is an end of the matter and that the Act by itself does not seek to give to someone, who otherwise would not have it, the right to bring an action for damages on the ground that there is a breach of statutory duty. He said that the principle was stated by the *EARL OF HALSBURY, L.C.*, in *Pasmore v. Oswaldtwistle Urban District Council* (5), and he cited a passage from the opinion of *LORD MACNAGHTEN* in that case. *LORD MACNAGHTEN* said ([1898] A.C. 397):

"Whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act . . . and on considerations of policy and convenience."

DU PARCQ, L.J., went on to say ([1945] 2 All E.R. 298):

" . . . it must be understood that the general rule was that, where a specific remedy was given, it deprived the subject of any other form of remedy, and therefore, if I accept the argument of counsel for the plaintiff, I would have to say this case came within the exception and not the rule. I am not satisfied that it does, for the reason I have given. I cannot find any indication that Parliament was seeking to protect the purchaser nor do I think, in the light of *Phillips v. Britannia Hygienic Laundry Co.* (6), that it would be right to say that Parliament was seeking to protect purchasers in the sense that it was giving a right to an action for damages to them as a class of persons, *viz.*, as members of the public using the highway."

Under factory legislation Parliament placed on occupiers of factories certain obligations and duties which they owe to the people whom they employ in the factories, and when they passed s. 17 of the Act of 1937 they introduced for the benefit of people who work in factories, and placed on the shoulders of the occupiers of factories, the special obligation that "all spur and other toothed or friction gearing" should be completely encased. Then they added the completely new provision, in s. 17 (2), that any person who sold a machine with gearing which was not so encased should be liable to a fine not exceeding £100. I think the argument on either side is very neatly and closely balanced, but, in my view, the person who sells a machine of this kind to another commercial concern is in a very different position from that of the occupier of the factory who actually employs people who have to use whatever machinery their employers buy, and I find it difficult to persuade myself that when Parliament passed s. 17 (2) they intended to place on the shoulders of the person who sold machinery to the occupier of a factory the same duty to the occupier's employees as the occupier himself owed under the general policy of factory legislation. It is one thing to say that the occupier of a factory must have his machinery fenced or protected in a certain way, and, if he fails to do so, his employees, with whom he is in day-to-day contact—and for whom he is responsible—shall have a right of action against him, and another thing to say that someone who makes and sells a machine shall be under a similar duty to the people employed in somebody else's factory. I have come to the conclusion that in this section Parliament were intending only to prevent unfenced machinery getting into factories. No doubt, in an attempt to make accidents of this sort less likely, they decided to bring in the manufacturer, but, in my opinion, they were satisfied to say that, if he committed an offence, he should be liable to a fine up to the amount of £100. For these reasons, and with the assistance of

Badham v. Lambs, Ltd. (4), as far as it can help me, I have come to the conclusion that the seller of the machine is not liable in damages because I do not think he owes any duty to the employees in the factory, whatever may be his relationship to the purchasers under the contract between himself and them and notwithstanding the fact that he is, under s. 17 (2), liable to a fine for selling a machine which has this unencased gearing in it.

A HIS LORDSHIP assessed the damages at £217 special damages and £1,900 general damages, and gave judgment for the plaintiff for those sums.

Judgment for the plaintiff. Judgment for the third party against the defendants.

Solicitors: *W. H. Thompson* (for the plaintiff); *Davies, Arnold & Cooper* (for the defendants); *Slaughter & May* (for the third party).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

B

MAGOR AND ST. MELLONS RURAL DISTRICT COUNCIL v. NEWPORT CORPORATION.

[HOUSE OF LORDS (Lord Simonds, Lord Goddard, Lord Morton of Henryton, Lord Radcliffe and Lord Tucker), July 4, 5, October 25, 1951.]

C

Local Government—Alteration of areas—Extension of county borough boundaries to include parts of rural districts—Loss to rural district ratepayers—Abolition of rural district councils affected and districts amalgamated—Right of new rural district council to financial adjustment with county borough—Local Government Act, 1933 (c. 51), s. 152 (1) (b), sched. V, r. 1 (a).

D

By the Newport Extension Act, 1934, s. 4, the boundary of the county borough of Newport was extended so as to include part of the area of the rural district of Magor and part of the area of the rural district of St. Mellons. The Act came into force on Apr. 1, 1935. By the Local Government Act, 1933, s. 151 and s. 152 (which are applied by s. 58 of the Act of 1934 where financial adjustments are necessary under the latter Act), provision is made for the adjustment of property, income, etc., between public bodies affected by any alteration in areas. Section 151 (1) enables public bodies so affected to settle any such adjustments by agreement. Section 152 (1) (b) provides that provision should (on an adjustment under s. 151) be made for payment to a local authority of such sum as may seem equitable in accordance with the rules contained in sched. V to the Act of 1933 in respect of any increase of burden which, as a consequence of any alteration of boundaries, would properly be thrown on the ratepayers of the area of that local authority in meeting the cost incurred by that local authority in the discharge of any of its functions. Rule 1 of sched. V provides that, in determining the sum to be paid, "regard shall be had to—(a) the difference between the burden on the ratepayers which will properly be incurred by the local authority in meeting the cost of executing any of their functions and the burden on the ratepayers which would properly have been incurred by the local authority in meeting such cost had no alteration of boundaries or other change taken place; (b) the length of time during which the increase of burden may be expected to continue." Before the Act of 1934 began to operate the Minister of Health made the County of Monmouth Review Order, 1935, which came into force on the same day as, but immediately after, the Act of 1934. The order abolished the rural district of Magor and the rural district of St. Mellons and formed a new rural district of Magor and St. Mellons, which included all the areas forming the two former rural districts except such parts thereof as were transferred to the borough of Newport by the Act of 1934 or to the areas of other authorities by the order. Under art. 53 of the order all property and liabilities of the dissolved district councils of Magor and St. Mellons

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were transferred to and vested in the new rural district council. "Property" in art. 53, it was provided, bore the same meaning as in the Local Government Act, 1888, which, in s. 100, defines it as including all property, real and personal, and all estates, interests, easements and rights, whether equitable or legal, in, to, and out of property, real and personal, including things in action. On a claim by the new rural district council of Magor and St. Mellons against the Newport Corporation for financial adjustment under the Act of 1934, it was accepted that, but for the order of 1935, the separate rural district councils for Magor and St. Mellons would each have been entitled to an adjustment under s. 151 of the Act of 1933. A

HELD: the new rural district council could only claim as successors to the two former councils and could claim no higher rights than their predecessors, and to receive any sum at all the two former councils would have had to prove that, in consequence of the alteration of the boundaries brought about by the Act of 1934, an increase of burden would be thrown on the ratepayers of those councils within s. 152 (1) (b) of the Act of 1933, but (LORD RADCLIFFE, *dissentiente*), since, by the order of 1935 the two former councils were dissolved immediately after the alteration of the boundaries, no cost would have to be met by these councils after the alteration and there could be no increase of burden to the ratepayers, with the result that the two former councils could recover nothing under s. 152 (1) (b), r. 1 of sched. V did not come into operation, and the new council could recover nothing. B

Decision of COURT OF APPEAL ([1950] 2 All E.R. 1226), affirmed. C
Observations of DENNING, L.J. (*ibid.*, p. 1236), criticised. D

AS TO FINANCIAL ADJUSTMENT ON ALTERATION OF AREAS, see HALSBURY, Hailsham Edn., Vol. 21, pp. 248-253, paras. 450-452; and FOR CASES, see DIGEST, Vol. 33, pp. 24-28, Nos. 109-132.

Cases referred to:

- (1) *Heydon's Case*, (1584), 3 Co. Rep. 7a; 76 E.R. 637; 42 Digest 614, 143.
- (2) *Assam Railways & Trading Co., Ltd. v. Inland Revenue Comrs.*, [1935] A.C. 445; 103 L.J.K.B. 583; 152 L.T. 26; 18 Tax Cas. 509; Digest Supp. E
- (3) *Seaford Court Estates, Ltd. v. Asher*, [1949] 2 All E.R. 155; [1949] 2 K.B. 481; *affd.* H.L. [1950] 1 All E.R. 1018; [1950] A.C. 508; 2nd Digest Supp.
- (4) *Oxford City Council v. Oxfordshire County Council*, [1938] 4 All E.R. 721; [1939] A.C. 48; 108 L.J.K.B. 136; 160 L.T. 161; 103 J.P. 79; Digest Supp. F
- (5) *Godstone Rural District Council v. Croydon Corpn.*, (1932), 102 L.J.K.B. 34; 148 L.T. 87; 96 J.P. 363; Digest Supp.

APPEAL by the rural district council of Magor and St. Mellons from a decision of the Court of Appeal (SOMERVELL and COHEN, L.J.J., DENNING, L.J., *dissentiente*), dated Nov. 27, 1950, and reported [1950] 2 All E.R. 1226, dismissing the council's appeal from an order of PARKER, J., dated Oct. 5, 1950, made on a Special Case stated by an arbitrator under the Arbitration Act, 1934, s. 9. The Court of Appeal held that the council (as successor to two rural district councils which had been abolished) was entitled to any right against the Newport Corporation to which the two former councils had been entitled, but that in the circumstances the rights of those councils in respect of a transfer of burden consequent on an alteration in boundaries had been of no money value.* G

Simes, K.C., and *C. E. Scholefield* for the rural district council of Magor and St. Mellons. H

H. B. Williams, K.C., and *Stewart-Brown* for Newport Corporation.

* See Local Government Act, 1948, s. 11.

The House took time for consideration.

Oct. 25. The following opinions were read.

LORD SIMONDS: My Lords, I have had the advantage of reading the opinion which my noble and learned friend, LORD MORTON OF HENRYTON, is about to deliver, and I fully concur in his reasons and conclusion, as I do in those of PARKER, J., and the majority of the Court of Appeal. Nor should I have thought it necessary to add any observations of my own were it not that the dissenting opinion of DENNING, L.J., appears to invite some comment.

My Lords, the criticism which I venture to make of the judgment of the learned lord justice is not directed at the conclusion that he reached. It is after all a trite saying that on questions of construction different minds may come to different conclusions and I am content to say that I agree with my noble and learned friend. But it is on the approach of the lord justice to what is a question of construction and nothing else that I think it desirable to make some comment, for at a time when so large a proportion of the cases that are brought before the courts depend on the construction of modern statutes it would not be right for this House to pass unnoticed the propositions which the learned lord justice lays down for the guidance of himself and, presumably, of others. He said: ([1950] 2 All E.R. 1236):

"We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis."

The first part of this passage appears to be an echo of what was said in *Heydon's Case* (1) three hundred years ago and, so regarded, is not objectionable. But the way in which the learned lord justice summarises the broad rules laid down by SIR EDWARD COKE in that case may well induce grave misconception of the function of the court. The part which is played in the judicial interpretation of a statute by reference to the circumstances of its passing is too well known to need re-statement. It is sufficient to say that the general proposition that it is the duty of the court to find out the intention of Parliament—and not only of Parliament but of Ministers also—cannot by any means be supported. The duty of the court is to interpret the words that the legislature has used. Those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited: see, for instance, *Assam Railways & Trading Co., Ltd. v. Inland Revenue Comrs.* (2), and, particularly, the observations of LORD WRIGHT ([1935] A.C. 458).

The second part of the passage that I have cited from the judgment of the learned lord justice is, no doubt, the logical sequel of the first. The court, having discovered the intention of Parliament and of Ministers too, must proceed to fill in the gaps. What the legislature has not written, the court must write. This proposition which re-states in a new form the view expressed by the lord justice in the earlier case of *Seaford Court Estates, Ltd. v. Asher* (3) (to which the lord justice himself refers), cannot be supported. It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation, and it is the less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act. For the reasons to be given by my noble and learned friend I am of opinion that this appeal should be dismissed with costs.

LORD MORTON OF HENRYTON: My Lords, my noble and learned friend LORD GODDARD has asked me to say that he entirely agrees with the opinion which I am about to deliver.

The matters in issue between the parties in this appeal arise out of a claim for a financial adjustment made by the appellants against the respondents in respect of an alteration of boundaries effected by the Newport Extension

Act, 1934 (hereafter called "the Act of 1934"). They involve the interpretation of the Act of 1934, s. 151 and s. 152 of and sched. V to the Local Government Act, 1933 (hereafter called "the Act of 1933"), and the County of Monmouth Review Order, 1935 (hereafter called "the order of 1935"). It is convenient to set out the relevant portions of these Acts and of the order before stating the questions which fall to be decided by your Lordships' House.

By s. 4 of the Act of 1934, which came into operation on Apr. 1, 1935, the boundary of the county borough of Newport was altered so as to include, in addition to the then existing borough, the parish of St. Woollos and parts of the parishes of Bettws and Malpas in the then rural district of St. Mellons, and part of the parish of Christchurch in the then rural district of Magor, all of which were, until the coming into operation of the Act of 1934, part of the administrative county of Monmouth. By s. 58 of the Act of 1934 it is, *inter alia*, provided that:

"(1) Where in consequence of this Act any adjustment of any property income debts liabilities or expenses or of any financial relations is required an adjustment shall be made between the councils or other authorities affected under and in accordance with s. 151 and s. 152 of the Act of 1933 as if this Act were an order made under Part VI of the Act of 1933."

By s. 151 of the Act of 1933 it is, *inter alia*, provided that:

"(1) Any public bodies affected by any alteration of areas or authorities made by an order under this Part of this Act [*viz.*, Part VI] may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities and expenses (so far as affected by the alteration) of, and any financial relations between, the parties to the agreement. (2) The agreement may provide for the transfer or retention of any property, debts, and liabilities, with or without any conditions, and for the joint use of any property, and for the transfer of any functions, and for payment by either party to the agreement in respect of property, debts, functions, and liabilities so transferred or retained, or of such joint user, and in respect of the remuneration or compensation payable to any officer or person, and that either by way of a capital sum or of a terminable annuity for a period not exceeding that allowed by the Minister. (3) In default of an agreement as to any matter requiring adjustment, such adjustment shall be referred to the arbitration of a single arbitrator agreed upon by the parties, or in default of agreement appointed by the Minister, and the award of the arbitrator may provide for any matter for which an agreement might have provided."

By s. 152 of the Act of 1933 it is, *inter alia*, provided that:

"(1) On an adjustment under the last preceding section the following provisions shall have effect: . . . (b) Provisions shall, unless otherwise agreed, be made for the payment to a local authority of such sum as seems equitable, in accordance with the rules contained in sched. V to this Act, in respect of any increase of burden which, as a consequence of any alteration of boundaries or other change in relation to which the adjustment takes place, will properly be thrown on the ratepayers of the area of that local authority in meeting the cost incurred by that local authority in the discharge of any of their functions. (2) This section shall also extend to an adjustment made under s. 32 or s. 62 of the Local Government Act, 1888, whether as originally enacted or as applied in England or Wales by any other enactment or statutory order, and consequent on an alteration of boundaries or other change effected after Mar. 31, 1930."

Section 305 of the Act of 1933 contains a list of definitions for the purposes of the Act which includes, *inter alia*, the following:

"'Local authority' means the council of a county, county borough, county district or rural parish."

By sched. V to the Act of 1933 it is provided as follows:

“ Rules for determining sum to be paid in respect of increase of burden on ratepayers. 1, Regard shall be had to—(a) the difference between the burden on the ratepayers which will properly be incurred by the local authority in meeting the cost of executing any of their functions and the burden on the ratepayers which would properly have been incurred by the local authority in meeting such cost had no alteration of boundaries or other change taken place; (b) the length of time during which the increase of burden may be expected to continue: Provided that no alteration of income in consequence of an apportionment under the regulations made under para. (b) of sub-s. (1) of s. 108 of the Local Government Act, 1929, shall be taken into account.”

The order of 1935 was made by the Minister of Health in pursuance of the powers given to him by s. 46 of Part IV of the Local Government Act, 1929, and the portions thereof which are material for the purposes of the present appeal came into operation on Apr. 1, 1935, but immediately after the Act of 1934. By the order the rural district of Magor and the rural district of St. Mellons were abolished, the councils of those districts were dissolved, and the areas comprised within those rural districts after the Act of 1934 had come into operation, except portions of the rural district of Magor comprising the parishes of Llangattock and Tredunnoch and parts of the parishes of Christchurch and Llanhennoch, which were, by the order, transferred to the areas of other authorities, were formed into a new rural district to be known as the rural district of Magor and St. Mellons. The said portions of the former rural district of Magor not incorporated in the rural district of Magor and St. Mellons comprised the following parishes and parts of parishes, which were transferred by the order to the following districts: Parish of Tredunnoch transferred to Pontypool rural district; part of parish of Llanhennoch transferred to Pontypool rural district; parish of Llangattock, part transferred to Pontypool rural district and part to Caerleon urban district; part of parish of Christchurch transferred to Caerleon urban district. Article 53 of the order of 1935 provides as follows:

“ Subject to the provisions of this order, all property and liabilities vested in or attaching to any of the dissolved district councils named in col. 1 of sched. IV shall by virtue of this order, be transferred to and vest in or attach to the authority named in col. 2 opposite the name of the dissolved council: Provided that any property or liability so vested or attaching in relation exclusively to an area which is transferred to the area of an authority other than the authority named in col. 2 opposite the name of the dissolved council shall by virtue of this order, be transferred to and vest in or attach to the corporation or council of the borough or district to which the area is transferred.”

In sched. IV the names of the dissolved councils of the rural districts of Magor and of St. Mellons appear in col. 1 and the name of the rural district council of Magor and St. Mellons (the appellants) appears in col. 2.

Section 134 of the Local Government Act, 1929, provides that in that Act “ property ” shall have the same meaning as in the Local Government Act, 1888, which, in s. 100 thereof, defines it as meaning (so far as material):

“ The expression ‘ property ’ includes all property, real and personal, and all estates, interests, easements, and rights, whether equitable or legal, in, to, and out of property real and personal, including things in action, and registers, books, and documents . . . ”

By art. 4 of the order and s. 31 of the Interpretation Act, 1889, this definition is applicable to the order.

My Lords, it is common ground between the parties that the portions of the rural districts of Magor and St. Mellons respectively which were transferred to the county borough of Newport by the Act of 1934 were profitable portions, producing annually in rates a sum more than sufficient to cover the expense incurred by the local authority in carrying out its functions in regard to these portions. It follows that, if these two rural district councils had remained in existence after Apr. 1, 1934, there would have been an "increase of burden" thrown on the ratepayers of each of the two rural districts, entitling each of the two rural district councils to payment of a sum under s. 58 (1) of the Act of 1934 and s. 151 and s. 152 of the Act of 1933. So far, the matter is free from doubt, but, in fact, neither the rural district council of Magor nor the rural district council of St. Mellons continued to exist after the alteration of their boundaries took effect. Immediately thereafter, each of these corporate bodies ceased to exist, by reason of the order, their respective councils were dissolved, and there came into existence the appellants, an entirely new corporate body.

In July, 1942, the appellants delivered to the respondents a detailed claim to a financial adjustment under the Act of 1934 and the applied provisions of the Act of 1933. The details of that claim are of no importance for the purposes of the present appeal. The parties were unable to agree on certain matters arising out of this claim, and by an agreement in writing dated Nov. 17, 1948, the matters requiring determination were referred to Mr. Michael Rowe, K.C., and it was agreed that he should state a Case for the opinion of the court. The first and second questions referred for the decision of the court by the Special Case were as follows, the appellants being referred to as "the rural council" and the respondents as "the borough council":

"(i) Whether the rural council, as successor of the former rural district councils, or otherwise, is entitled to claim as against the borough council a financial adjustment under s. 58 (1) of the Act of 1934 and the applied provisions of the Act of 1933 in respect of the alteration of boundaries effected by the Act of 1934. (ii) If the first question is answered affirmatively, whether a claim for any increase of burden within the meaning of s. 152 of the Act of 1933 can lawfully be made by the rural council."

The third question fell to be answered only if the first and second questions were answered affirmatively, and raised certain queries as to how the sum to be paid by the respondents to the appellants in that event ought to be computed. PARKER, J., thought that the appellants could "theoretically" claim a financial adjustment as successors to the property of the two rural district councils which were abolished by the order of 1935. He continued:

"I say 'theoretically' because any claim in right of the old rural district councils would, I think, be limited to any increase in burden for the period during which they remained in existence after the Act of 1934 came into operation."

This period would only be a moment of time, and the claim would be to all intents and purposes nil. "The answers, therefore, to the questions stated for the opinion of the court are: (i) To the first question, 'Yes.' (ii) To the second question, 'No.' (iii) To the third question, that the point does not arise." The appellants' appeal to the Court of Appeal was dismissed. COHEN and SOMERVELL, L.JJ., agreed with the decision of PARKER, J., but DENNING, L.J., dissented.

My Lords, my reasons for thinking that this appeal should be dismissed can be briefly stated, and I should have been content merely to express my agreement with the judgments of the majority of the Court of Appeal and of PARKER, J., but out of respect for the vigorous dissenting judgment of DENNING, L.J., I shall state my reasons in my own words and shall then go on to explain why I cannot agree with the reasoning or with the conclusion of DENNING, L.J.

It is clear from the opening words of s. 151 of the Act of 1933 that the only bodies which can claim a financial adjustment under that section are public bodies affected by an alteration of area as therein mentioned. The appellants are not such a body since they were not in existence when the areas of the old rural districts of Magor and St. Mellons were altered by the Act of 1934. They only came into existence immediately after that alteration. Consequently, they can make no claim in their own right to any financial adjustment under s. 151 and s. 152 of the Act of 1933. Their rights, if any, to claim such an adjustment depend entirely on art. 53 of the order of 1935, whereby the "property" of the two dissolved district councils was transferred to and vested in the appellants. It was conceded by counsel for the respondents that the "property" so transferred included any rights to an adjustment which the rural district councils of Magor and St. Mellons respectively possessed immediately before they were dissolved. It is necessary, therefore, to consider what sum each of these two councils could have claimed under s. 152 of the Act of 1933 immediately before its abolition, and, as they would both be in the same position, I shall take, for the sake of simplicity, the case of the rural district council of St. Mellons. In order to receive any sum at all, that local authority would have had to prove that, in consequence of the alteration of boundaries brought about by the Act of 1934, an increase of burden would properly be thrown on the ratepayers of the rural district council of St. Mellons in meeting the cost incurred by that local authority in the discharge of any of its functions. The rural district council of St. Mellons could never prove any such thing. Immediately after the alteration of boundaries came the abolition of the rural district of St. Mellons and the dissolution of the council of that rural district. Therefore, no cost could be incurred by that local authority after the alteration of boundaries, and there could be no increase of burden to the ratepayers of that local authority in meeting such cost. Thus, the rural district council of St. Mellons could recover nothing under s. 152 (1) (b). The rules in sched. V to the Act of 1933 would afford them no assistance. These rules only come into operation if there is an "increase of burden to ratepayers" within s. 152 (1) (b) and they are directed to determining the sum to be paid in respect of that increase of burden. If there is no increase of burden which comes within s. 152 (1) (b) there is nothing on which the rules can operate. Any claim by the rural district council of Magor would be bound to fail for the same reasons. If I am right so far, any claim by the appellants must fail, since they can only claim as successors to the two rural district councils of Magor and St. Mellons and they can claim no higher rights than their predecessors in title. My Lords, I think it is manifest that in enacting s. 152 the legislature had in mind cases where the area of a local authority is altered and that local authority continues to exist after the alteration: see *Oxford City Council v. Oxfordshire County Council* (4) per LORD RUSSELL OF KILLOWEN ([1938] 4 All E.R. 725). In such a case, if the wealthier portion of the area is lost, there is an increase of burden on the ratepayers in the area which remains, and s. 151 and s. 152 are directed to meeting such a case. The present case is one in which each of two local authorities loses a wealthy portion of its area and is abolished immediately after the loss occurs. It may well be that, if the legislature had contemplated such a state of affairs, some special provisions would have been inserted in the Act of 1933. What these provisions would have been can only be a matter of guesswork.

For the reasons which I have stated, I think that PARKER, J., and the majority of the Court of Appeal arrived at the right conclusion. DENNING, L.J., however, took a different view, and I think I can only do justice to his reasoning if I set it out in full. After referring to the facts, and to the view expressed by PARKER, J., the learned lord justice continued ([1950] 2 All E.R. 1235):

"I cannot think that the judge is right about this. The Minister's order expressly provided that the property of the two rural district councils should

be transferred to and vest in the combined council. The right of the two councils to compensation was clearly 'property' which vested in the combined council, and the judge so held, but he thought that the right was worth nothing because the two councils only lived for a moment of time after they had been shorn of their rich grounds. Much as I respect his opinions, I cannot agree with him about this. The effect of the Minister's order was, if I may use a metaphor, not the death of the two councils, but their marriage. The burdens which each set of ratepayers had previously borne separately became a combined burden to be borne by them all together. So, also, the rights to which the two councils would have been entitled for each set of ratepayers separately became a combined right to which the combined council was entitled for them all together. This was so obviously the intention of the Minister's order that I have no patience with an ultra-legalistic interpretation which would deprive them of their rights altogether. I would repeat what I said in *Seaford Court Estates, Ltd. v. Asher* (3). We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.

It may be said that these heroics are out of place, and I agree they are, because I think that Parliament has really made its intention plain enough. The Act which conferred the title to compensation conferred it on each of the district councils, not in its own right, but in right of its ratepayers: (see s. 152 (1) (b) of the Act of 1933). The district council was the hand to receive the compensation, but it only received it so that it might give relief to the ratepayers for the increased burden which the change of boundaries cast on them. The amalgamation changed the legal identity of the two district councils, but it did not change the ratepayers at all, nor did it relieve them of their burdens: and there is no reason whatever why the amalgamated council should not claim the compensation due to the ratepayers.

This enables me to show what I believe is the fallacy in the judgment of the learned judge. These are the steps in his argument. (i) Each district council only remained in existence for a moment of time after it was shorn of its rich grounds. (ii) Therefore, its increased burdens were to all intents and purposes nil. (iii) Therefore, it is entitled to nothing. (iv) The amalgamated council only takes over the property of the two district councils. (v) Therefore, as each of them was entitled to nothing, the amalgamated council is entitled to nothing. The fallacy in the whole of that argument is at the second step. It assumes that each district council was entitled in its own right in respect of its own increased burdens. On that basis it would, of course, be entitled to nothing, because it did not live long enough to bear any increased burden itself. The answer is, however, that it was never entitled in its own right at all. It was only entitled in right of its ratepayers in respect of *their* increased burdens, and their increased burdens did not last only for a moment of time. They lasted for years. Parliament expressly said that the arbitrator was to have regard to the length of time during which the increase of *burden on the ratepayers* might be expected to continue: see r. 1 (a) and (b) of sched. V of the Act of 1933; whereas the judge has limited the arbitrator to the length of time during which the rural district councils might be expected to continue, to wit, only a moment of time. The answer is that the right of each district council, even during that one moment; was a right to compensation for the whole length of time in the future during which the increased burden might be expected to fall on

the ratepayers, and it was that right which devolved on the amalgamated council.

In my judgment, therefore, amalgamation does not destroy the rights of those ratepayers whose councils are amalgamated. It only transfers them to the amalgamated body."

My Lords, I have already described this as a vigorous judgment, and it is certainly one which invites some comment. I feel sure that PARKER, J., had no desire to defeat the Minister's intention by giving an ultra-legalistic interpretation to this order, nor did he wish to pull the language of the Act of 1933 and of the order of 1935 to pieces, or to make nonsense of them. He set out to interpret the Act and the order, and I agree with his interpretation. In so far as the intention of Parliament or of Ministers is revealed in Acts of Parliament or orders, either by the language used or by necessary implication, the courts should, of course, carry these intentions out, but it is not the function of any judge to fill in what he conceives to be the gaps in an Act of Parliament. If he does so, he is usurping the function of the legislature.

Passing from the observations which the learned lord justice himself describes as "heroics", I shall state why I cannot agree with his reasoning in the present case. I think the fundamental difference between us lies in the view which we take as to the effect of the order of 1935. The learned lord justice regards the order as bringing about, not the death of the two councils, but their marriage. I regard the order as effectively destroying each of the two councils by abolishing the rural districts of Magor and St. Mellons and dissolving their councils. Immediately thereafter there came into existence a new corporate body, the appellant council. Members of the new council had to be elected, and the ratepayers, some of whom had formerly been ratepayers of Magor and some of St. Mellons, became ratepayers of the new rural district. The policy of the new council as regards expenditure might not be the same as that of either of the two dissolved councils. Neither the new council nor its ratepayers could make any claim to an adjustment under s. 151 and s. 152, since the corporate body was not affected by any alteration of areas, and these sections give no right to any ratepayers to make a claim in their own right. All that remains, in my view, is the right which the new council has as successor to the "property" of the two dissolved councils, and that right is worthless, for the reasons which I have already stated.

I have not thought it necessary to refer in detail to *Godstone Rural District Council v. Croydon Corpn.* (5) or to the *Oxford City Council* case (4), but, in my view, the reasoning in each of these cases is entirely in harmony with the reasoning of PARKER, J., and the majority of the Court of Appeal in the present case. I would dismiss the appeal with costs.

LORD RADCLIFFE: My Lords, I differ very little from the views expressed by my noble and learned friend, LORD MORTON OF HENRYTON, but that small difference has led me to come to an opposite conclusion as to what should be the fate of this appeal.

I think that the effect of the Newport Extension Act, 1934, was to give to each of the two district councils, Magor and St. Mellons, a right to a sum of money in respect of increase of burden, assuming, of course, that the extension of the area of the county borough had deprived each of them of a beneficial area. The making of adjustment between local authorities is a matter of statutory duty. Section 58 (1) of the Act of 1934 says that it "shall be made" under and in accordance with s. 151 and s. 152 of the Local Government Act, 1933. Section 151 of that Act requires arbitration if an adjustment cannot be made by agreement, and s. 152 directs that on an adjustment provision "shall" be made, unless otherwise agreed, for the payment of a sum in respect of increase of burden. If someone had sat down to calculate that sum of money at the moment

that the Act of 1934 came into force, there is no doubt what the nature of the calculation would have been. He would have made two computations, both necessarily theoretical. In one he would have assumed the continued existence of the rural district council as the local authority for the unaltered area, although he would know that in fact this was not to be so, and he would have made a theoretical estimate of what it would have spent in coming years on this or that service. In the other computation he would have assumed the continued existence of the rural district council as the local authority for the altered area, and estimated, again by theory, what it would spend in coming years on the same services. These two calculations, when set against the rateable values of the unaltered and altered areas respectively, would have shown what increase of burden resulted from the alteration and the compensation due in respect of the increase would have been expressed as an annual sum or capitalised. It was the right to have a calculation of this sort made and the resulting sum of money paid over that the County of Monmouth Review Order, 1935, passed on from the rural district councils, which it dissolved, to the new rural district council, amalgamating Magor and St. Mellons, which it created. The transfer was effected the moment after this right came into existence, but what, I think, is of importance is that the right did exist according to its terms before it was transferred. Supposing that it has been the right to an ascertained sum, say £1,000 per annum, there would not have been any dispute that the appellants would have been entitled to receive it. Does it make an essential difference that the sum, though its basis was determined, remained to be ascertained by agreement or arbitration? To me the difference appears as one of form, not of substance.

The view that has commended itself to the majority of the Court of Appeal is that the calculation which a dissolved rural district council could have claimed as the basis of its right can never now be made, because, owing to its dissolution, it will never incur any cost in discharging its functions, or, alternatively, its dissolution will prevent it having any burden. I do not think that the Local Government Act, 1933, speaks of the burden as being that of the local authority. What the Act is concerned with is the burden which the ratepayers of that authority carry and with the contingency of their burden being increased. But that may be only a verbal point. The crucial question seems to me to be how far it would be proper for an arbitrator, assessing the claim of one of the dissolved rural district councils, to modify the award that he would otherwise have made by the knowledge that after the claim came into existence that local authority, though not its functions, had ceased to exist. It is at this point that I find myself at variance with the view that commends itself to the others of your Lordships. For I think that that view denies the very premise on which the transferred right exists. It does not seem to me so much a question of taking account of the period for which the increase of burden will last as of rejecting the possibility of there being an increase of burden at all. I think that the arbitrator making an award in respect of that claim ought to place himself at the moment of time when it came into existence and ought to carry out the theoretical computations which I have indicated on the basis that the authority which existed then would continue to exist. If by doing so and ignoring something which had subsequently come about he would produce a demonstrable injustice, I have no doubt that it would be right, since he is only to award such sum as seems equitable, to authorise him to modify his award by taking cognizance of that subsequent fact. That seems to me to allow for as much principle as *Godstone Rural District Council v. Croydon Corpn.* (5) contains. For I know of no general rule that an arbitrator must always take account of matters subsequent to the date to which his award relates. I should have said that it depended on the nature of the claim. In the *Godstone* case (5) the later legislation had altered the local authority's duties, not its area, and to pay the Godstone authority a sum of

money in relief of road rates to cover a period when a quite different authority would have been making those rates would have been a manifest injustice. But, in the present case, I think that injustice is more likely to result from taking cognizance of the subsequent change than from ignoring it. For the mere turning of the two former rural district councils into one will not have any demonstrable effect in reducing the increased burden which the immediately preceding alteration of boundaries had thrown on the ratepayers of the dissolved authority. They will merely carry the increased burden, assuming that there is one, without the compensation which the Newport Extensions Act, 1934, provided on their behalf. I regard this as an injustice. Indeed, if the order of 1935 had been made to come into operation immediately before, instead of immediately after, the Act of 1934, the new amalgamated rural district council would then have been an "authority affected" within the meaning of s. 58 (1) of that Act, and would have been entitled to make its claim and receive its compensation in the ordinary way. By so small a difference of time is a good claim separated from a bad, if this appeal is not to succeed. Of course, a claim is not necessarily the more valid at law because, if valid, it would avoid what looks like an injustice. I only differ from your Lordships in this respect that I think, as you do not, that the wording of the relevant Act and order is not such as to compel us to accept the result that I have described.

LORD TUCKER: My Lords, s. 152 (1) of the Local Government Act, 1933, applies only to adjustments under the preceding section which provides for adjustments as between "public bodies affected by any alteration of areas or authorities" made by an order under that Part of the Act. On such adjustment it is provided by s. 152 (1) (b):

"Provision shall, unless otherwise agreed, be made for the payment to a local authority of such sum as seems equitable, in accordance with the rules contained in sched. V to this Act, in respect of any increase of burden which, as a consequence of any alteration of boundaries or other change in relation to which the adjustment takes place, will properly be thrown on the ratepayers of the area of that local authority in meeting the cost incurred by that local authority in the discharge of any of their functions."

The appellants claim, not as "a public body affected," but as successors of the two former district councils who, it is said, were "public bodies affected." It is necessary, therefore, for the appellants to establish that immediately prior to the coming into force of the Monmouth Review Order, 1935, the old councils would each have had a right to receive payment of such sum as seemed equitable in respect of any increase of burden which as a consequence of the alteration of boundaries would properly be thrown on the ratepayers of their respective areas in meeting the cost incurred by each of such local authorities in discharge of their functions. It is to be observed that no rights are given to the ratepayers dissociated from the local authority in whose area they are ratepayers. Once this authority ceases to exist, and the ratepayers, instead of constituting the totality of ratepayers of local authority A, become a percentage of the total ratepayers of local authority B, any increase of burden which will fall on them as such is something quite different from that contemplated by and provided for in s. 152. It is a difference, not only in amount, but in kind, and cannot be calculated in the terms laid down, *viz.*, on the basis of the difference between "the would be" burden and "the will be" burden falling on the ratepayers as a result of costs properly incurred by "the local authority" which clearly pre-supposes that it will be one and the same local authority in each case. Rule (1) (b) of sched. V to the Act of 1933 directs the arbitrator to have regard to the length of time during which the increase of burden may be expected to continue. If it were made known to him that the local authority was only to continue in existence for six months, this would, in my opinion, be a matter

which would be relevant for him to take into consideration in fixing the amount of compensation. This seems to me to negative the idea that all his calculations are hypothetical and divorced from actuality and to point to the conclusion that once it is shown that the local authority making the claim is doomed to be "liquidated" forthwith there is no sum which can properly be awarded to it.

I think it is clear that the situation which has arisen in the present case was never present to the minds of those responsible for the Local Government Act, 1933, and that the language is quite inappropriate to meet it. In these circumstances your Lordships would be acting in a legislative rather than a judicial capacity if the view put forward by DENNING, L.J., in his dissenting judgment were to prevail. I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Torr & Co.*, agents for *Wade & Son*, Newport, Mon. (for the appellants); *Rees & Freres*, agents for *J. G. Iles*, town clerk, Newport (for the respondents).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

HIGHNAM v. TURIER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Slade, JJ.), October 16, 17, 1951.]

Food and Drugs—Milk—Standard of quality—Sale of "Guernsey" milk—Butter-fat content less than that prescribed for "Channel Islands milk"—Food and Drugs Act, 1938 (c. 56), s. 3 (1)—Milk (Control and Maximum Prices) (Great Britain) Order, 1947 (S.R. & O., 1947, No. 2032), art. 1 (1).

Milk sold to a purchaser as Guernsey milk contained less than the four per cent. of butter-fat prescribed for "Channel Islands milk" by the Milk (Control and Maximum Prices) (Great Britain) Order, 1947. The supplier was prosecuted for having sold milk which was not of the quality demanded by the purchaser, contrary to the Food and Drugs Act, 1938, s. 3.

HELD: the definition of "Channel Islands milk" in the order of 1947 did not apply for the purposes of the Act of 1938, and the supplier was, therefore, not guilty of an offence under the Act.

FOR THE FOOD AND DRUGS ACT, 1938, s. 3, see HALSBURY'S STATUTES, Second Edn., Vol. 10, p. 386.

FOR THE MILK (CONTROL AND MAXIMUM PRICES) (GREAT BRITAIN) ORDER, 1947, see BUTTERWORTH'S EMERGENCY LEGISLATION SERVICE, Sixth Binder, Title Control and Prices—Milk [38], p. 1083.

Cases referred to:

- (1) *Hunt v. Richardson*, [1916] 2 K.B. 446; 85 L.J.K.B. 1360; 115 L.T. 114; 80 J.P. 305; 25 Digest 128, 492.
- (2) *Few v. Robinson*, [1921] 3 K.B. 504; 91 L.J.K.B. 42; 126 L.T. 94; 85 J.P. 257; 25 Digest 128, 495.

CASE STATED by Somerset justices.

At a court of summary jurisdiction sitting at Axbridge on May 21, 1951, an information was preferred by the respondent, a chief inspector of weights and measures, under s. 3 (1) of the Food and Drugs Act, 1938, charging the appellant with having, on Apr. 2, 1951, at Cheddar, unlawfully sold to one Cockburn to the prejudice of the purchaser milk, purporting to be Guernsey milk, which was not of the quality demanded, contrary to s. 3 (1) of the Act. The purchaser bought from the appellant's wife two bottles of milk, paying for them the maximum price of 6d. specified for sale by retail of Channel Islands milk under the Milk (Control and Maximum Prices) (Great Britain) Order, 1947. On analysis

A the milk proved to be below the standard prescribed for Channel Islands milk by the order, but the milk came from a herd of cows of Channel Islands strain and no adulteration of it had taken place. For the appellant it was contended that the definition of "Channel Islands milk" in the order was expressly stated to relate only to the order and had no application to a prosecution under the Food and Drugs Act, 1938, s. 3 (1). For the respondent it was contended that there was no definition of "Channel Islands milk" other than that in the order and that that definition applied by virtue of the Food Standards (General Provisions) Order, 1944. The justices convicted the appellant, holding that the milk was bought and sold as Guernsey milk (which was Channel Islands milk), and the only definition of Channel Islands milk was contained in the order of 1947; that the price paid was the maximum applicable to Channel Islands milk (which was greater than for ordinary milk) under the order, which was applicable; and that the milk was not of the quality prescribed in the order for Channel Islands milk in that: (a) it contained less than four per cent. of butter-fat and (b) it was not sold by the producer by retail nor did he receive a premium paid through the medium of a premium contract issued by the Milk Marketing Board. The appellant appealed.

C *Perks* for the appellant.

Vernon Gattie for the respondent.

D **LORD GODDARD, C.J.:** An information against the appellant was preferred by the respondent, a chief inspector of weights and measures, under s. 3 (1) of the Food and Drugs Act, 1938, for that on Apr. 2, 1951, he did unlawfully sell to one Cockburn to the prejudice of the purchaser milk, purporting to be Guernsey milk, which was not of the quality demanded, contrary to s. 3 (1) of the Food and Drugs Act, 1938. The justices came to the conclusion that an offence had been committed. In my opinion, the offence charged had not been committed, the appellant having been charged with the wrong offence.

E The purchaser asked for Guernsey milk and was supplied with a bottle of milk for which a charge of 6d. a pint was made. Under the Milk (Control and Maximum Prices) (Great Britain) Order, 1947, art. 1 (1), there is this definition of "Channel Islands milk":

F " . . . milk (a) which is produced from cows of the Channel Islands breeds, and (b) which shows on analysis a butter-fat content of not less than four per cent., and (c) which the producer thereof sells by retail or in respect of which he receives a premium paid through the medium of a premium contract issued by a milk marketing board."

G In the present case the milk was not sold by the producer. However, I suppose it may be said that, if a person chooses to sell milk as Channel Islands milk and the person who was the producer has received a premium, that is sufficient to make it Channel Islands milk. The milk which was supplied is found by the justices to be milk of Channel Islands cows. The justices also found that the milk supplied was as it came from the cow. It has been decided by a number of cases, starting with *Hunt v. Richardson* (1), which was succeeded by *Few v. Robinson* (2), that, if a seller of milk can show that the milk which he has sold is unadulterated and is the natural product of the cow, although it may be deficient in fat, he cannot be convicted of an offence under the Food and Drugs Acts because he has supplied genuine milk. It seems to me that the same principle must apply in this case as would have applied if the purchaser had asked for milk instead of for "Channel Islands" milk, because when he is asking for "milk" he is asking for milk which *prima facie* contains a particular percentage of butter-fat, and if he asks for "Channel Islands milk" he must be taken to be asking for milk with a higher percentage.

The main objection to this conviction is that the appellant is charged under the wrong provision. He is charged with an offence against the Food and Drugs

Act, 1938, s. 3 (1). The order of 1947, which lays down the standard for Channel Islands milk, is not an order made by the Minister of Agriculture, who makes the orders dealing with what is genuine milk. It is an order made by the Minister of Food under reg. 55, reg. 55AA and reg. 55AB of the Defence (General) Regulations, 1939, and deals only with prices. It is conceded by counsel for the appellant that the appellant would have had no defence if he had been charged with the offence of charging too much for the milk, because, as he supplied milk which contained less than four per cent. butter-fat, he was not entitled to charge the price for Channel Islands milk which is higher than the price which he could get for ordinary milk, and, therefore, he committed an offence against the Milk (Control and Maximum Prices) (Great Britain) Order, 1947, art. 6 (1) (a), and sched. II (as amended by the Milk (Control and Maximum Prices) (Great Britain) (Amendment) Order, 1951 (S.I., 1951, No. 138))—an order which has for its statutory force the Defence (General) Regulations, 1939, and not the Food and Drugs Act, 1938. It seems to me, therefore, that, while what occurred in connection with this sale might have been an offence against the order of 1947, it was not an offence against the Food and Drugs Act, 1938, and, therefore, this appeal must be allowed.

HILBERY, J.: As the offence charged was alleged to have been committed contrary to the Food and Drugs Act, 1938, s. 3 (1), but was in fact an offence, not against that Act, but against a price regulation contained in the order of 1947 (as amended), I agree, for the reasons given by LORD GODDARD, C.J., that this appeal must be allowed. I desire, however, to reserve my opinion whether, when a person asks for "Guernsey" milk, he is to be taken as demanding "Channel Islands" milk, as defined by art. 1 (1) of the order of 1947. I am not satisfied that the two demands are necessarily the same. I incline to the view that the expression "Channel Islands milk" created by the order of 1947 is a new term of art, whereas to ask for "Guernsey" milk or "Jersey" milk is a popularly understood description.

SLADE, J.: I agree. In the court below it was contended by the respondent that there was no definition of Channel Islands milk other than the definition contained in the Milk (Control and Maximum Prices) (Great Britain) Order, 1947, art. 1 (1), and that that definition, accordingly, applied to the present case by virtue of art. 1 of the Food Standards (General Provisions) Order, 1944 (S.R. & O., 1944, No. 42), as amended by S.R. & O., 1944, No. 654. The definition of Channel Islands milk in the order of 1947 involves the fulfilment of three requirements. The first can be said to relate to the nature, substance or quality of the milk. The second can also be said to relate to the nature, substance or quality of the milk, but the third requirement is dependent entirely on whether the producer sells it by retail or receives a premium paid through the medium of a premium contract issued by the milk marketing board. If, therefore, it were permissible to import into s. 3 (1) of the Act of 1938 a definition used solely for the purposes of a price and control order, *i.e.*, the prices at which and the persons to whom milk can be sold, it would be possible to sustain a conviction for selling Channel Islands milk which fully answered both the nature, substance and quality demanded by the purchaser, but which happened to have been obtained either from a producer who did not sell by retail or who had not received a premium paid through the medium of a premium contract issued by the milk marketing board. I agree that this appeal should be allowed and the conviction quashed.

Appeal allowed.

Solicitors: *Peacock & Goddard*, agents for *Burrough, Pullblank & Horner, Wedmore* (for the appellant); *Boxall & Boxall*, agents for *Dixon & Hindle, Wells* (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

JONES v. ENGLISH.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Slade, JJ.), October 17, 1951.]

Street Traffic—Having charge of motor vehicle "when under the influence of drink"—"Special reasons" for not disqualifying—Need of evidence of grounds for reasons—Road Traffic Act, 1930 (c. 43), s. 15 (2).

Where on a plea of guilty or after evidence has been heard a defendant has been convicted of an offence under the Road Traffic Acts—*e.g.*, driving or being in charge of a motor vehicle while under the influence of drink—for which the penalty of disqualification for holding or obtaining a licence is prescribed by the Act and he puts forward special reasons why the court should not impose disqualification, the justices ought to hear evidence on those matters and not merely to accept statements by the defendant's advocate.

FOR THE ROAD TRAFFIC ACT, 1930, s. 15, see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 589; and FOR CASES, see DIGEST, 2nd Supp.

Case referred to:

(1) *Jowett-Shooter v. Franklin*, [1949] 2 All E.R. 730; 113 J.P. 525; 2nd Digest Supp.

CASE STATED by Essex justices.

At a court of summary jurisdiction sitting at Stratford on May 2, 1951, an information was preferred by the appellant under the Road Traffic Act, 1930, s. 15 (1), charging the respondent with having been, on Apr. 10, 1951, under the influence of drink while in charge of a motor vehicle, namely, a Bedford lorry, in Exmouth Road, Walthamstow, E.17, to such an extent as to be incapable of having proper control of the vehicle. The respondent pleaded Guilty and was convicted and fined and his licence was endorsed, but the justices ordered that for special reasons he should not be disqualified for holding or obtaining a licence for twelve months under the Road Traffic Act, 1930, s. 15 (2). The appellant appealed.

Havers for the appellant.

D. J. L. Fitzgerald for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the Becon-tree division sitting at Stratford before whom the respondent was charged with having been under the influence of drink while in charge of a motor vehicle to such an extent as to be incapable of having proper control of the vehicle. The respondent pleaded Guilty. The police were represented by counsel for the appellant in this court, and the respondent was represented by an advocate who, the respondent having pleaded guilty, made certain statements. From the way in which the Case is stated I think we must assume that the justices considered that the prosecution did not dispute the facts so put before them for the purpose of asking them to find special reasons for not disqualifying the respondent for holding or obtaining a licence under s. 15 (2) of the Road Traffic Act, 1930.

The Case states:

"On the hearing of the information the following facts were put before us by counsel on behalf of the appellant."

It then sets out what the justices were told by the prosecution. No evidence was given, but I am not commenting on that for a moment because the respondent did not challenge the facts put forward and after the plea of Guilty there was no need for evidence unless the justices wished to have any particular evidence. Then it is said:

"On the hearing of the said information the following facts were put before us on behalf of the respondent."

That means that his advocate, counsel or solicitor, made a statement to the justices and urged certain circumstances as showing special reasons. The Case continues:

"On behalf of the respondent it was contended that the circumstances did amount to special reasons why the court should order that the respondent should not be disqualified for holding or obtaining a licence for a period of twelve months. No contentions were put forward by the appellant who left the matter to the court after directing our attention to the following decisions . . ."

In those circumstances I am sure the justices were under the impression—as I should have been if I had been one of them—that the prosecution were accepting the statements that were made by the respondent. But where, on a plea of Guilty or after evidence has been heard, a defendant has been convicted of an offence for which the penalty of disqualification is laid down by Act of Parliament and he seeks to rely on special reasons for the non-imposition of disqualification, he ought to give evidence, and the justices ought to hear evidence on the point and not merely to accept statements. This is highly desirable because the onus is on the defendant to show special reasons why he should not be disqualified.

The statements which were put forward on behalf of the respondent were these:

"(i) The lorry was broken down and had been towed to the position in which it was found. (ii) It was parked in a side road. (iii) The respondent had three beers after the lorry had been left by the towing vehicle and went to sleep in the lorry in a side road as he did not feel justified in allowing it to remain unattended even in a side turning."

Then two statements were made which have nothing to do with the matter:

"The respondent had not been convicted of any driving offence for ten years."

We have said over and over again that that is not a matter which can be a special reason. Then:

"The respondent uses the lorry every day for business purposes," and that, again, cannot be a special reason. These last two reasons may be hardship reasons, but cannot be special reasons.

Counsel for the appellant has pointed out that the lorry was

"stationary in a diagonal position across the road about a hundred yards from the junction of Edinburgh Road,"

and that, if it had been towed there, it had been left there by the towers and the respondent had not put on his lights. I agree that that was reprehensible, but those are matters for the justices. We have often pointed out in this court that there may be a considerable difference between a case in which the charge is driving under the influence of drink and one where the offence is merely being in charge under the influence of drink. It not infrequently happens that, although a man is charged only with being in charge while under the influence of drink the facts show that he must have been driving when he was under the influence of drink, and that is quite a different matter. But a man may leave his car in the car park of an hotel and after getting under the influence of drink in the public house realise his state and by his actions show that he does not intend to drive the car. In a recent case, *Jowett-Shooter v. Franklin* (1), a man came out of an hotel and did not attempt to drive, but got into his car in the car park, and, having taken out the ignition key, sat in his car asleep. He satisfied the justices that he had done so because he realised that he was not in a fit state to drive and had no intention of driving. We held in that case that that was ample evidence on which the justices could find special reasons.

In the present case the respondent's lorry had broken down and could not be driven. It had been towed into a side street, but had not been left in a proper condition, because it had not got its lights on. That in itself was, of course, an offence, and, if the justices had declined to find special reasons, this court would not have said they were bound to do so, but on the finding of the justices we cannot say that there was no evidence on which they could find special reasons. For these reasons I think the appeal must be dismissed.

HILBERY, J.: I agree.

SLADE, J.: I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor, Metropolitan Police* (for the appellant); *J. H. Fellowes* (for the respondent).

[Reported by F. A. AMIES, Esq., *Barrister-at-Law.*]

LEWIS v. REEVES.

[COURT OF APPEAL (Somervell, Denning and Hodson, L.JJ.), October 16, 17, 25, 1951.]

Rent Restriction—Sub-tenancy—Sub-tenant deemed to become tenant—Part of premises sub-let by widow of statutory tenant—Death of widow—"Determination" of interest—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (3).

In 1945 the statutory tenant of premises to which the Rent Restrictions Acts applied died, leaving a widow who remained in possession by virtue of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. In 1949 the widow sub-let part of the premises to the original tenant's grandson. In 1950 the widow died. In an action by the landlord against the sub-tenant for possession,

HELD: the widow was a statutory tenant under s. 12 (1) (g) and as such under s. 15 (1) was entitled to the benefit of all the terms and conditions of the original contract of tenancy, including the original statutory tenant's right to sub-let; the part of the premises, therefore, was lawfully sub-let to the sub-tenant; on the widow's death her interest was determined within the meaning of s. 15 (3) of the Act of 1920, and under that sub-section the sub-tenant became the direct tenant of the landlord; and, therefore, he was entitled to the protection of the Rent Acts.

AS TO THE POSITION OF SUB-TENANTS UNDER THE RENT RESTRICTIONS ACTS, see HALSBURY, Hailsham Edn., Vol. 20, p. 333, para. 399; and FOR CASES, see DIGEST, Vol. 31, pp. 581, 582, Nos. 7303-7310.

Cases referred to:

- (1) *Guillan v. Sargent*, [1939] L.J.N.C.C.R. 271.
- (2) *Summers v. Donohue*, [1945] 1 All E.R. 599; [1945] K.B. 376; 114 L.J.K.B. 401; 172 L.T. 310; 2nd Digest Supp.
- (3) *Bolsover Colliery Co., Ltd. v. Abbott*, [1946] K.B. 8; 115 L.J.K.B. 5; 173 L.T. 172; 2nd Digest Supp.
- (4) *American Economic Laundry, Ltd. v. Little*, [1950] 2 All E.R. 1186; [1951] 1 K.B. 400; 2nd Digest Supp.
- (5) *Moodie v. Hosegood*, [1951] 2 All E.R. 582.
- (6) *Roe v. Russell*, [1928] 2 K.B. 117; 97 L.J.K.B. 290; 138 L.T. 253; 92 J.P. 81; Digest Supp.
- (7) *Oak Property Co., Ltd. v. Chapman*, [1947] 2 All E.R. 1; [1947] K.B. 886; [1947] L.J.R. 1327; 177 L.T. 364; 2nd Digest Supp.

APPEAL by the landlord from an order of His Honour JUDGE TUDOR REES, made at Brentford County Court on June 11, 1951, whereby he refused to grant an order for possession against a sub-tenant on the ground that the widow of the statutory tenant of the premises had granted a lawful sub-tenancy, and, on her death, the sub-tenant was entitled to the protection of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3).

Pearl and Wellwood for the landlord.

Anwyl-Davies for the sub-tenant.

Cur. adv. vult.

Oct. 25. The following judgments were read.

SOMERVELL, L.J.: In this case the plaintiff landlord claimed possession of premises admittedly within the Rent Restrictions Acts. The defendant resisted the claim on the ground that he had a sub-tenancy granted by a Mrs. Reeves of the premises in issue, and he relied on s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

The sub-tenant's grandfather was the original tenant, and at the date of his death in 1945 was a statutory tenant. He left a widow, Mrs. Reeves, who retained possession under the provisions of s. 12 (1) (g) of the Act of 1920 which includes within the expression "tenant" the widow of a tenant. The sub-tenancy relied on was granted by her in November, 1949. In January, 1951, she died and these proceedings were started after that date. The learned county court judge decided that Mrs. Reeves was a statutory tenant, that she granted a lawful sub-tenancy, and that the sub-tenant was entitled to the protection of s. 15 (3) of the Act of 1920 which provides:

"Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejection, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

There has been more than one decision by county court judges that on the death of a widow or other member of the tenant's family who has become a tenant under s. 12 (1) (g), a sub-tenant cannot claim, as the defendant did here, the protection of s. 15 (3). In *Guillan v. Sargent* (1) the learned judge regarded the opening words of s. 15 (3)—"Where the interest of a tenant of a dwelling-house to which this Act applies is determined"—as inapplicable to cases where the interest ceases on death. He held that the words "is determined" required an active step, and the following words "for any other reason" must, therefore, be restricted to a surrender, or, anyhow, exclude termination on death. If this is right, it would apply not only to a widow or other relative who can claim the advantage of s. 12 (1) (g), but to the case of an original statutory tenant who dies leaving no one with a claim within that sub-section. With respect, I do not so construe the words. I think the words "is determined . . . for any other reason" in their ordinary meaning cover cases where the interest comes to an end on death. There was some discussion as to why there was express reference to an order or judgment of the court. It may well have been thought desirable to make clear beyond the possibility of argument that the provision which followed was to operate notwithstanding an order which, *prima facie*, covered the whole premises.

The argument on that point, I think, fails. There was, however, a further argument which I will now consider. In *Summers v. Donohue* (2) this court decided that s. 12 (1) (g) of the Act of 1920 could only operate once. The relevant words of s. 12 (1) (g) are as follows:

"the expression 'tenant' includes the widow of a tenant . . . who

was residing with him at the time of his death, or, where a tenant . . . leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court."

A By the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 13, a period of six months' residence was required for a member of the tenant's family, but that does not affect the argument. In *Summers v. Donohue* (2) the original tenant died leaving a widow who remained in possession by virtue of s. 12 (1) (g). She then died leaving a daughter who had been residing with her and claimed also to retain possession under s. 12 (1) (g). MACKINNON, L.J., decided that the word "tenant" in the definition part of the section referred to only one person—that is, the original contractual or statutory tenant, and B did not include one who has become an artificial tenant by inheritance from the original tenant under the earlier part of the definition. The daughter, therefore, had no right to remain in possession under the sub-section. It is submitted for the landlord as a result that a tenant holding under s. 12 (1) (g) is not a statutory tenant in the ordinary sense, and, therefore, though this clearly does not necessarily follow, that the provisions protecting sub-tenants do not apply C on the determination of such a tenancy.

Section 15 (1) of the Act of 1920 provides:

D "A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled to give up possession of the dwelling-house only on giving such notice as would have been required under the original contract of tenancy, or, if no notice would have been so required, on giving not less than three months' notice: Provided that, notwithstanding anything in the contract of tenancy, a landlord E who obtains an order or judgment for the recovery of possession of the dwelling-house or for the ejectment of a tenant retaining possession as aforesaid shall not be required to give any notice to quit to the tenant."

F Although the contrary was suggested in argument, I have no doubt that a widow or other relative who remains on the premises, using neutral words, in virtue of the provisions of s. 12 (1) (g), is "a tenant who by virtue of the provisions of this Act retains possession," to whom the provisions of s. 15 (1) apply. This was laid down clearly by SCOTT, L.J., in *Bolsover Colliery Co., Ltd. v. Abbott* (3). He said ([1946] K.B. 12):

" . . . a tenancy carried on by the provisions of the Act as to the succession of a widow or other relation is the same tenancy with its advantages and disadvantages unaltered."

G In that case the "disadvantage" to the successor arose, not out of the lease, but out of a statutory provision, but the words used plainly mean that s. 15 (1) is applicable.

In *American Economic Laundry, Ltd. v. Little* (4) JENKINS, L.J., said ([1950] 2 All E.R. 1190):

H "I agree that the right principle to be followed is the one stated in the *Bolsover* case (3), which shows that the member of the family who becomes a statutory tenant on the death of the original tenant—although in a sense claiming in his or her own right, *i.e.*, not claiming under the statutory tenant in the same way as an assignee or legatee of a contractual tenancy may be said to claim under the grantor or testator—nevertheless becomes a statutory tenant under the same tenancy by virtue of which the original statutory tenant was in possession."

In *Moodie v. Hosegood* (5) the House of Lords, overruling a previous decision of this court, held that s. 12 (1) (g) applied, not only where the original tenant was at the date of his death a statutory tenant, but also when he was a contractual tenant. In the course of his opinion LORD MORTON OF HENRYTON, with whom LORD PORTER, LORD REID and LORD ASQUITH OF BISHOPSTONE agreed, said ([1951] 2 All E.R. 586):

" . . . so long as the widow remains in possession she, and not the contractual tenant, is bound to observe the terms and conditions of the lease and has the benefit thereof."

This is clearly following the words of s. 15 (1), to which the noble and learned Lord later refers.

It seems clear to me, therefore, that the widow or other relative is a statutory tenant in the ordinary sense. The only difference is that the words of s. 12 (1) (g) do not confer on a subsequent widow or other relative the rights which are conferred on the widow or other relative of the original tenant. While, however, the widow or other member is alive I can see no reason why the grant of a sub-tenancy should not have the same consequences as such a grant by the original statutory tenant. The sub-tenant of a statutory tenant to whom part of the premises have been lawfully sub-let can claim the protection of s. 15 (3): *Roe v. Russell* (6). There is nothing in *Summers v. Donohue* (2) which, in my opinion, takes away this right from a sub-tenant of a widow or other relation whose statutory tenancy arises under s. 12 (1) (g). The position if the whole premises were sub-let was reserved in *Oak Property Co., Ltd. v. Chapman* (7) ([1947] 2 All E.R. 5).

It was said that the learned county court judge's decision here has in effect, as respects the larger part of the premises, given a member of the family a protection which could not have been claimed as respects the whole premises under s. 12 (1) (g), and, therefore, on principle the landlord ought to succeed. There is plainly nothing in s. 15 (3) which would entitle one to apply one principle to a sub-tenant who was a relative and another to one who was not. The sub-tenant of part of premises is, *prima facie*, protected whether his lessor is a contractual or a statutory tenant at the time. I can find no principle, nor any words in the Act, which preclude the sub-tenant in the present case from relying on s. 15 (3), and I think the appeal should be dismissed.

DENNING, L.J.: In my opinion, the argument in favour of the sub-tenant is unanswerable. It runs in this way. Under the Rent Restrictions Acts the expression "tenant" includes the widow of a tenant: see s. 12 (1) (g) of the Act of 1920. Hence she cannot be ejected: see s. 3 (1) of the Act of 1933. Furthermore she is entitled to the benefit of all the terms and conditions of the original contract of tenancy: see s. 15 (1) of the Act of 1920. Whence it follows that, inasmuch as the original tenant was entitled to sub-let part, she is also entitled to sub-let part. Hence the sub-letting by the widow was lawful. On the death of the widow her interest was determined. Whereupon the sub-tenant became direct tenant of the head landlord: see s. 15 (3) of the Act of 1920. The only step in that argument which is open to any challenge is the one which says that, on the death of the widow, her interest is determined. That depends on whether the widow had an "interest" and whether it was "determined" by her death. She clearly had an "interest" because she had an interest out of which she could and did validly create a sub-tenancy during her lifetime. But was her interest "determined" by her death? It is plain that her interest is determined when she herself gives notice to quit and delivers up possession under s. 15 (1), or when she surrenders her interest to the landlord. I think it is also determined when she dies. In *Guillan v. Sargent* (1) decided in 1939, a county court judge drew a distinction between "is determined" and "determines," and said that on the death of a statutory tenant his interest determines, but is not

"determined." I cannot accept this distinction. Just as a contractual tenancy is determined by effluxion of time, so a statutory tenancy is determined by death. So also a widow's interest is determined by her death.

The only difficulty I feel about our decision is that it creates an anomaly. It has been held in *Summers v. Donohue* (2) that the widow's daughter is not protected by the Rent Restrictions Acts, whereas by our decision today we are holding that the widow's sub-tenant is protected. It is odd that a sub-tenant should be protected and a daughter should not. But these Acts do give rise to odd results. The anomaly may lie not so much in protecting the sub-tenant, as in refusing protection to the daughter. I expect that, as a result of this case, lawyers will advise daughters how to get protection by taking a sub-tenancy. It is simple enough. I agree that the appeal should be dismissed.

HODSON, L.J.: I agree.

Appeal dismissed.

Solicitors: *Campbell, Hooper & Todd* (for the landlord); *Wilfrid Firth & Co.* (for the sub-tenant).

[*Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.*]

ALLENDER v. COUNCIL OF THE ROYAL COLLEGE OF VETERINARY SURGEONS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Slade, JJ.), October 16, 1951.]

Veterinary Surgeon—Refusal to register on supplementary register—Appeal to High Court—Procedure—Re-hearing—Veterinary Surgeons Act, 1948 (c. 52), s. 6 (5).

An appeal to the High Court under s. 6 (5) of the Veterinary Surgeons Act, 1948, against the refusal of the council of the Royal College of Veterinary Surgeons to register a person's name in the supplementary veterinary register is by way of a re-hearing to which the same principles apply as apply to an appeal to the Court of Appeal against the decision of a judge of the High Court sitting as a judge of fact at first instance.

EDITORIAL NOTE. In this case the Divisional Court gave their decision on affidavit evidence although under R.S.C., Ord. 59, r. 38 (1), oral evidence could have been heard. In addition to appeals under the Veterinary Surgeons Act, 1948, the rule applies to appeals to the High Court under s. 4 of the Midwives Act, 1902, against the removal by the Central Midwives Board of a midwife's name from the register; appeals under s. 7 (1) of the Nurses Registration Act, 1919, against removal from the register of nurses; appeals under s. 9 of the Dentists Act, 1921, against removal from the dentists register or refusal to register; appeals under s. 2 (1) of the Therapeutic Substances Act, 1925, against the revocation or suspension of a licence to manufacture therapeutic substances; and appeals under s. 14 (3) of the Pharmacy and Poisons Act, 1933, against a direction of the statutory committee or a refusal by the committee of an application to give a direction under the Act. It is submitted, therefore, that the decision in this case applies to appeals under the above Acts. In all these cases, it should be noted, the right of appeal to the High Court given by the particular statute is not restricted to an error in point of law. Where that limitation is imposed, as, for example, in s. 6 of the Pensions Appeal Tribunals Act, 1943, the High Court always refuses to interfere with the findings of fact of the statutory tribunal.

FOR THE VETERINARY SURGEONS ACT, 1948, s. 6, see HALSBURY'S STATUTES, Second Edn., Vol. 15, p. 444.

Cases referred to:

- (1) *Almond v. Council of the Royal College of Veterinary Surgeons*, (1951), unreported.
- (2) *S.S. Hontestroom v. S.S. Sagaporack. S.S. Hontestroom v. S.S. Durham Castle*, [1927] A.C. 37; 95 L.J.P. 153; 136 L.T. 33; Digest Supp.
- (3) *Powell v. Streatham Manor Nursing Home*, [1935] A.C. 243; 104 L.J.K.B. 304; 152 L.T. 563; Digest Supp.

APPEAL of the applicant from a refusal of the respondent council to place his name on the supplementary veterinary register.

Scholfield for the appellant.

Lincoln, K.C., and *Fortune* for the respondents.

LORD GODDARD, C.J.: This is an appeal brought pursuant to s. 6 (5) of the Veterinary Surgeons Act, 1948, the appellant having applied to the Royal College of Veterinary Surgeons to have his name entered on the supplementary veterinary register. The supplementary register was established to enable the council of the Royal College of Veterinary Surgeons to put on it persons who satisfied the college that they had been genuinely carrying on business as veterinary surgeons although they were not qualified by any examination. Power is given under s. 6 (2) of the Act to enter on the supplementary register a person who satisfies the following conditions: (a) that he is of good personal character; and (b) that during the ten years immediately preceding the application he has for a period of not less than seven years in the aggregate been engaged in the United Kingdom as his principal means of livelihood in diagnosing diseases of animals and giving medical or surgical treatment to animals. In other words, he must show that he has been genuinely practising as an unqualified veterinary surgeon. The council, having considered the appellant's application, refused it, but they gave him an opportunity of going before them, if he chose, so that they could question him and satisfy themselves that his principal means of livelihood was acting as a veterinary surgeon. He did not so satisfy them.

By s. 6 (5) of the Act it is provided:

"Where the council refuse an application for registration under this section made within the time limited by or under the last foregoing subsection, they shall state the reason for the refusal and the applicant may in accordance with rules of court appeal to the High Court, and the High Court may confirm or reverse the decision of the council."

R.S.C., Ord. 59, r. 38 (1) provides that:

"Every such appeal shall be supported by affidavit and, if the court so directs at the hearing, by oral evidence."

In this case the council said they were "not satisfied that the appellant during the ten years immediately preceding the application has for a period of not less than seven years in the aggregate been engaged in the United Kingdom as his principal means of livelihood in diagnosing diseases of animals and giving medical or surgical treatment to animals." In other words, they were not satisfied that he had been mainly engaged as an unregistered veterinary surgeon.

In my opinion, the words of s. 6 (5) require the court to hear the case and treat it as a re-hearing in the same way as an appeal from a judge of the High Court sitting at first instance is treated by the Court of Appeal. We should naturally pay the greatest attention to the decision given below, but that would not prevent us, and did not prevent us in *Almond v. Council of the Royal College of Veterinary Surgeons* (1), where we thought the decision below was not justified on the facts, from reversing the decision of the council. It is not a thing we should lightly do, because I think we must pay the same attention

to the findings of the council as the Court of Appeal always pays to the findings of the judge from whom they are differing. Sometimes it is found that the facts are not in dispute, and, therefore, nothing turns on the demeanour of a witness, and so the Court of Appeal have not much difficulty, if they come to the conclusion that the facts justify a different decision, in reversing the court below. Where something turns on such a matter as the demeanour of witnesses the Court of Appeal is much less prone to differ from the judge of fact instance.

In the present case, had the matter stood solely on the affidavits without taking into consideration the oral hearing before the council, I do not think I should have come to any conclusion different from that to which the council came. I should have been far from satisfied on the evidence of the affidavits that the appellant was carrying on as a main part of his business the practice of veterinary surgery, which is a compendious expression to comprise the words of the statute. Having read the proceedings before the council I can say that my opinion is strengthened on that point. I see no ground for reversing the council's decision, and, accordingly, think that this appeal should fail.

HILBERY, J.: I agree and for the same reasons, but I would like to make just these observations. In the first place, I think it is for the appellant to satisfy us that the decision below was wrong. In the second place, I think that on a re-hearing we must consider the evidence, always bearing in mind the limitations which the House of Lords has more than once laid down as existing on the power of a Court of Appeal to interfere where the court below has seen the witnesses and has given findings of fact which depend on their having seen the witnesses and assessed by that means to some extent the reliability of the evidence given. Speaking from memory, I think the two cases to which I am referring are *S.S. Hontestroom v. S.S. Sagaporack*. *S.S. Hontestroom v. S.S. Durham Castle* (2), and *Powell v. Streatham Manor Nursing Home* (3). I would also like to say that I concur in the view of my Lord. Having examined the evidence which was given before the council of the Royal College of Veterinary Surgeons and having considered the statements made by the appellant when he was before the council, I am not surprised that the council came to the conclusion to which they did. I should have come to the same conclusion, bearing in mind that under the Act the appellant had to satisfy the council that he had been engaged during the ten years immediately preceding his application for a period of not less than seven years in the aggregate in diagnosing diseases of animals and giving medical or surgical treatment to animals as his principal means of livelihood.

SLADE, J.: I agree.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Adam F. Greenhalgh & Co.*, Bolton (for the appellant); *G. Thatcher & Son* (for the respondents).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

AIR MINISTRY *v.* HARRIS.

[COURT OF APPEAL (Somervell, Denning and Hodson, L.JJ.), October 22, 1951.]

County Court—Possession action—Order for possession—No warrant to issue without leave of registrar—Limit to period of refusal of leave.

The tenant, while a member of the Royal Air Force, occupied premises, the property of the Air Ministry. On his discharge from the Air Force he was given two months' notice to quit. He failed to leave the premises and an order for possession in one month was made with the proviso that no warrant was to issue without leave of the registrar. After six months had elapsed, an application to the county court judge to issue a warrant was refused on the ground that the tenant could not find other premises.

HELD: although there was no objection to the form of the order for possession, the proviso must not be used to give the tenant an indefinite extension of time; in the circumstances the judge was exercising too wide a discretion; and the landlords were entitled to a warrant.

AS TO RECOVERY OF POSSESSION, see HALSBURY, Hailsham Edn., Vol. 8, p. 174, para. 271; and FOR CASES, see DIGEST, Vol. 13, pp. 470, 471, Nos. 193-205.

Case referred to:

(1) *Jones v. Savery*, [1951] 1 All E.R. 820.

APPEAL by the landlords, the Air Ministry, from a decision of His Honour JUDGE ARCHER, K.C., at Chichester County Court on June 29, 1951, in an action for recovery of possession of certain premises.

The learned county court judge made an order for possession in one month, but directed that no warrant was to issue without the leave of the registrar. An application for leave, made to him six months later, was refused on the ground that the tenant had nowhere to go.

W. Gumbel for the landlords.

The tenant did not appear.

SOMERVELL, L.J.: This is an appeal from a refusal of His Honour JUDGE ARCHER, K.C., to remove a stay of execution from an order for possession of certain premises. The premises in question are Air Ministry married quarters. The tenant was previously in the Royal Air Force and he then resided in these quarters with his wife and children. In May, 1950, he was discharged and was given two months' notice to quit. He did not leave the premises, and in July, 1950, a summons was taken out against him in the Chichester County Court. After an adjournment on Dec. 8, 1950, the case came on for hearing on Jan. 12, 1951, when an order for possession in one month was made. At the end of the order were added the words: "No warrant without leave of the registrar." In March, 1951, leave to issue a warrant was asked for and refused. On June 29, 1951, an application was made to the learned judge and he refused on the ground that the tenant and his family could not find anywhere to go.

This is not a case to which the Rent Restrictions Acts have any application, and it has been laid down that the power of the court to keep a landlord out of possession to which he is entitled at common law is a limited one. In *Jones v. Savery* (1) DENNING, L.J., pointed out ([1951] 1 All E.R. 822) that normally in cases of the kind then under consideration the landlord had a right at law to possession. It may well be that in certain circumstances a county court should be regarded as having a somewhat greater power to keep a landlord out of possession in cases such as the present than in earlier days when alternative accommodation was easier to find, but the learned county court judge here was exercising a wider discretion and granting a longer time than is admissible in this class of case. Therefore, this appeal must be allowed and the stay removed.

DENNING, L.J.: The order for possession was in a form which is quite proper: "Order for possession in one month: no warrant to issue without leave of the registrar." On such an order the party has to go to the court to ask for leave before a warrant can be issued, but I do not think that the proviso should be used so as to give an indefinite extension of time. Any additional extension should be only of very limited duration. In the present case it has gone beyond all bounds. I agree that the appeal should be allowed.

HODSON, L.J.: I agree.

Appeal allowed.

Solicitors: *Treasury Solicitor* (for the landlords).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

Re GARE (deceased). FILMER AND ANOTHER v. CARTER AND OTHERS.

[CHANCERY DIVISION (Harman, J.), October 19, 1951.]

Will—Residuary gift—Double gift.

Charity—Religion—Gift to "St. Peter's Church Staines."

By his will, dated Nov. 14, 1946, which he wrote on a printed will form, a testator who died on Mar. 31, 1950, made certain bequests and continued: "The residue of my estate to be divided equally between St. Peter's Church Staines and Oxford University. My executors may postpone realisation of any assets until necessary for the final distribution of the estate." There followed the printed words "I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto" and the testator had himself added the words "my executors to deal with at their discretion."

HELD: (i) the two gifts relating to the residue of the testator's estate were not irreconcilable, but the first gift carried the whole of the testator's estate not already disposed of, and, therefore, providing that the first gift was fully effective, the second gift was inoperative.

Statement of principle in *THEOBALD ON WILLS*, 10th ed., p. 532, criticised.

(ii) notwithstanding that no person or corporate body was named to receive it, the gift to St. Peter's Church, Staines, was a valid charitable gift to be applied for church purposes, *i.e.*, purposes connected with the services of the church in question.

AS TO INCONSISTENT GIFTS, see *HALSBURY*, Hailsham Edn., Vol. 34, p. 218, para. 273; and FOR CASES, see *DIGEST*, Vol. 44, pp. 606-609, Nos. 4335-4365.

Cases referred to:

- (1) *Re Spencer*, (1886), 54 L.T. 597; 44 Digest 609, 4361.
- (2) *Re Isaac*, [1905] 1 Ch. 427; 74 L.J.Ch. 277; 92 L.T. 227; 44 Digest 609, 4362.
- (3) *Hardwicke (Earl) v. Douglas*, (1840), 7 Cl. & Fin. 795; West, 555; 7 E.R. 1271; 44 Digest 595, 4196.
- (4) *Cheeseman v. Partridge*, (1739), 1 Atk. 436; 26 E.R. 279; 8 Digest 317, 983.
- (5) *Re St. Andrew's, Holborn* (undated), cited in 1 Atk. 437; 26 E.R. 280; 8 Digest 317, 982.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of William George Leslie Gare, deceased, the testator's residuary real and personal estate was directed to be divided between St. Peter's Church, Staines, and Oxford University, or was given to the plaintiffs, the executors, to be dealt

with at their discretion, and, if the former, whether the gift to the church was valid.

R. W. Goff for the plaintiffs, executors and trustees of the will.

M. J. Albery for the first, second and third defendants, interested in residue.

Harold Lightman for the fourth and fifth defendants, interested on intestacy.

Denys B. Buckley for the Attorney-General.

HARMAN, J.: The testator, William George Leslie Gare, made his will on Nov. 14, 1946, and died on Mar. 31, 1950. His estate was of the value of some £25,000, £5,000 of which was realty. He made his will on a printed form which he had purchased. Having written his name and address, he bequeathed certain pecuniary legacies. He then proceeded to give five-sixths of his capital in the partnership firm in which he was interested to his partner and one-sixth to his employees in that firm. The will continues:

"The residue of my estate to be divided equally between St. Peter's Church Staines and Oxford University. My executors may postpone realisation of any assets until necessary for the final distribution of the estate."

Then the testator came to the ultimate printed portion of the form, which is in these terms:

"I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto,"

and he added in ink: "my executors to deal with at their discretion."

It is said that this is an ordinary case where the latter of two inconsistent dispositions in a will should be preferred over the former. No doubt, such a rule exists, but it is, like a similar but converse rule applying to deeds, only a counsel of despair, and will only be resorted to where the court is faced with absolute inconsistency and no alternative can be seen. The court will apply the rule in order that some effect may be given to the document. It seems to me, however, that there is no great difficulty in this case. The testator gives the residue of his estate to two beneficiaries. Then, finding in the will form a line referring to "estate not hereby otherwise disposed of," he says "my executors are to have that." One has only to ask oneself: What is it that is not "hereby otherwise disposed of?" If the first gift is good, nothing is not otherwise disposed of, and there remains nothing for the ultimate gift to operate on. On the other hand, if the gift to St. Peter's Church and Oxford University should fail for some reason, or to some extent, then, no doubt, the ultimate gift would serve a useful purpose.

It does not seem to me that I am confronted with an inconsistency. I do not subscribe to the view indicated in *THEOBALD ON WILLS*, 10th ed., p. 532, where it is said that in *Re Spencer* (1) the testator used a printed will form and made two residuary gifts, and that it was held that the first, which was in writing, prevailed. *Re Spencer* (1) does not support the proposition indicated. It is true that counsel argued the matter on that footing, but *SIR JAMES BACON, V.-C.*, said nothing about it in his judgment, and I do not think it would be right to assume that one must disregard printed gifts in such forms and regard only the manuscript. But, however that may be, it has been pointed out to me—and so far as I know this is right—that the doctrine of irreconcilability has not been applied to cases of apparently double gifts of residue, and the reason, I think, is that which has been given in several of the cases—that the second gift was meant to sweep up lapsed legacies or shares of residue.

In *Re Isaac* (2), before *BUCKLEY, J.*, there was an argument on the footing that lapsed legacies fell into the second rather than the first residue, and the learned judge, having found the first residue was the residuary gift, also held

that the lapsed legacies fell into the first residue. In *Earl Hardwicke v. Douglas* (3), where the second residuary gift was in a codicil, the majority of the House of Lords came to the conclusion that the codicil revoked the will, but, even so, LORD COTTENHAM, L.C., who gave a dissenting judgment, would not have held that revocation to be effective. However that may be, two bequests appearing in a will and a codicil are quite different from those which appear one after the other in the will in this case, and I have no hesitation in holding that the first gift carried the whole of the estate, in so far as it was an effective gift, and that, therefore, the second gift to the executors had no operation.

The second question with which I have to deal is whether the first gift was good in so far as half of it was to "St. Peter's Church, Staines." In my judgment, it is a good charitable gift. No perpetuity is involved. It is a gift for a religious purpose. The argument chiefly turned on the question whose was the proper hand to receive the gift. I have not found any authority about a gift to a church later than a reference by LORD HARDWICKE, L.C., speaking of "an old case," in *Cheeseman v. Partridge* (4) where he says (1 Atk. 437):

" . . . [this] is like the old case [*Re St. Andrew's, Holborn* (5)] of a gift to the parish church of St. Andrew, Holborn, which was construed to be a gift to the parson and parishioners of St. Andrew, and their successors for ever."

I think that LORD HARDWICKE meant by that observation that the gift was charitable and for the benefit of the parson and parishioners.

The gift is to the church. Is it a gift, therefore, to the parochial church council, a corporate body appointed by the Parochial Church Councils Measure, 1921, or is it a gift to the parson and the churchwardens, or a gift, not to any person, but intended to be devoted to church purposes? In my judgment, the last is right. It is a gift intended to be devoted to church purposes in the parish of St. Peter's, Staines. No doubt, the proper body to direct those activities will be the parochial church council. In my judgment, the uses to which the money may be put are limited to church purposes, *i.e.*, purposes connected with the services of the church. The money may not be expended on parochial purposes, which might be other than religious in their nature. Unless the Attorney-General and the solicitors for the church council can agree before the order is drawn up, there must be a scheme for the administration of this fund.

Order accordingly.

Solicitors: *Wake, Wild & Boulton* (for all parties other than the Attorney-General); *Treasury Solicitor*.

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

PAVIA & CO., S.P.A. v. THURMANN-NIELSEN.

[KING'S BENCH DIVISION (McNair, J.), October 17, 1951.]

Sale of Goods—Payment—Confirmed credit—Time for opening credit.

Sellers contracted to sell three thousand metric tons of Brazilian groundnuts for shipment from Brazil to Genoa of the first fifteen hundred tons in February, March, or April, 1949, and of the second fifteen hundred tons in March, April, or May, at sellers' option, payment to be by the opening of a confirmed, irrevocable, divisible, transmissible, and transferable credit opened in favour of the sellers and utilisable by them against delivery of certain documents. The sellers guaranteed the necessary Brazilian export licence and the buyers the necessary Italian import licence. The export licence was obtained on Feb. 9, 1949, and the sellers so advised the buyers on that day by cable, giving the necessary particulars and requesting them to open the credit. The import licence was obtained on Mar. 4. The buyers only made the credit available on Apr. 22.

HELD: the credit must be opened and confirmed, not when the sellers were ready to tender the documents or took steps to ship the goods, but, if reasonably practicable, within such time as would enable the sellers to ship at any moment of their permissible period. In the present case the credit should have been made available, in the case of the first shipment, at such time as it would have been available if the buyers had exercised reasonable diligence to make it available after Feb. 9, when the particulars were supplied to them by the sellers, and, in the case of the second shipment, by Mar. 1 or so soon thereafter as they reasonably could secure that it was opened.

AS TO CONFIRMED CREDITS, see HALSBURY, Hailsham Edn., Vol. 29, p. 213, para. 283.

Cases referred to:

- (1) *Guaranty Trust Co. of New York v. Hannay & Co.*, [1918] 2 K.B. 623; 87 L.J.K.B. 1223; 119 L.T. 321; 6 Digest 161, 1037.
- (2) *Equitable Trust Co. of New York v. Dawson Partners Ltd.*, (1926), 25 Ll.L. Rep. 90.
- (3) *Guaranty Trust Co. of New York v. Van den Berghs*, (1925), 22 Ll.L. Rep. 447.
- (4) *Urquhart Lindsay & Co. v. Eastern Bank, Ltd.*, [1922] 1 K.B. 318; 91 L.J.K.B. 274; 126 L.T. 534; Digest Supp.
- (5) *Dexters, Ltd. v. Schenker & Co.*, (1923), 14 Ll.L. Rep. 586.
- (6) *Garcia v. Page & Co., Ltd.*, (1936), 55 Ll.L. Rep. 391.
- (7) *Hartley v. Hymans*, [1920] 3 K.B. 475; 90 L.J.K.B. 14; 124 L.T. 31; 12 Digest 402, 3112.

SPECIAL CASE stated for the opinion of the court under the Arbitration Act, 1934, s. 9 (1) (a).

The appellants were the buyers from the respondents, the sellers, of three thousand metric tons of Brazilian groundnuts under a contract providing for shipment from Brazil to Genoa as to the first fifteen hundred tons in February, March, or April, 1949, and as to the second fifteen hundred tons in March, April, or May, at the sellers' option, and for payment by confirmed credit utilisable by the sellers on delivery of certain documents. The sellers claimed damages for delay which they said had taken place between Feb. 9, when the necessary particulars were supplied to the buyers, and Apr. 22, when the credit was made available. They contended that the buyers were under an obligation to make the credit available to the sellers, if they reasonably could, so that the sellers would have the whole of the shipping period prescribed by the contract available to them. The buyers submitted that they were under no obligation to open the credit until the sellers were ready to tender the documents or took steps

to ship the goods. The arbitrators held that the buyers were in default in not opening the credit in due time and were liable in damages.

A. S. Diamond for the buyers.

Mocatta, K.C., for the sellers.

McNAIR, J.: This matter comes before me in the form of a Special Case stated under s. 9 (1) (a) of the Arbitration Act, 1934, by way of a consultative Case, and raises an interesting and important question as to the practice and obligations under a contract which provides for the payment of goods sold c. and f. against an irrevocable credit. The facts are set out at length in the Case, which is stated by the board of appeal of the Incorporated Oil Seed Association. The appellants, Messrs. Pavia & Company, S.P.A., were the buyers from Messrs. K. Thurmman-Nielsen, the sellers and respondents before me, under a contract in writing dated Jan. 20, 1949, under which the sellers agreed to sell and the buyers agreed to purchase about fifteen hundred tons of one thousand kilograms each (with an option to the sellers to raise this quantity to three thousand tons) of shelled Brazilian groundnuts, shipment to Genoa f. a. q. from Brazil in February and/or March and/or April at sellers' option at 259 United States dollars for one thousand kilograms, payment by a confirmed, irrevocable, divisible, transmissible, and transferable credit opened in favour of the sellers and utilisable by them against delivery of certain documents. Those documents included a complete set of "on board" bills of lading, a weight note of a certain superintendent company, an analysis certificate, and a commercial invoice. This contract also contained the following express provisions:

"Subject to sellers obtaining export licence and to buyers obtaining import licence before Jan. 31, 1949,"

and it incorporated the general conditions of the Incorporated Oil Seed Association of London. On Jan. 31 the contract was varied by an addendum under which the quantity agreed to be sold was increased to three thousand tons of one thousand kilograms each, with shipment periods as to fifteen hundred tons February, March and April, as in the original contract, and as to fifteen hundred tons March, April and May. It is under this addendum that the sellers guaranteed the Brazilian export licence and the buyers guaranteed the Italian import licence. On Feb. 9 the export licence permitting the export from Brazil of the goods covered by the contract was obtained by the sellers, and they advised the buyers on the same day by cable, giving the necessary particulars. The Italian import licence could not be obtained until the Brazilian export licence had been granted. It was obtained by the buyers on Mar. 4, 1949. On Feb. 9 the sellers requested the buyers to open the credit under the two contracts and continued to press them to do so throughout the rest of February and throughout March. The buyers repeatedly told the sellers that the credit would be available in a few days' time, but it was not made available until Apr. 22.

The question of law for my decision is this. When, on the facts found and the true construction of the contract, should the credit under the contract have been opened by the buyers or made available to the sellers? The original arbitrators took the view that the buyers were in default in not opening the credit in due time, and, accordingly, were liable in damages. On behalf of the buyers it is submitted that there is no obligation on their part to open a credit in favour of the sellers until the sellers themselves are ready to tender the documents or until the sellers take steps to ship the goods. On the other hand, on behalf of the sellers it is contended that the buyers' obligation under this contract is to make the credit available to the sellers, if they reasonably can, so that the sellers have the whole of the shipping period prescribed by the contract available to them.

The contract itself does not prescribe expressly when the credit has to be opened or confirmed. If it did, the present difficulty would not have arisen, but it seems to me that, to answer the question which is put to me, it is necessary, first, to form some judgment as to how this contract is intended to work. There have been a number of decisions on the mechanism of the very familiar piece of credit machinery known as the confirmed credit. I was referred to the judgments of SCRUTTON, L.J., in the three well-known cases of *Guaranty Trust Co. of New York v. Hannay & Co.* (1), *Equitable Trust Co. of New York v. Dawson Partners, Ltd.* (2) and *Guaranty Trust Co. of New York v. Van den Berghs* (3). In passages in his judgments in those cases, SCRUTTON, L.J., sets out in classic language what is the object of this particular form of financial machinery, but I do not find any express statement which enables me to decide the point which I have to decide now.

I, therefore, approach the problem in the way which is suggested to me by counsel for the sellers, to see first what the sellers' rights are as regards shipment. Under the contract as varied the sellers had a right to ship the first fifteen hundred tons at any time between Feb. 1 and the last day of April, and they had the right to ship the second fifteen hundred tons at any time between Mar. 1 and May 31. They could ship the whole on the first day or the whole on the last day or parcels on any intermediate days, but one thing is quite clear—that it would be impossible for them to obtain payment in the manner contemplated by the parties unless two things had first happened: (i) that the buyers had opened the credit and (ii) that the institution with whom credit had been opened had confirmed it to the sellers. Accordingly, it seems to me that, unless the sellers are to be deprived of their right of shipment at any time during the contract period, it necessarily follows that the credit must both be opened and confirmed, if reasonably practicable, within such time as will enable the sellers to ship at any moment of their permissible period. It seems to me that this contract simply will not work if the buyers are under no obligation to put up a credit until they know that the sellers are ready to ship. Confirmed credit is a devise, as I see it, intended primarily for the sellers' benefit. In saying that, I am not forgetting the passages which have been cited to me from SCRUTTON, L.J.'s judgment in *Guaranty Trust Co. of New York v. Hannay & Co.* (1) ([1918] 2 K.B. 660), where he points out that a certain form of commercial credit also operates to the buyers' advantage, but I think it is clear that SCRUTTON, L.J., had in mind those forms of commercial credit where the obligation is to pay, not in cash, but by ninety days' bills. The particular form of credit now before me seems to me to be purely for the sellers' advantage. He is (to use the language of ROWLATT, J., in *Urquhart Lindsay & Co. v. Eastern Bank, Ltd.* (4) ([1922] 1 K.B. 324) entitled to "have a responsible paymaster in this country"—in that case the United Kingdom—"to protect him against" certain contingencies, *viz.*, contingencies of the buyer concerned failing to pay. As I have said, unless the buyer is under the obligation of opening this credit and causing it to be confirmed at an early date, the sellers for whose protection the credit is opened may be deprived of part of their legitimate period of shipment.

In the present case it appears that it was not until Feb. 9, 1949, that the buyers received from the sellers the necessary particulars. As I read that, it means the necessary particulars to enable the buyers to open the credit. Accordingly, on well-recognised principles the obligation of the buyers would not start until Feb. 9, but after Feb. 9 it seems to me that they were under an obligation to take reasonable steps to see that the credit was opened, at any rate as respects the first fifteen hundred tons, and they were also under an obligation to see that the credit for the second fifteen hundred tons was opened by Mar. 1 or so soon thereafter as they reasonably could secure that it was opened.

The views which I have expressed in this judgment are, I think, in line with those expressed by GREER, J., in *Dexters, Ltd. v. Schenker & Co.* (5) (14 Ll.L.R.

588), where, considering a contract in slightly different words from the contract before me, he said:

"Now it is clear that until [the buyers] got a form of banker's credit which would comply with the terms of the contract [the sellers] were not bound to send the goods forward at all."

A There, GREER, J., indicates, to my mind, that he is taking the view that the first obligation to be discharged is an obligation to be discharged by the buyers and that the two duties, putting up the credit and tendering the documents, were not correlative. I think that what I have said is also not inconsistent with, though not directly supported by, the judgment of PORTER, J., in *Garcia v. Page & Co., Ltd.* (6) (55 Ll.L.R. 391), though, in my judgment, the comment made by counsel on that case is well-founded, namely, that it is merely an illustration of the application of the well-known doctrine laid down in *Hartley v. Hymans* (7).

C Accordingly, the answer which I would give to the question of law submitted in the Case is that the date when the credit under the contract should have been opened by the buyers and made available to the sellers is, as regards the first fifteen hundred tons, at such time as it would have been opened or made available if the buyers had exercised reasonable diligence after Feb. 9 to obtain the opening and making available of the credit, and that, as regards the second fifteen hundred tons, the date on which the credit should have been opened is Mar. 1, 1949, or so soon thereafter as it could have been opened by the exercise of reasonable diligence by the buyers.

Award of arbitrators upheld.

D Solicitors: *Hicks, Arnold & Co.* (for the appellants); *Richards, Butler & Co.* (for the respondents).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

E NASH (INSPECTOR OF TAXES) v. TAMPLIN & SONS BREWERY BRIGHTON, LTD.

[HOUSE OF LORDS (Lord Morton of Henryton, Lord Reid, Lord Radcliffe, Lord Tucker and Lord Asquith of Bishopstone), July 17, 18, 19, 23, 24, October 25, 1951.]

F *Income Tax—Deductions against profits—Brewery company—Tied houses—Premises held under long leases—Premises sub-let at rents lower than those obtainable without tie—Deduction of rent foregone—Income Tax Act, 1918 (c. 40), sched. D, cases I and II, r. 3 (a)—Finance Act, 1940 (c. 29), s. 17 (2).*

G The taxpayers, a brewery company, were leaseholders of licensed houses under leases granted for a term exceeding fifty years, which were "long leases" within the meaning of s. 17 (1) of the Finance Act, 1940. The taxpayers sub-let the licensed houses to tied tenants who, in consideration of the tie, paid a rent less than the full annual value, and less, in the aggregate, than the amount which the taxpayers paid by way of rent to their lessor. In computing the amount of their profits to be charged to income tax the taxpayers sought to deduct the "rent foregone," which they defined as the difference between the rents which they received from the tied tenants and the rents which would have been received by them if they had sub-let the houses free from the burden of the tie. The Crown contended that the only relevant deduction which the taxpayers would have been able to make against their profits was the amount of the rent paid by them to the freeholders less the rent received by them from each tied tenant, but that by reason of s. 17 (2) of the Act of 1940 such deduction was precluded.

HELD: the deduction which the taxpayers were entitled to take was the "rent foregone," on the basis (LORD RADCLIFFE *dissentiente*) of the rent which notionally they could have charged if the house were not tied; such a deduction was unrelated to the "rents under long leases" which they paid and to which s. 17 of the Act of 1940 applied, and, therefore, that section was inapplicable.

Usher's Wiltshire Brewery, Ltd. v. Bruce ([1915] A.C. 433), explained and applied.

Decision of the COURT OF APPEAL ([1950] 2 All E.R. 93), affirmed.

AS TO DEDUCTION AGAINST PROFITS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 149-156, paras. 309-320; and FOR CASES, see DIGEST, Vol. 28, pp. 56, 57, Nos. 284-292.

- (1) *Usher's Wiltshire Brewery, Ltd. v. Bruce*, [1915] A.C. 433; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399; 28 Digest 56, 287.
- (2) *Russell v. Town & County Bank*, (1888), 13 App. Cas. 418; 58 L.J.P.C. 8; 59 L.T. 481; 53 J.P. 244; 2 Tax Cas. 321; 28 Digest 45, 227.
- (3) *Lowry v. Consolidated African Selection Trust, Ltd.*, [1940] 2 All E.R. 545; [1940] A.C. 648; 109 L.J.K.B. 539; 164 L.T. 56; 23 Tax Cas. 259; 2nd Digest Supp.
- (4) *Fry v. Salisbury House Estate, Ltd.* *Jones v. City of London Real Property Co., Ltd.*, [1930] A.C. 432; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; Digest Supp.
- (5) *Hoare & Co., Ltd. v. Collyer*, [1932] A.C. 407; 101 L.J.K.B. 274; 146 L.T. 469; 17 Tax Cas. 169; Digest Supp.
- (6) *Collyer v. Hoare & Co., Ltd. (No. 2)*, [1937] 3 All E.R. 491; [1938] 1 K.B. 235; 107 L.J.K.B. 1; 158 L.T. 383; 21 Tax Cas. 318; Digest Supp.

APPEAL by the Crown from a decision of the Court of Appeal, reported *sub nom.* [1950] 2 All E.R. 93.

The taxpayers, a brewery company, held licensed houses under long leases at rents in excess of the net annual values and let them to tied tenants at rents lower than the net annual values. The Special Commissioners held that, in computing their profits for assessment to tax, the taxpayers were not entitled to deduct the difference between the rents which could have been obtained from the properties if let without the burden of the tie and the rents actually receivable under the tie. CROOM-JOHNSON, J., dismissed the taxpayers' appeal from the commissioners' decision, but the Court of Appeal allowed their appeal from the decision of CROOM-JOHNSON, J.

Grant, K.C., and *R. P. Hills* for the Crown.

Cyril King, K.C., *Talbot, K.C.*, and *H. M. Allen* for the taxpayers.

The House took time for consideration.

Oct. 25. The following opinions were read.

LORD MORTON OF HENRYTON: My Lords, this appeal arises out of additional first assessments made on the respondents for 1942-43 in the sum of £32,033, and for the year 1943-44 in the sum of £32,790, under sched. D, case I, and s. 125 of the Income Tax Act, 1918, in respect of their profits as brewers.

The respondents are the lessees of a number of licensed houses, the freeholder whereof is Tamplin's Licensed Properties, Ltd., a wholly-owned subsidiary company of the respondents. These houses are held by the respondents as lessees under an agreement for lease dated June 1, 1938, for a term of sixty-one years computed from Oct. 1, 1933. Some of the houses were retained by the respondents under their own management, but others were sub-let by the respondents to "tied" tenants under agreements whereof a specimen is exhibited to the Case stated. By cl. "P" of each of these agreements the tenant and licensee of the

public house entered into the usual undertaking to purchase solely and exclusively from the respondents all the ale, beer, stout and other malt liquor and all wines, spirits and mineral waters which should be required for sale in or out of the premises, and by cl. "Q" he entered into an undertaking not to buy from any other source than the respondents. It is common ground between the parties to this appeal that the terms of the said specimen agreement are those commonly to be found in tenancy agreements between brewers and their "tied" tenants and that the respondents entered into these tenancy agreements for the purpose of obtaining a better market for their beer. It is also common ground that if the respondents had chosen to let the same houses under agreements which omitted the "tie" clauses, but were in other respects the same as the specimen agreement, they could have obtained higher rents than those which they obtained from the tied tenants. Lastly, it is common ground that up to the date when the Finance Act, 1940, came into operation, the facts just stated entitled the respondents to make a certain deduction in computing the amount of their profits under case I of sched. D to the Income Tax Act, 1918. The deduction is commonly called "the Usher deduction" or "the Usher allowance," as the right to make it was first established by the decision of this House in *Usher's Wiltshire Brewery, Ltd. v. Bruce* (1).

So far, the parties are in agreement. I must now state the difference of opinion which has given rise to this appeal. The Crown contends that by reason of the decision in *Usher's* case (1) the respondents were entitled, in computing their profits under case I of sched. D of the Income Tax Act, 1918, to deduct the amount of the rent paid by them to the freeholders for each licensed house let to a "tied" tenant less the rent received by them from each "tied" tenant. The Crown further contends that the rents paid by the respondents to the freeholders were "rents under long leases" within the Finance Act, 1940, s. 17 (1), and that by reason of sub-s. (2) of the same section, the respondents ceased to be entitled to make the deduction just mentioned when the Act of 1940 came into force. The respondents agree that the rents paid by them to the freeholders are "rents under long leases" within s. 17 (1) of the Act of 1940, but they say that the deduction which they were entitled to make under the decision in *Usher's* case (1) was not the difference between the rents paid by them to the freeholders and the rents received by them from the "tied" tenants, but the difference between the rents which could have been obtained for the licensed houses in question if they had been let to tenants free from the "tie" imposed by cl. "P" and "Q" already quoted and the rents which they in fact obtained from the "tied" tenants. They further contend that s. 17 of the Act of 1940 has no effect on this right, since they do not seek to deduct any "rents under long leases"; what they were and are entitled to deduct in the case of each house is the notional rent which could have been obtained from a "free" tenant, less the rent paid by the "tied" tenant.

My Lords, it will be apparent that it is necessary to consider *Usher's* case (1) with some care, in order to ascertain what was in fact decided by your Lordships' House. The rule which had to be considered by this House in *Usher's* case (1) is to be found in the Income Tax Act, 1842, s. 100, and is incorporated by reference in the Income Tax Act, 1853. It is r. 1 of the Rules applying to Cases I and II of sched. D and there is no material difference between that rule and the rule which applies in the present case, r. 3 (a) of the Rules applicable to Cases I and II of sched. D of the Income Tax Act, 1918. Under both the old rule and the present rule it has to be decided whether the sum sought to be deducted is "money wholly and exclusively laid out or expended for the purposes of" the trade in question. In *Usher's* case (1) the facts were the same as in the present case, except that the brewers owned the freehold of some of the houses let to tied tenants and were leaseholders of others of these houses. They appealed against an assessment made on them in respect of the profits of their trade, and

claimed to have the assessment reduced by (*inter alia*) a sum of £2,134 14s. 6d. described by them as the "difference between rents of leasehold houses or sched. 'A' assessment of freehold houses on the one hand, and rents received from 'tied' tenants on the other hand." It is worthy of note, however, that in the brewers' contention (C) ([1915] A.C. 437) it was pointed out that the tied tenants paid "a much less rent *than the full annual value of the premises*," and the following paragraph appears in a supplemental statement of facts agreed between the parties and signed in pursuance of an order of HORRIDGE, J.:

"B. In consideration of the 'tie' contained in the tenancy agreement the appellants let the tied houses at considerably less than their annual value or what they could get for them without such a tie and in the case of houses rented by them also below what they pay for the rent thereof themselves. Such letting is made by them deliberately and solely in order to get the trade which the using of such houses as tied houses affords and by means of so doing they are enabled to make a profit on their total trading transactions by reason of the increased sale of their beer and other goods. The letting at less than the annual value or head rent is not due to a change in the value of the premises. The figures in question represent the difference between the rents received by the appellants on the one hand and (i) in the case of their freehold houses, the net sched. A assessment; (ii) in the case of their leasehold houses, the rents paid by them. If it should be held that in case (ii) the net sched. A assessment is the proper figure, it can be ascertained."

This House unanimously allowed the deduction claimed, as being money "wholly and exclusively laid out or expended for the purpose of" the brewers' trade. But the opinions delivered must be studied with care, as two alternative views of these opinions have been put forward in argument. Counsel for the respondents contend that what was allowed to be deducted, both in the case of the freeholds and in the case of the leaseholds, was the difference between the rents which were in fact obtained from the "tied" tenants and the notional rents which could have been obtained if the same premises had been let free from the "tie." Counsel for the Crown, on the other hand, contend that the deduction allowed in *Usher's* case (1), in the case of the brewers' leasehold properties, was simply the rent paid to the freeholder less the rent received from the "tied" tenant. They deal with the deduction allowed in the case of the freehold properties by saying that it was simply the difference between the sched. A assessment and the rent received from the tied tenant; that it was an "anomalous" decision; and that it has no application to the present case, because the respondents are leaseholders of all the houses now in question.

I now turn to the speeches in *Usher's* case (1), in order to ascertain which of these contentions is entitled to succeed. EARL LOREBURN said (*ibid.*, 445):

"The next item which the brewery company seeks to deduct is £2,134 14s. 6d., which is the difference between the annual value or the rents which they pay to the freeholders of the tied houses on the one hand and the rents which they receive for the same houses from their tied tenants on the other hand. This difference arises because the tied tenants are bound by covenant to buy their liquor solely from the brewery company. In consideration of this 'tie' the tenants occupy at rents less than the annual value and less than the rents which the brewery company itself has to pay for the houses, and the sum claimed to be deducted must be taken to represent in each case the difference between the rents actually received from the tied tenants and the proper annual value. For no argument was offered to show that the rent paid by the brewery company is other than the proper annual value. And it is agreed that this letting at reduced rents is made solely to get the trade which the using of the tied houses affords, and so to swell the profits of the brewery business. On ordinary

principles of commercial trading such loss arising from letting tied houses at reduced rents is obviously a sound commercial outlay. Therefore this item must be deducted."

It is to be observed that LORD LOREBURN treats the freehold and leasehold premises as being on the same footing, and the vital words are:

A "the sum claimed to be deducted must be taken to represent in each case the difference between the rents actually received from the tied tenants and the proper annual value. *For no argument was offered to show that the rent paid by the brewery company is other than the proper annual value.*"

B This passage shows clearly, to my mind, that, if the rent paid by the brewery company had been other than the "proper annual value", it would not have been adopted as the figure from which the rent paid by the "tied" tenant was to be deducted, and I think that by "proper annual value" LORD LOREBURN meant the rent which could have been obtained from a "free" tenant. LORD ATKINSON said (*ibid.*, 457):

C "As to the next item, it must be conceded that if the appellants had put into occupation of a house a manager, as distinguished from a tenant, who managed their trade in the way I have described, they would, under the authority of *Russell v. Town & County Bank* (2) have been entitled to deduct the full annual value of the house as estimated under sched. A, whether that house was a freehold or leasehold. I do not think it can possibly make any real difference in principle in respect to this right to deduct, if the salesman put into the tied house, to live in it (as he must do to obtain a publican's licence), happens to be a tenant and not a manager, though the brewer no doubt occupies the house in the one case, because the occupation of the manager is his occupation, and not in the other; but the balance of the profits and gains of the brewer's trade would, according to the methods of practical business men, be ascertained in the same way in both cases, *i.e.*, by deducting from the receipts what it costs to earn them. Part of the cost to the brewer is, in the manager's case, his salary, and possibly a discount on profits. In the case of the tenant it is the difference between the annual value of his, the brewer's, freehold house and the rent he receives for it, and in his leasehold house the difference between the rent he receives for it and the rent he pays for it, if that be equal to the full annual value under sched. A. For the purposes of striking the balance of profits and gains the two cases are in principle undistinguishable."

F Here, the vital words are

"in his leasehold house the difference between the rent he receives for it and the rent he pays for it, *if that be equal to the full annual value under sched. A.*"

G The comment which I have just made as to LORD LOREBURN's words apply equally to LORD ATKINSON except that the latter speaks of "the full annual value under sched. A" instead of using the phrase "the proper annual value." For the moment I pass over the opinion of LORD PARKER OF WADDINGTON and turn to the opinion of LORD SUMNER, where he said (*ibid.*, 469):

H "Next as to the rent. A trader who utilises, for the purposes of his trade, something belonging to him, be it chattel or real property, which he could otherwise let for money, seems to me to put himself to an expense for the purposes of his trade. Equally he does so if he hires or rents for that purpose property belonging to another. The amount of his expense is *prima facie* what he could have got for it by letting it in the one case, and what he pays for it when hiring it in the other. Where he gets something back for it, while employing it in his trade, by receiving rent or hire for it in connection with that trade, the true amount of his expense can only be arrived at by

giving credit for such receipt. In principle, therefore, I think that in the present case rent foregone, either by letting houses, which the brewers own, to tied tenants at a low rent instead of to free tenants at a full rackrent in the open market, or by letting houses in the same way, which they hire and then re-let at a loss, is money expended within the first rule applying to both of the first two cases of sched. D, and that upon the findings of the Special Case, which are conclusive, it is 'wholly and exclusively expended for the purposes of such trade'."

Certain portions of this passage have been criticised as being too widely expressed; see, for instance, the observations of VISCOUNT MAUGHAM and LORD RUSSELL OF KILLOWEN in *Lowry v. Consolidated African Selection Trust, Ltd.* (3) ([1940] 2 All E.R. 554, 562). Counsel for the respondents does not seek to rely on these portions as establishing a wide general rule. I think, however, it is plain that in the particular case before him LORD SUMNER thought that the proper deduction to be allowed was the difference between the rent received from the "tied" tenants and the rent which could have been obtained if the houses had been let "to free tenants at a full rack rent in the open market." This difference he described as "rent foregone" and he regarded it as money "wholly and exclusively expended for the purpose of such trade." I now turn to the judgment of LORD PARKER OF WADDINGTON. He said ([1915] A.C. 463):

"My Lords, some of the licensed houses which the appellants acquired for the purposes of their trade were of freehold and some of leasehold tenure, but the rent reserved in all the tenancy agreements on which they have been let is less, in the case of freeholds, than the annual value according to the sched. A assessment, and, in the case of the leaseholds, than the rent which the appellants themselves have to pay. The appellants claim to deduct, in the one case, the difference between the sched. A assessment and the rent they receive, and in the other case the difference between the rent they pay and the rent they receive. In other words, they claim the sched. A assessment value or the rent they pay as a deduction, giving credit on the other side of the account for the rent paid by the tenants of the tied houses. I am of opinion that they are also right in this contention. Unless there is some express prohibition the case appears to be covered by *Russell v. Town and County Bank* (2) . . . The right to make the deduction, however, must of course carry with it the obligations to give credit for the rents received from the tenants of the tied houses."

Counsel for the Crown in the present case rely on this passage as supporting their contention, but I incline to the view that if there had been evidence that the rents paid by the brewers to the freeholders had been greater than the rent which they could have obtained from a "free" tenant, LORD PARKER would not have allowed the brewers to deduct the whole of the difference. It is to be noted that he expresses no dissent from the views which had already been expressed by LORDS LOREBURN and ATKINSON. LORD PARMOOR did not deal specifically with this particular claim by the brewers, but he expressed no dissent from the views which had already been expressed by the other noble and learned Lords.

My Lords, I shall first consider the case of the leasehold houses dealt with in *Usher's* case (1). The deduction in fact allowed was the deduction claimed by the brewers, viz., the difference between the rents paid to the freeholders and the rents received from the tied tenants, but, in my view, this deduction was allowed because, and only because, it represented the difference between the notional rent which could have been obtained from a free tenant and the rent obtained from the tied tenant, and if there had been evidence that the actual rent paid to the freeholder was higher or lower than this notional rent, the deduction would have been based on the notional rent and not on the actual rent. I think that this sufficiently appears from the passages which I have quoted

A from the speeches of LORDS LOREBURN, ATKINSON and SUMNER. The point is not so clear in the case of the freehold properties, but as all the properties are leasehold in the present case it is not necessary to express a concluded opinion as to the view which this House would have taken in *Usher's* case (1) if there had been evidence that the sched. A assessments were out of date and that the rent which could be obtained from a "free" tenant was in fact higher or lower than the sched. A assessment. I incline to the view that in this event the House would have discarded the sched. A assessment as the basis. No one of the noble Lords appeared to think that there was any difference in principle between the freeholds and the leaseholds, and I believe that they adopted the sched. A assessments merely because they assumed that these assessments accurately represented the rent which could be obtained from a "free" tenant. LORD PARKER OF WADDINGTON discussed the question whether, in the case of the freeholds, the basis should be the gross or the net sched. A figure, but I find it unnecessary to go into this matter, as no other member of the House discussed it in *Usher's* case (1), and your Lordships are not concerned with freeholds in the present case.

C The result is that, in my opinion, the respondents are right in their contention that the *Usher* deduction is a notional figure less the rent actually paid by the tied tenant, and, if this be the true view, it is plain that the right to make this deduction is not affected by the Finance Act, 1940. This appeal must, therefore, fail, and it becomes unnecessary to consider the second submission of counsel for the respondents, that the additional assessments are bad in law, because the inspector made no "discovery" within the meaning of the Income Tax Act, 1918, s. 125. It was suggested by counsel for the Crown that, if *Usher's* case (1) were to be heard today, it would be decided differently by reason of the difference in wording between r. 5 of the Rules applicable to Cases I and II of sched. D of the Income Tax Act, 1918, and the corresponding rule in force when *Usher's* case (1) was decided. I do not, however, find any foundation for this argument in the speeches of the noble Lords who decided *Usher's* case (1). I have based my opinion as to the effect of the decision in *Usher's* case (1) simply on the language used by those who decided it. I would add, however, that certain strange results would follow if the Crown's contention were accepted. Assume that brewers hold a public house as lessees for a term of 870 years from 1852 at a rent of 1s. per annum. These are the facts in the case of the Globe Hotel, Abertillery, one of the houses in question in the next appeal before your Lordships' House. Assume further that the house is let to a tied tenant at £60 a year and that the rent which could be obtained from a free tenant and the net sched. A assessment are both £100 a year. If the Crown's contention is right, the brewers could never deduct anything under the decision in *Usher's* case (1), because the rent they pay is less than the rent they receive from the tied tenant, but if they had been freeholders, instead of being leaseholders for 870 years, they could have deducted £40 a year, both before and after the Act of 1940. This seems a strange and capricious result. If, on the other hand, the respondents' contention is right, the brewers could always have deducted £40 a year, as "rent foregone" for the purposes of their trade.

H Another reason for rejecting the Crown's contention arises from the decision of this House in *Fry v. Salisbury House Estate, Ltd.* *Jones v. City of London Real Property Co., Ltd.* (4). The Crown's contention is, in effect, that the right of the brewers under the decision in *Usher's* case (1) is to treat the rent paid to the freeholders as an outgoing of the business and the rent received from the tied tenants as a receipt of the business, but the latter part of this contention cannot, in my view, be reconciled with the *Salisbury House* case (4). Counsel for the Crown rely on the explanation of *Usher's* case (1) given by LORD RUSSELL OF KILLOWEN in *Lowry v. Consolidated African Selection Trust, Ltd.* (3) when

he said ([1940] 2 All E.R. 560):

“ . . . so far as concerns the leaseholds, the position seems to present no abnormal features. It is a plain case of entering actual income and actual outgoings.”

But, with the utmost respect to that great judge, I do not see how the receipts from the tied tenants can be computed as income from the brewing business for the purposes of sched. D, in view of the decision in the *Salisbury House* case (4). Taxation in the case of each tied house would be imposed under sched. A and under no other schedule. I prefer the exposition of *Usher's* case (1) which was given by LORD WARRINGTON OF CLYFFE in *Hoare & Co., Ltd. v. Collyer* (5) ([1932] A.C. 414), where he points out that the deduction in *Usher's* case (1) was “rent forborne.”

Counsel for the Crown submitted that a decision in favour of the respondents might have far-reaching results in many different types of business. I do not think so. In *Usher's* case (1) this House decided that in the very special case of a brewer's tied houses “rent foregone” was money wholly and exclusively “laid out or expended” for the purposes of the brewer's trade. I can find nothing in the facts of the present case to distinguish it from *Usher's* case (1) and nothing in any Act passed since *Usher's* case (1) was decided which adversely affects that decision. It was, in my view, a decision on a narrow point, exactly covering the present case. If any of LORD SUMNER's observations are to be construed as laying down a broad general rule, I cannot find that that rule was accepted by the other members of the House or has been applied in any subsequent case. For these reasons, which do not differ in substance from the reasons given by the Court of Appeal, I move that this appeal be dismissed with costs.

LORD REID: My Lords, the respondents hold a number of public houses on long leases from a subsidiary company and pay to that company a rent of £40,000. These public houses are let by the respondents as tied houses for rents which amount in all to £5,329, and the assessments of these public houses, for the purpose of sched. A, amount in all to about £12,000. The respondents maintain that in the assessment of the profits of their brewery business for the purpose of sched. D the decision of this House in *Usher's Wiltshire Brewery, Ltd. v. Bruce* (1) entitles them to a deduction of a sum equal to the difference between the amount of the tied rents received by them—£5,329—and either the amount of the rents which they could get if they let these public houses free of any tie (which I shall call the potential rents) or, alternatively, the amount of the sched. A assessments. There is no finding as to what those potential rents would amount to, but it is clear that they would greatly exceed the tied rents and they might considerably exceed the sched. A assessments. It is common ground that the facts of this case are indistinguishable from the facts in *Usher's* case (1) and there is no doubt that in *Usher's* case (1) a deduction was allowed in respect of tied houses which were held by brewers under leases. But the appellants maintain that the deduction then allowed in respect of leasehold premises was of a different character. They maintain that the only deduction then allowed was a sum equal to the difference between the tied rents received by the brewers and the rents which were actually paid by the brewers to their lessors. At first sight the difference between these two contentions might seem to be of a minor character, and so it would be but for the Finance Act, 1940, s. 17.

Sections 13 to 17 of the Finance Act, 1940, appear to have been passed to deal with certain rents which had escaped taxation before that date. The reason for this immunity is to be found in *Fry v. Salisbury House Estate, Ltd.* (4). In that case a company owned a block of buildings and let out rooms in it as unfurnished offices. The rents which the company received exceeded the total sched. A assessment of the building, and the Crown sought, unsuccessfully, to

A tax the amount of that excess as a profit of the company under sched. D. The position then was that a tenant who paid rent which exceeded the amount of the sched. A assessment of his premises paid to the Crown tax on the sched. A assessment and no more. He was then entitled to deduct that tax from the rent which he paid to his landlord, but he could not deduct more than he was liable to pay, so he paid the excess of his rent over the sched. A assessment without deduction of tax. The landlord could not be directly assessed, so the result was that no tax was payable by anyone on the excess rent. The effect of the Finance Act, 1940, was to make such excess rents taxable. The Act dealt differently with rents under short leases and rents under long leases and it is unnecessary in this case to refer to those provisions which deal with short leases. Long leases are dealt with by s. 17, and its effect is that a tenant can now deduct tax on the whole rent which he pays to his landlord. If the section stopped there the landlord would pay tax on all that he received, but the tenant would gain because he would have deducted tax from the whole rent and still only be liable to pay tax on the sched. A assessment. In the ordinary case, any such gain to the tenant is prevented by further provisions in the section. Before 1940 the tenant was entitled, in determining his profits under sched. D, to deduct as an expense the whole rent which he paid, but s. 17 now prohibits him from making any deduction in respect of rent payable by him under a long lease. I need not enter further into an examination of the complicated provisions of this section, because it is agreed that in the ordinary case the ultimate result is that the landlord now pays tax on the full amount received by him, whereas the amount of tax payable by the tenant is on balance unaltered.

D I must now deal with the effect of s. 17 on this case. Admittedly, the brewers get the benefit of s. 17 in that they can now deduct and retain tax on the whole £40,000 which they pay as rent. The question is whether the countervailing prohibition also applies to them. The section only prohibits the taxpayer from deducting in his sched. D account any payment of rent under a long lease. So, if the deduction allowed in *Usher's* case (1) was a deduction of the rent paid by the brewer, either in whole or in part, that deduction is now prohibited by s. 17. But if the deduction allowed in *Usher's* case (1) was not based on rent paid by the brewer but was based on something else—potential rent or annual value—then s. 17 has no application to it and the deduction can still be claimed. It is for this reason that it is necessary to discover precisely what this House held to be the basis of the deduction allowed in *Usher's* case (1). In *Usher's* case (1) the brewers had let to tied tenants a number of public houses some of which they held on lease and some of which were freehold, and they claimed a number of different deductions. The two most important claims were:

“(a) Repairs to tied houses—£1,004 0s. 10d.; (b) Difference between rents of leasehold houses or sched. A assessment of freehold houses on the one hand, and rents received from tied tenants on the other hand—£2,134 14s. 6d.”

G The commissioners held:

H “3. In common with other brewery companies the appellants have from time to time in order to increase their trade purchased licensed houses which they let to tenants, one of the terms of such lettings being that the tenants should buy from the appellants all the ale, beer, wines and spirits sold in such tied houses. 4. The profits of the appellants are made by brewing ale, beer, and other articles and purchasing spirits in bulk and selling these commodities partly to private individuals, partly (to a limited degree) to free licensed houses, and as to the greater part to the tenants of their tied houses. All these profits of the appellants are included in the assessment. Such profits are materially increased owing to the possession by them of the tied houses in question and in consequence of an increased sale of these commodities to the tenants of those tied houses and to the

fact that they are able to obtain and do obtain for the same class of goods a higher price from the tenants of their tied houses than they can obtain or are able to obtain from their other customers . . . 7. The said premises have been acquired by the appellants and are held by them solely in the course of and for the purpose of their said business and as a necessary incident to the more profitably carrying on of their said business. The possession and employment of the said premises as aforesaid are necessary to enable them to earn the profits upon which they pay income tax, and without the said premises and their use as aforesaid the appellants' profits, if there were any at all, would be less in amount."

The main question in *Usher's* case (1) was whether the brewers were entitled to any of these deductions at all. EARL LOREBURN said ([1915] A.C. 443):

"Accordingly the main question for decision is this. When the owners of a brewery business, who are also landlords of tied houses which sell their commodities by retail, come to be assessed for income tax under sched. D, can they, in estimating the balance of profits and gains on the brewery business, bring into account expenses which they have properly though voluntarily incurred in supporting their tenants so as to enable them to sell the goods supplied by the brewery company?"

This question was determined in favour of the brewers. It then became necessary to decide whether each of the separate claims was valid and there was much argument about the first claim for the cost of repairs. This claim was held to be valid, but I need not consider the reason why, because the reasoning regarding this claim is not relevant in the present case.

What we are concerned with in this case is the second claim, and the reasons for which it was allowed. That claim covered both freehold and leasehold properties. The form in which the claim in respect of leasehold properties was made and allowed is helpful to the appellant in this case, because it purports to be based on the rents actually paid by the brewers whereas the claim in respect of freehold properties purports to be based on the amount of the sched. A assessments. These are in their nature very different things. The rents paid were sums actually expended, whereas the sched. A assessments did not represent anything paid out by the brewers. But this difference in character received little attention either in the arguments as reported or in the speeches in this House. It may well be that the reason for that was that it was assumed throughout that there was no difference in amount between the rents paid by the brewers, the sched. A assessments, and what I have called the potential rents which the brewers could have got by letting without any tie. I think that the real problem in this case is to discover whether the claims in respect of freehold and leasehold properties were allowed for the same reasons or not. I do not think that it is very difficult to discover the grounds of the decision on the freehold part of the claim. LORD LOREBURN (*ibid.*, 446) states this claim as "the difference between the rents actually received from the tied tenants and the proper annual value" and he then says (*ibid.*):

"On ordinary principles of commercial trading such loss arising from letting tied houses at reduced rents is obviously a sound commercial outlay. Therefore this item must be deducted."

LORD ATKINSON referred (*ibid.*, 452) to the decision in *Russell v. Town & County Bank* (2)

". . . that a trader who owns and occupies premises in which he carries on his trade is entitled to deduct from his receipts the full annual value of those premises assessed under sched. A,"

and then said (*ibid.*):

"This is obviously right and just, because if he abstains from letting his

premises and devotes them to the purposes of his trade he must be taken to have dedicated to that trade a sum equivalent to the annual sum which he might have obtained in the shape of rent if he had let them to an untied tenant."

Then he considered whether the fact that the brewer was not in occupation of the tied house made any difference and said (*ibid.*, 457):

- A "I do not think it can possibly make any real difference in principle in respect to this right to deduct, if the salesman put into the tied house, to live in it (as he must do to obtain a publican's licence), happens to be a tenant and not a manager, though the brewer no doubt occupies the house in the one case, because the occupation of the manager is his occupation, and not in the other; but the balance of the profits and gains of the brewer's trade would, according to the methods of practical business men, be ascertained in the same way in both cases, *i.e.*, by deducting from the receipts what it costs to earn them. Part of the cost to the brewer is, in the manager's case, his salary and possibly a discount on profits. In the case of the tenant it is the difference between the annual value of his, the brewer's, freehold house and the rent he receives for it and in his leasehold house the difference between the rent he receives for it and the rent he pays for it, if that be equal to the full annual value under sched. A. For the purposes of striking the balance of the profits and gains the two cases are in principle undistinguishable."

LORD PARKER OF WADDINGTON also based his opinion on the decision in *Russell v. Town & County Bank* (2). He said (*ibid.*, 460):

- D "Thirdly, *Russell v. Town & County Bank* (2) decides, if not expressly at any rate by implication, that the first part of the rule which prohibits deductions for disbursements and expenses, not being money wholly and exclusively expended for the purpose of the trade, does not preclude a deduction for the annual value of premises used wholly for the purposes of the trade, though such annual value is not money expended in the ordinary sense of the word."

- I will not quote from LORD SUMNER's speech because I think that he goes too far in the passage which has so often been quoted. But at least he makes it clear that in his opinion "rent foregone" is the basis of the deduction. LORD PARMOOR's speech is more difficult to interpret, but I think that he regarded the annual value of the freehold properties as an expense. As I read the speeches, this House decided unanimously that, as regards freehold properties, the difference between annual value and the tied rent was to be regarded as "money wholly and exclusively laid out or expended for the purposes of the trade" within the meaning of what was then r. 1 and is now r. 3 (a) of cases I and II of sched. D, and was, therefore, a good deduction. It was argued for the appellant that this decision must be regarded as having been in some way superseded by reason of changes in other rules of cases I and II since 1914, but the only rule which has been materially altered is that which was r. 2 and is now r. 5. That rule has never had any application except to a trader who was occupying the premises the annual value of which is to be deducted. So it could not be the basis of the deduction allowed in *Usher's* case (1), and in fact no one in that case ever suggested that it was the basis of the deduction allowed. I am, therefore, unable to understand how a change in that rule can have any effect on the decision in *Usher's* case (1). I confess I do not find it easy to understand how the conclusion was reached that the difference between the annual value and the amount of the tied rent could be regarded as money expended, but I have no doubt that that was the decision of the House and I cannot see that any later statutory enactment has in any way invalidated that decision.

It remains to determine what was meant in *Usher's* case (1) by annual value.

Was it annual value for the purpose of sched. A assessment or was it the potential rent? In 1914 there was seldom any material difference between the two, but now the difference is frequently material. Probably the point was not much considered in *Usher's* case (1), and, therefore, there appears to be some difference of opinion. LORD PARKER seems the only one of the noble and learned Lords who was definitely of opinion that the sched. A assessment should be taken. I cannot discover which view LORD PARMOOR held, but I think that LORD LOREBURN, LORD ATKINSON and LORD SUMNER all held that potential rent was the true basis of the deduction. LORD SUMNER was clearly of that opinion, and I think that LORD LOREBURN's opinion is almost equally clear because he refers to the "loss arising from letting tied houses at reduced rents". That must, I think, mean the difference between those rents and something which the brewer could have received if he had acted differently; he could have received the potential rent, but he could never have received the amount of the sched. A assessment as such. LORD ATKINSON, in the passage I first quoted from his speech, seems to regard the two as interchangeable, but in the end he states quite clearly that the trader must be regarded as having dedicated to his trade what he could have obtained as rent from an untied tenant. If their Lordships had intended that the deduction should be based on something other than the true annual value and that the sched. A assessment should be taken instead, I would have expected to find some reference to a reason for this. To base a deduction on the difference between what was received and what might have been received is intelligible, once it is established that there is to be a deduction; but to base it on the difference between what was received and a figure which may have little relation to any present value would seem to require some justification, and I can find none. Accordingly, but not without some hesitation, I have come to be of opinion that it must be held that this House decided, at least by a majority, that the deduction permissible in the case of freehold properties was the difference between what the brewer might have got as rent from an untied tenant and what he in fact got from his tied tenant.

Was the decision of this House that the same deduction should be allowed in the case of leasehold properties or was the basis of the deduction in that case to be something different? At first sight it would seem that there was some difference, because there are constant references to annual value in the case of freehold properties and rent in the case of leasehold properties, but these references seem merely to echo the wording of the brewers' claim, and in order to find the real ground of decision one has to look at the reasoning rather than at the words which were used.

My Lords, it is very unsatisfactory to have to grope for a decision in this way, but the need to do so arises from the fact that this House has debarred itself from ever re-considering any of its own decisions. It matters not how difficult it is to find the *ratio decidendi* of a previous case, that *ratio* must be found. And it matters not how difficult it is to reconcile that *ratio* when found with statutory provisions or general principles, that *ratio* must be applied to any later case which is not reasonably distinguishable. It is not even suggested that this case can be distinguished from *Usher's* case (1). Subsequent events have given importance to differences which, when *Usher's* case (1) was decided in 1914, were of little moment, and it is not surprising that these matters were not then elaborated. But there must have been a decision. There are three possible bases for the deduction which this House undoubtedly allowed in the case of leasehold properties—the basis must have been deduction of rents received from either rents paid, or sched. A assessments (gross or net), or potential rents which the brewer might have got from untied tenants. It is true that in *Usher's* case (1), whichever basis was held valid, the practical result would have been the same, because in that case rents paid, sched. A assessments, and potential rents were all assumed to be equivalent in amount. But no deduction at all

could have been allowed until a valid basis had been found for it and the House must have chosen between the three possibilities, unless, indeed, it had held that all three were admissible—a result which would be fatal to the appellants' case.

A It does not appear from the reported arguments in this House that either side stressed any difference between the cases of freehold and leasehold properties. For the Crown it was contended that no part of the deduction claimed was allowable. For the brewers it was contended that the whole deduction was permissible under r. 1 of cases I and II of sched. D and very little distinction was drawn between the cases in the speeches in this House. But I think that the reasoning of at least LORD LOREBURN, LORD ATKINSON and LORD SUMNER shows that they must have taken annual value as the basis of the deduction in this case as they did in the case of freehold properties. LORD LOREBURN said, dealing with both parts of the second claim (*ibid.*, 446):

B “In consideration of this ‘tie’ the tenants occupy at rents less than the annual value and less than the rents which the brewery company itself has to pay for the houses, and the sum claimed to be deducted must be taken to represent in each case the difference between the rents actually received from the tied tenants and the proper annual value. For no argument was offered to show that the rent paid by the brewery company is other than the proper annual value.”

C I think that it is clear that, if the “proper annual value” had differed from the rent paid by the brewer, LORD LOREBURN would have held that the proper basis for the deduction was the annual value. If he had had to deal with the facts of the present case on the footing that the rent paid by the respondents to their subsidiary company greatly exceeds the proper annual value, I feel sure that he would not have allowed the full rent paid to be taken into account. And I think that it is equally clear that LORD ATKINSON would not have accepted a rent which differed from the annual value. He said, dealing with the costs to the brewer which had to be brought into account (*ibid.*, 457):

E “. . . it is the difference between the annual value of his, the brewer's, freehold house and the rent he receives for it, and in his leasehold house the difference between the rent he receives for it and the rent he pays for it, if that be equal to the full annual value under sched. A.”

F I have already noted that LORD ATKINSON seems to regard annual value under sched. A and potential rent as the same thing, and stated why I think that he and LORD LOREBURN support potential rent rather than sched. A value. LORD PARKER refers to the rent paid by the brewers and makes no reference to annual value in the case of leasehold property. LORD SUMNER refers to “rent foregone” by the brewers letting houses which they hire and then re-let at a loss. He does not refer to annual value or potential rent, but this must, I think, be what he means because one can only forego rent if one could have obtained that rent by acting otherwise. LORD PARMOOR's view is less clear, but at least he draws no distinction between the cases of freehold and leasehold properties.

G It is convenient at this point to notice the facts in the next appeal in which Webbs (Aberbeeg) Ltd. are respondents. For all but one of the public houses with which that case is concerned, the rents paid by the respondents are less than the sched. A values and also presumably less than the potential rents which they could get from untied tenants. An extreme instance is the Globe Hotel, Abertillery, which the respondents hold on a lease for 870 years at a rent of 1s., but to acquire this lease they paid £14,900. The tied rent is £60 and the gross sched. A valuation £66. If the appellants' contention is right that *Usher's* case (1) decided that the only deduction allowable in respect of leasehold premises was the amount by which the tied rent fell short of the rent paid by the brewer, then the brewer could never have got any deduction in respect of this house, however small the tied rent might have been. I find it impossible to reconcile

such an unreasonable result with the reasoning in *Usher's* case (1), and I doubt whether even LORD PARKER would have supported it. If the Globe Hotel had been freehold instead of being held on an 870 years lease, the deduction would undoubtedly have been based on the annual value (potential rent or sched. A valuation). In *Collyer v. Hoare & Co., Ltd.* (No. 2) (6) the Crown sought to avoid such a disparity by conceding that the deduction should be based on annual value where that exceeded the rent paid by the brewers, but that concession is not made in this case, and it is quite illogical. I can find no ground in *Usher's* case (1) or elsewhere for the view that the brewer can claim the annual value as the basis of the deduction when the rent which he pays is small, but cannot claim that basis when the rent is large. So I am fortified in my opinion that *Usher's* case (1) decided that he can claim the annual value as the basis in every case.

I must now notice certain expressions of opinion which appear to be adverse to the conclusion at which I have arrived. In *Lowry v. Consolidated African Selection Trust, Ltd.* (3), *Usher's* case (1) was distinguished. The company had issued shares to its employees at less than market value and it was held that they were not entitled to deduct as an expense the additional sum which they could have obtained if they had sought the market price. To reach this result it was not necessary to determine precisely the nature of the deduction allowed in *Usher's* case (1) in respect of leasehold premises but LORD RUSSELL OF KILLOWEN dealt with that matter at some length. He said ([1940] 2 All E.R. 560):

"The matters there in debate which are relevant to the present case were two—namely, (i) the freehold tied houses which the brewery, let to tenants at rents lower than the sched. A assessment, and (ii) the leasehold tied houses which the brewery sub-let to tenants at rents lower than the rents paid by the brewery to the freeholders. It was held that, in ascertaining its profits, the brewery could charge as an expense (in the first case) the difference between the rents paid by the tenants and the sched. A assessment, and (in the second case) the difference between the rents paid by the tenants and the rents paid by the brewery. In other words, the receipts side of the account included the smaller sums of rent received by the brewery, while the expenditure side included the larger sums representing (i) the annual value of the freeholds and (ii) the rents paid by the brewery. Three things may here be noted. First, so far as concerns the leaseholds, the position seems to present no abnormal features. It is a plain case of entering actual income and actual outgoings. Secondly, the great difficulty arose as to the freeholds, in regard to which no actual disbursement or expense was made or incurred by the brewery which could be described as money laid out or expended for the purposes of the trade. Thirdly, it was never suggested that anything beyond the sched. A assessment—e.g., the amount of a potential rackrent—could be charged as an expense. It is in regard to the decision concerning the annual value of the freeholds that I propose to consider the case."

None of the other noble and learned lords explained *Usher's* case (1) in this way. VISCOUNT CALDECOTE, L.C., merely said (*ibid.*, 549):

"In the case of the leaseholds, the rent paid, which, as EARL LOREBURN pointed out, was not other than the proper annual value, was an obvious item of expense."

LORD MAUGHAM did not deal separately with this point. LORD WRIGHT, who dissented, said (*ibid.*, 567), apparently with reference to both freehold and leasehold properties,

"The brewers were letting their houses at an undervalue in order to promote their trade. They were held entitled to a deduction of the true value, subject to allowance for the rent which they actually received."

LORD ROMER, who also dissented, came nearest to agreeing with LORD RUSSELL on this point. He said (*ibid.*, 578):

"Both the annual values in the case of the freeholds and the rents paid in the case of the leaseholds were treated as forming part of the cost of the brewery business, and for precisely the same reason—namely, that both the rents paid for the leasehold properties and the rents which would have been received for the freeholds had they been let, instead of being used for the business, formed part of the costs incurred in earning the receipts of the business, and that the deduction of them was not prohibited by the Act."

If it were permissible to enter the rents received by the brewery in the receipts side of the account as LORD RUSSELL suggests, then *Usher's* case (1) might well be regarded as "a plain case of entering actual income and actual outgoings."

But LORD RUSSELL must, I think, have omitted to notice that that is just what the *Salisbury House* case (4) prevents. It was rightly admitted for the appellant in this case that that is so. So, if this were the right way to look at the case and the rent paid should be entered as an actual outgoing, nothing ought to be entered on the other side of the account and the brewer would get a much larger deduction than *Usher's* case (1) allowed him. The Crown seek to get round this difficulty by deducting the rent received from the rent paid before the latter is entered in the account and only entering the difference. It was argued that the *Salisbury House* case (4) does not prevent this procedure. I think that the answer to that argument is to be found in *Hoare & Co., Ltd. v. Collyer* (5). In that case the brewers were entitled to deductions in respect of some public houses, but they also held others where payments by the tied tenants exceeded the annual values. The Crown sought to diminish the deductions by setting off against them the excess rents received from tenants who paid more than the annual value, but it was held that this was not permissible. LORD WARRINGTON OF CLYFFE said ([1932] A.C. 414):

"It seems to me to be now settled by the authority of *Fry v. Salisbury House Estate, Ltd.* (4) that the profits and gains arising from the ownership of lands, whether used for the purposes of a trade or not, are determined exclusively by reference to annual value, and not by the result of an account of receipts on the one hand and expenses on the other, and that accordingly the rents received cannot be included in an account under sched. D of the profits and gains of the trade for the purposes of which the lands are used . . . Items of receipt and expenditure respectively cannot in my opinion be set off one against the other unless they are both properly included in one account."

LORD WARRINGTON was not alone in this view. LORD ATKIN said it made no difference whether you are seeking to establish a balance of profit or destroy an item of loss. LORD TOMLIN said (*ibid.*, 420):

"It does not seem to me to be any the less a bringing into charge because the thing, or the part of the thing, brought in is brought in for the purpose of wiping out deficits arising in cases where the rents do not equal the sched. A valuations."

And LORD MACMILLAN said (*ibid.*, 421):

" . . . to use part of the rents in diminution of a deduction from the profits is just to that extent to add the rents to the profits."

It is true that the point in *Hoare's* case (5) was not precisely the same as that in this case, but I think that the ground of decision in *Hoare's* case (5) was general. If you cannot bring a rent in on one side of the account, you cannot use it to diminish an entry on the other side. If this answer to the appellant's argument is not sufficient I think that it can also be met in another way. The contention is that a part of the rent paid, but only a part of it, is to be entered

in the account as a deduction. That must mean that the part which is to enter the account was money wholly expended for the purposes of the trade, but that the rest was not. The part which is not to enter the account was certainly expended, and it can only be excluded from the account if it was not wholly expended for the purposes of the trade. For what purpose then was it expended? The brewer has to pay rent under a long lease and the tied rent which he receives may vary from time to time. I am at a loss to understand how rent which would otherwise be held to have been wholly expended for the purposes of the brewer's trade can cease in part to have been expended for those purposes because the brewer has received money from a sub-tenant. So, if the decision in *Usher's* case (1) had been that the rent paid is money expended within the meaning of r. 3 (a) and that the rent received must be deducted from it, far from being a plain case it would be highly anomalous. I think that whichever way *Usher's* case (1) is interpreted the decision is anomalous, and, if it is relevant to have regard to such considerations, I prefer the interpretation which involves the same anomaly throughout rather than that which involves two separate anomalies one for the freehold and another for the leasehold properties.

The respondents submitted a further argument based on the Income Tax Act, 1918, s. 125, but, as I am of opinion that they are entitled to succeed on other grounds, I do not find it necessary to consider this argument. I agree that these appeals should be dismissed.

LORD RADCLIFFE: My Lords, the decision of this House in *Usher's* case (1) has been often alluded to and sometimes explained. More than once it has been rather explained away than explained, for I think that it has come to be regarded as a special case, the principle of which it is difficult to discover and almost impossible to extend. But now, and, perhaps, for the first time, it is necessary for this House to decide exactly what that principle is.

There has never been room for doubt as to what *Usher's* case (1) decided. It is the basis of the decision that is the matter for debate. First, it decided something in favour of a brewing concern and not against the concern. It decided that that concern had a right to the claims that it put forward. In our courts a party gets what he asks for if it is not more than that to which he is entitled, but he does not always ask for all that he is entitled to get. Secondly, it decided (and this was the real contest in that case) that the relation of a brewing concern to its tied houses was so special that it was entitled to charge against the receipts of its brewing business, when making up its taxable profits under sched. D, sums expended by it, actually or notionally, in respect of those houses. And, lastly, it decided that those sums included the "difference between rents of leasehold houses or sched. A assessment of freehold houses on the one hand and rents received from tied tenants on the other."

Now the first question is: What is the basis of that decision with regard to leasehold houses? The argument has thrown up a variety of possible answers. What looks like the simplest is to say that it is a mere question of entering on one side of the account the sum disbursed to pay the head rent and on the other side the sum received from the tied tenant. That gives the difference. And so it would, if you make the very large assumption that in each case the head rent is larger than the tied rent. If it is not, the principle goes astray, for the brewer, who may have paid a large premium to acquire his leasehold house at a low rent, foregoes annual value in his tied rent just as much if he is himself paying a low rent as if he is paying a rackrent. But this explanation, if it were admissible, would support the Revenue's case in this appeal, for plainly the entry of rent paid under long leases would no longer be a permissible charge to profits under sched. D now that s. 17 of the Finance Act, 1940, has been enacted. In my opinion, we are bound to reject this explanation of *Usher's* case (1). It can invoke two very great names at least in support of it. I cannot read what LORD PARKER says ([1915] A.C. 463) without concluding that he did

treat the claim in respect of leasehold houses as being essentially one to deduct rent paid on terms of giving credit for rent received, nor do I doubt that in *Lowry's* case (3) LORD RUSSELL OF KILLOWEN accounted for *Usher's* case (1) in the same way. Nor does that exhaust the list of authorities that might be prayed in aid of this view. But it seems to me quite impossible to reconcile such a reading with the decision of this House in *Fry v. Salisbury House Estate, Ltd.* (4). For if, as
A that case decides, the actual rents received from the tied tenants are not taxable receipts for the purpose of assessing the brewing concern's profits under sched. D, how can they be treated as entered on one side of the account for the purpose of "mitigating" the charge in respect of the actual amounts paid by way of head rent? Indeed, if this were the true basis of *Usher's* case (1), the full amounts paid by way of head rent would have been admissible as deductions, but no
B counter entry could have been made in respect of receipts. And no one appears ever to have suggested that this is the result of *Usher's* case (1) and the *Salisbury House* case (4), when taken together. The two decisions were, in fact, much canvassed before this House in *Hoare & Co., Ltd. v. Collyer* (5), and I think it fairly obvious from the speeches of the noble and learned lords who took part in that decision that they were well aware that an interpretation would have
C to be placed on the decision in *Usher's* case (1) that would not bring it into conflict with the general principle embodied in the other and later decision. But, if so, an interpretation which is based merely on setting receipts against expenditure must be abandoned.

To reject this explanation of *Usher's* case (1) is, I think, to reject the real basis of the Revenue's appeal. But their argument as presented to your Lordships
D clung, no doubt wisely, to the indisputable fact that, in the case of leaseholds, *Usher's* case (1) had accepted the difference between rents paid and rents received as the measure of the brewer's permitted charge. At least, it was said, "rents paid" involves a claim based on the actual disbursement in respect of rent, and it is just those disbursements, if made under "long leases," which are no longer admissible deductions. But *Usher's* case (1) took as its measure a
E difference, not an actual disbursement. The distinction may mean much or little. If the test is not simply disbursement against receipt, the difference denotes either such part of the actual rent paid as exceeds the rent actually received or else some method of calculating a notional disbursement which does not affect to express an actual disbursement at all. The former view would, I think, support the Revenue, for if the rent paid under a long lease cannot be
F charged against receipts in assessing profits, then the charge of even a part of it must similarly be prohibited. But if the latter view prevails, then the principle of *Usher's* case (1) is untouched by the Finance Act, 1940.

My Lords, I have come to the conclusion that it is the latter view that must prevail. I cannot see any rational basis for the former. If the House had really
G meant to decide in *Usher's* case (1) that rent paid by a brewing concern in respect of its tied houses was itself expenditure made wholly and exclusively for the purposes of the trade, it was very easy to say so. I do not think that any of their Lordships (with the possible exception of LORD PARKER) did so decide or intended so to decide. Had they done so, then the right to treat the whole amount expended as a charge would have been established, whatever
H difficulties the *Salisbury House* decision (4) might have involved. But the point is that either the whole of the rent or none of it must be regarded as such a disbursement. If it is the purpose of such expenditure that is in question, I cannot think of any reason why one part of it should be treated as expended for the purposes of the trade and not another. Accordingly, to take the case of any individual tied house, I can find no reason why so much of the rent paid by the owner as exceeds the rent received by him should be regarded as a disbursement for the purposes of the trade, if the whole of the rent is not.

As I see it, the House in *Usher's* case (1) did not conceive itself to be dealing with an actual disbursement at all, nor did it intend to approach the solution from that point of view. The "difference" between rents paid and rents received represented a way of calculating a "loss" which, to those who took part in the decision, was itself a proper charge in the trader's accounts. It was this "loss," not any sum actually paid, that was the expenditure or disbursement. Indeed, once the assessment of the trade profits is approached on this basis it necessarily follows that a trader cannot both charge the "loss" and the rent actually expended, and a decision that the allowable item of expenditure in these tied house cases is the "loss" excludes by inference the correctness of charging the rent paid as itself an item of admissible expenditure. I think that the speeches of LORD LOREBURN, LORD ATKINSON and LORD SUMNER are only consistent with the hypothesis that it was a notional expenditure equivalent to the "loss" that they proposed to allow to the trader, and it is only an explanation on these lines that covers the fact that none of those who took part in the decision (with the possible exception of LORD PARKER) appeared to think that any different principle governed the case of the leaseholds from that which governed the case of the freeholds. Yet in the case of the latter there was no question of any actual expenditure.

It is not easy to say exactly what the principle is that forms the basis of such a charge. It does not arise from any interpretation of r. 5 of the Rules applicable to Cases I and II of sched. D, for, whatever the real meaning of r. 5 (1), it applies only to land and buildings occupied for the purpose of the trade or profession, and none of their lordships treated the tied houses in *Usher's* case (1) as being in the occupation of the brewer or thought that this particular rule could support his decision. On the contrary, the charge is supported "on ordinary principles of commercial trading," as being "according to the methods of practical business men," or as an illustration of the economic propositions that are set out in the well-known passage of LORD SUMNER's speech. But the validity of these same propositions as a guide to the law of income tax has been virtually disowned by your Lordships' House in the later case of *Lowry v. Consolidated African Selection Trust, Ltd.* (3), and in *Hoare & Co., Ltd. v. Collyer* (5) there was uncontradicted evidence from a chartered accountant called by the Revenue that in computing commercial profits no deduction could properly be made "in respect of annual value or rent foregone or sacrificed" in respect of the brewer's freehold properties. I am bound to say that I should myself have so supposed, for I do not think that there is any general practice or principle by which a trader charges his profits with a sum in respect of the use either of his assets or of his capital. The consumption of his capital raises different considerations. But, even if the conception on which the *Usher* decision rests is ambiguous in origin and exceptional in practice, I think that it does both involve and establish the proposition that a trader who owns such assets as tied houses and uses them as tied houses are used may charge his trading profits with a sum equivalent to the part of the annual value of those assets that he has "foregone" by such use.

Now, if that is the principle, as I think that analysis of the speeches in *Usher* (1) shows that it is, the actual head rent paid in respect of leaseholds cannot be a real factor in determining what is foregone. It may be an adequate practical indication of the "loss," as it was treated as being in *Usher* (1). But the rent may be much less than the annual value, or more or less equivalent to it, or even much greater than it, as it is here in the case of the main Tamplin head-lease. Nor, if the rent paid were the conclusive test, would there be any purpose served by the insistence of both LORD LOREBURN and LORD ATKINSON that the brewer's claim to deduct the difference between rents paid and rents received is justified only if the rents paid are equal to the "proper annual value" or "the full annual value under sched. A." Such a qualification necessarily implies

that it is the "full" or "proper" annual value that is the true factor in the deduction and not the actual rent.

With this much said, I will try to summarise what I believe to be involved in the *Usher* decision. It decided that a brewer's relation to his tied houses was a special one, since, though not occupied by him, they are used or utilised by him for the purpose of his trade. The house is the "market place" for his beer, A to borrow LORD ATKINSON's phrase. It decided that the brewer's trade profit in such circumstances ought to bear a charge equivalent to the amount of annual value "foregone" in respect of each house so utilised—the whole annual value if he got no return from the house (though that, I am afraid, rather begs the question), or the difference between the annual value and the rent received in respect of the house, so far as he took rent. His right to charge this sum or B this difference arises, it was held, from the ordinary principles of commercial accounting, and, not being prohibited by anything to be found in the income-tax statutes, it ought to be allowed. Whether this principle is an application or an extension of what was decided in *Russell v. Town & County Bank* (2), whether it is in any way founded on what is said or not said in rr. 1 to 5 of the Rules applicable to Cases I and II of sched. D, and whether the structure of the C Income Tax Act, with its different schedules, may not have contributed, though without recognition, to the discovery of the principle—all these questions, are, "though puzzling, not beyond all conjecture." But the conjectures are, I think, of no ultimate importance once the principle has been laid down. Finally, the principle is the same whether the brewer's tied house is freehold or leasehold.

For these reasons, I think that the appeal must fail, since it is not suggested D that if the *Usher* decision proceeds on the basis that I have stated the brewer's position has been altered by the Finance Act, 1940. But, though I agree that the appeal must fail, I do not agree with the respondent's claim that the "difference" ought to be ascertained by taking as a factor "the rents at which these houses could have been severally let free from the restriction of the tie." I think that that is to introduce a novel and unwanted idea into the *Usher* computation. E Moreover, it seems to me that, in the case of freeholds, this House did explicitly decide that the correct measure was the net sched. A assessment and nothing else. Paragraph B of the supplemental statement in the *Usher* case (1) had stated that in the case of freeholds the net sched. A assessment had been taken as the basis of the figures. If the gross assessment had been taken, it would, of course, have given the brewer a larger disbursement to charge to his profits. F If, on the other hand, the true standard was the rent of the house as let without the tie, no one could say whether the result would have favoured the brewer or not, for among other things each letting would have had to be considered separately and the details of its various other terms ascertained. In this House LORD PARKER alone went into the point, and he expressed a view in favour of taking the gross, not the net, sched. A assessments. None of the G other Lords, who could hardly have been unaware of what he proposed to say, said anything in support of this view. But on that state of facts how can we avoid the conclusion that the question was considered by the House and that its decision upheld the net sched. A assessment as the correct standard in the case of freeholds? I do not find that, except for LORD PARKER's preference for the gross assessment, a standard which still adheres to sched. A, any member H of the House said anything to suggest that, either in the case of freeholds or of leaseholds, the right thing to do was to take each house each year, ascertain the terms of its letting, and then compute what its rent would have been in that year had it been let with those terms but without the tie. They speak of "annual value," "proper annual value," or "full annual value under sched. A," and two of them certainly base themselves on *Russell's* case (2), which turned on "annual value" and nothing else. But, whether sched. A is explicitly referred to or not, "annual value" is itself the familiar phrase that we all

know to be used in the Income Tax Act to describe the basis of the sched. A assessment, and it denotes where lands are not let at a rackrent, the "rackrent at which they are worth to be let by the year." I cannot think that it is an appropriate phrase to describe a hypothetical computation of what rent could have been obtained under an actual letting if the tie had been removed.

I think, for these reasons, that the question is concluded by previous decision in the case of freeholds. And, since I think that the essence of the *Usher* decision is that freeholds and leaseholds were treated as coming under the same principle, it seems to me that the same measure ought to be adopted in the case of leaseholds. I am sure that it would be much more convenient to do so. I appreciate that, if you are searching for a figure for rent foregone, the net sched. A assessment may not give you as "scientific" a measure as the test proposed by the respondents. But it is a working measure, and, if we are seeking to give effect to a principle of commercial accounting, I think that the trader would be far more likely to be content to work by a known figure, such as the sched. A assessment, than by a theoretical computation of the rent likely to be received from his tied house, if it were untied.

This is not, so far as I can see, a matter of any important principle. I start from the same assumption as is, I believe, common to all your Lordships—that the notional disbursement allowed to the brewer is that amount of the annual value of his tied house which he fails to realise by virtue of taking the covenant for the tie. The annual value itself is necessarily a hypothetical figure in all such cases. The only point is: Which is the best working hypothesis? You might proceed by employing a valuer to survey all your houses, each year, and compute for each a rackrent according to the values of that year. No doubt the Revenue must do the same, and no doubt, at some stage, the appropriate figures would be settled. Or, you might proceed by employing a valuer to survey all your houses, each year, and compute for each a rent according to the values of that year, representing what it would have let for under the existing lease, minus the covenant for the tie. Here again there must be controversy and possible counter valuation, and, no doubt, an ultimate conclusion. Or you might proceed by taking the existing sched. A assessment which represents for income tax purposes the hypothetical rackrent of every property. If I think that the last form of procedure is the best, apart from being the one already finally decided on, it is because I think that it is the one that every trader would prefer to accept, once the logical austerities of legal argument are allowed to be forgotten.

LORD TUCKER: My Lords, the decision in *Usher's Wiltshire Brewery, Ltd. v. Bruce* (1) must be considered in the light of the law as subsequently expounded by your Lordships' House in *Ery v. Salisbury House Estate, Ltd.* (4). So considered it is, I think, impossible to accept the Crown's argument that the former case proceeded on the basis of allowing the brewer in the case of leasehold houses to deduct rent paid on giving credit for rent received. This would be contrary to the *Salisbury House* case (4) which decided that rents received cannot be included in an account under sched. D of the profits and gains of the trade for the purposes of which the lands producing the rents are used. This was the explanation of that case given by LORD WARRINGTON OF CLYFFE in *Hoare & Co., Ltd. v. Collyer* (5), and it shows that the interpretation of *Usher's* case (1) given by LORD RUSSELL OF KILLOWEN in *Loury v. Consolidated African Selection Trust, Ltd.* (3) in the passage which has already been referred to cannot be reconciled with the *Salisbury House* decision (4). This, I think, compels your Lordships to reject the contention of the Crown that under *Usher's* case (1) the respondents would have been entitled in computing their profits under case I of sched. D to deduct the rents paid by them for tied houses less the rents received from the tied tenants, but that the rents paid by them being

rents under long leases are no longer deductible by reason of the provisions of the Finance Act, 1940, s. 17 (1).

If *Usher's* case (1) never allowed the deduction of these rents, what did it decide? My Lords, I do not propose to set out again those passages from the speeches of LORDS LOREBURN, ATKINSON and SUMNER which have already been referred to. It is sufficient for me to say that, in my opinion, they show that at any rate the majority of your Lordships' House allowed the brewers' deduction in the case of both freeholds and leaseholds on the basis of rent "foregone," being the difference between rents received and the potential rents which could otherwise have been obtained from free tenants, *viz.*, the full annual values of the houses. It was never suggested that the rents paid in the case of the leaseholds or the sched. A assessments in the case of the freeholds did not represent the full annual values in each case and I think the reasoning of the majority shows that they were so accepted. If their Lordships had been of opinion that the sched. A assessment must always and for all purposes be accepted as representing the full annual value or potential rent it is difficult to understand why they did not substitute the sched. A assessments for the rents paid in the case of the leaseholds. The truth is, I think, that in each case the figures put forward were accepted, but they were accepted as reflecting the full annual values and I can find nothing in the decision to indicate that in either case it is not open to either side to call evidence to show what are the potential rents obtainable from "free" tenants for the purpose of quantifying the rent "foregone." For these reasons, although it will no doubt often be found convenient in practice for the parties to agree to accept the sched. A assessments as representing the potential rents, I think the respondents are right in their contention that the rents "foregone" should be ascertained by deducting the rents received from the rents at which the tied houses could have been severally let free from the restriction of the tie. I would dismiss the Crown's appeal in each case.

LORD MORTON OF HENRYTON: My Lords, my noble and learned friend **LORD ASQUITH OF BISHOPSTONE**, who is unable to be present today, has asked me to say that he agrees with the opinion which I have delivered.

Appeals dismissed.

Solicitors: *Solicitor of Inland Revenue; Godden, Holme & Co.* (for the taxpayers).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

F

R. v. RECORDER OF GRIMSBY. *Ex parte* PURSER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Slade and Devlin, JJ.), October 24, 25, 1951.]

Q *Quarter Sessions—Committal of offender to, for sentence—Borstal training—Proof of age—Age admitted by accused—Sworn evidence not given of age or other matters required by statute—Validity of committal—Criminal Justice Act, 1948 (c. 58), s. 20 (3).*

Justices—Procedure—Plea of Guilty—Need to hear evidence on oath.

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An offender pleaded Guilty before a court of summary jurisdiction to stealing a cycle. He stated that he was seventeen years of age, but no evidence of that fact was given, nor was evidence on oath given regarding the matters to be considered by the justices under s. 20 (3) of the Criminal Justice Act, 1948, under which sub-section the justices committed the offender to quarter sessions for sentence. Quarter sessions held that the committal was bad because the offender's age had not been properly proved before the justices and no evidence had been given about the other relevant matters.

Held: (i) where an accused person admitted his age and the justices came to the conclusion that he was telling the truth, there was no necessity to hear formal evidence on the matter.

R. v. Turner ([1910] 1 K.B. 346), applied.

(ii) where an accused person was committed for sentence under s. 20 (3), quarter sessions, under sub-s. 5 (a) (i), had to satisfy themselves regarding his character and previous conduct and the circumstances of the case, and, therefore, the fact that no evidence on those matters had been called before the justices did not vitiate the committal. A

Per curiam: in the absence of any statutory provision setting out the procedure to be followed in a court of summary jurisdiction when an accused pleaded Guilty, it was not desirable for the Divisional Court to lay down a particular rule of procedure. It was a matter for the justices to decide for themselves, though, if the accused person objected that the statement of facts by the prosecution was not correct it would be advisable to hear sworn evidence. B

FOR THE CRIMINAL JUSTICE ACT, 1948, s. 20, see HALSBURY'S STATUTES, Second Edn., Vol. 28, p. 369.

Cases referred to:

- (1) *R. v. Turner*, [1910] 1 K.B. 346; 79 L.J.K.B. 176; 102 L.T. 367; 74 J.P. 81; 14 Digest 482, 5258. C
- (2) *R. v. McCann*, (1911), 6 Cr. App. Rep. 115; 14 Digest 480, 5240.
- (3) *R. v. Middlesex Quarter Sessions. Ex parte Public Prosecutions Director*, [1950] 1 All E.R. 916; [1950] 2 K.B. 589; 114 J.P. 276; 2nd Digest Supp. D

MOTION for an order of *certiorari* to remove into the High Court to be quashed an order made by the recorder of Grimsby on July 19, 1951, that one J. A. Middleton be discharged from the custody of the governor of Lincoln prison, and for an order of *mandamus* directing the recorder to sentence or otherwise deal with the said Middleton in accordance with s. 20 (5) of the Criminal Justice Act, 1948. The recorder held that he had no jurisdiction to deal with the case because at the time of committal the justices had no proof of Middleton's age or of other relevant matters before them, and, therefore, his committal was bad. E

G. D. Roberts, K.C., and *J. Malcolm Milne* for the applicant.

T. R. Fitzwalter Butler for the offender.

R. J. Parker for the recorder of Grimsby. F

LORD GODDARD, C.J.: The applicant moves for an order of *certiorari* to bring up and quash an order made by the recorder of Grimsby directing that John Arthur Middleton should be discharged out of custody, and also for an order of *mandamus* directing the recorder to hear and determine the case against Middleton under s. 20 (5) of the Criminal Justice Act, 1948, and to decide what sentence should be passed on him, he having been committed by justices to quarter sessions for sentence under s. 20 (3). The accused, who is said to be, and to have admitted that he is over seventeen years of age, pleaded Guilty before the Grimsby justices to a charge of cycle stealing. G

There is no statutory provision enacting the procedure in a court of summary jurisdiction when an accused person pleads Guilty. Some courts take evidence on oath; other courts do not think that necessary and deal with a plea of Guilty in the same way as does a court of assize. Generally at assizes or quarter sessions, if convictions have to be proved, evidence on oath is given by a police officer, but, so far as the circumstances of the case are concerned, the court hears only a statement by counsel. As there is no statutory provision, I do not think it would be desirable for this court to lay down any particular rule of practice to be observed by courts of summary jurisdiction one way or the other. Often it may be desirable for the court to hear some evidence on oath, but this is not H

necessary in the many cases which are very trivial and the facts can be stated informally. Of course, if the accused person says that the facts have not been stated correctly, the justices would be well advised to have the informant sworn so that he can be cross-examined, but in a case where no question arises I am not prepared to say as a matter of practice that courts of summary jurisdiction are bound to, or need, take evidence on oath where there is a plea of Guilty.

A The question arises here whether there should be any difference from the usual practice where the justices are proposing to act under s. 20 (3) of the Criminal Justice Act, 1948, and commit a person to quarter sessions for sentence. Section 20 provides:

B “ (1) Where a person is convicted on indictment of an offence punishable with imprisonment, then if on the day of his conviction he is not less than sixteen but under twenty-one years of age, and the court is satisfied having regard to his character and previous conduct, and to the circumstances of the offence, that it is expedient for his reformation and the prevention of crime that he should undergo a period of training in a Borstal institution . . . (3) . . . the court may commit him in custody to quarter sessions for sentence in accordance with the following provisions of this section.”

C When a person is so committed for sentence the following provisions in s. 20 (5) apply:

“ (a) the appeal committee or court of quarter sessions shall inquire into the circumstances of the case and may—(i) if satisfied of the matters mentioned in sub-s. (1) of this section, sentence him to Borstal training . . . ”

D The matters they have to be satisfied about, it is clear, have reference to whether, having regard to the offender's character and previous conduct and the circumstances of the offence, it is expedient that he should be sent to Borstal.

E The first point made in this case was that the committal was bad because there had been no evidence before the justices of the age of the accused. The accused admitted that his age was seventeen. What is the necessity of proving that statement if the justices, having before them a person who appears to be about seventeen, hear him say that he is seventeen? He is admitting he is over sixteen and that he is under twenty-one. If in any case the justices were not satisfied, it would be right that they should hear evidence, but if, using ordinary observation and common sense, and having heard an accused person state his age, the justices come to the conclusion that he has told them the truth, I do not see the least necessity for evidence on the matter to be called. If an accused

F person can admit that he is guilty of the offence, I cannot see why he cannot admit that he is seventeen years of age. In *R. v. Turner* (1) the accused, who was over a certain age, had been convicted, and, giving the judgment of the court, CHANNELL, J., said ([1910] 1 K.B. 362):

G “ In order that a person may be found to be a habitual criminal it is necessary that the jury should find on evidence that he has previously been convicted three times since he was sixteen years of age. The jury must therefore return their verdict on evidence, but there may be cases in which no doubt can arise. For example, convictions against the prisoner, three in number, may be proved to have all taken place within the last year, and it may be perfectly obvious to everybody that the prisoner is very considerably over sixteen years of age at the time of the inquiry, and, therefore, must have been over sixteen when those convictions took place. There are, therefore, cases in which no difficulty can arise. But at least three previous convictions since the age of sixteen must be proved, and when the prisoner is of an age which makes it doubtful whether he may not have been under the age of sixteen at the date of the first conviction which is alleged against him, some further evidence is necessary; but the fact that the prisoner has stated at a particular time that he is a particular age would be sufficient. The statement of a prisoner's age in the court calendar is generally derived

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from statements made by the prisoner himself. As I understand the practice, the governor of the gaol is responsible for the calendar and the statement of the prisoner's age in the calendar is equivalent to a statement that the prisoner so gave his age, but in all cases where the jury would not be prepared to act upon their own view without evidence it must be proved. If the governor or the gaoler were to give evidence to the effect that 'I cannot recollect whether I examined this man myself, but in the course of our regular procedure the man when he comes into gaol gives his age, and the age in the calendar was given to me as that which he stated it to be,' I think that would be sufficient, because the official says that the age mentioned in the calendar is that which was reported to the prison authorities as the prisoner's age by the prisoner himself, and that kind of evidence would be sufficient; but in all cases where the prisoner's appearance is not sufficient to satisfy the jury some kind of evidence must be given."

In *R. v. McCann* (2) the accused was convicted of larceny at quarter sessions, and the ground of his appeal to the Court of Criminal Appeal, after he had been sent to Borstal training, was that he was convicted on his twenty-first birthday, and, consequently, was too old to be sent to a Borstal institution. No age had been given, but LORD READING, C.J., giving the judgment of the court, said (6 Cr. App. Rep. 116):

"By the Prevention of Crime Act, 1908, the appellant was liable to be sent to a Borstal institution if it appeared to the court that he was not less than sixteen nor more than twenty-one years of age."

In that case it did appear to the court that he was not more than twenty-one years old. The court was informed that he was twenty and had no reason to doubt it. There are no words in s. 20 of the Act of 1948 which in any way affect the matter, because sub-s. (1) only says: "if on the day of his conviction [the accused] is not less than sixteen." The section does not say that the court has to be satisfied, either on a view of the accused or anything else. So far as age is concerned, I am clearly of opinion that there is nothing in the point which has been urged.

Counsel for the accused also argued that a committal is bad if the accused is committed by the justices for sentence without evidence on oath having been taken, because without such evidence the justices cannot be satisfied, having regard to his character and previous conduct, and the circumstances of the offence, that he is a suitable person for Borstal training. Those, however, are the very things into which quarter sessions has to inquire. Is quarter sessions also to inquire into whether the justices below were satisfied about a certain matter? They have shown they were satisfied by having committed the accused for sentence. I think, therefore, that it would be idle for quarter sessions to inquire into what was before the justices and why they were satisfied or how they were satisfied, because, if quarter sessions are not satisfied it is a proper case to impose a sentence of Borstal training, they do not send an offender to Borstal. In my opinion, the recorder had jurisdiction to deal with the accused under s. 20 (5). For these reasons the order discharging him from custody will be quashed, and an order of *mandamus* will go to the recorder directing him to deal with the accused who should be given notice to appear at the next quarter sessions. If he does not appear, he must be taken into custody.

SLADE, J.: I agree.

DEVLIN, J.: I also agree.

Orders for certiorari and mandamus.

Solicitors: *Hyde, Mahon & Pascall*, agents for *L. W. Heeler*, town clerk, Grimsby (for the applicant); *Biddle, Thorne, Welsford & Barnes*, agents for *Hudsons, Hart & Borrowes*, Richmond, Yorks (for the offender); *Treasury Solicitor* (for the recorder of Grimsby).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

UNIVERSAL PERMANENT BUILDING SOCIETY v. COOKE AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.J.J.),
October 22, 23, 1951.]

Mortgage—Power of leasing—Tenancy by estoppel—Tenancy agreement entered into by purchaser before completion of purchase by her of mortgaged property—Mortgage of premises by purchaser by deed dated day after completion—Exclusion of mortgagor's power of leasing—Position of tenant.

On Nov. 3, 1948, the mortgagor entered into a contract for the purchase of certain premises. She had no right to possession until completion, but on Dec. 12, 1948, she purported orally to let part of the premises to a tenant who went into occupation on Dec. 16, 1948, having no knowledge that the mortgagor then had no legal estate. By a conveyance dated Dec. 28, 1948, the purchase by the mortgagor was completed, and by deed dated Dec. 29, 1948, the premises were mortgaged to the mortgagee. The mortgage excluded the mortgagor's power of leasing. The mortgagor having become in default, the mortgagee claimed possession of the whole premises. The tenant resisted the claim on the ground that the mortgagee took subject to the tenant's right to possession.

Held: there being no evidence that the conveyance and the mortgage constituted a single transaction, having regard to the dates which the respective instruments bore, there was a period when the fee simple was vested in the mortgagor unencumbered by the mortgage, and during that period the tenant's title to a lease at law was completed by estoppel, so as to take priority over the mortgage.

Coventry Permanent Economic Building Society v. Jones ([1951] 1 All E.R. 901), distinguished.

Dictum of MARTIN, B., in *Cuthbertson v. Irving*, (1859) (4 H. & N. 757), explained.

AS TO MORTGAGEE'S RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 23, pp. 358-361, paras. 535-539; and FOR CASES, see DIGEST, Vol. 35, pp. 394-398, Nos. 1370-1404.

Cases referred to:

(1) *Dudley & District Benefit Building Society v. Emerson*, [1949] 2 All E.R. 252; [1949] Ch. 707; [1949] L.J.R. 1441; 2nd Digest Supp.

(2) *Hunt v. Luck*, [1902] 1 Ch. 428; 71 L.J.Ch. 239; 86 L.T. 68; 35 Digest 469, 2044.

(3) *Coventry Permanent Economic Building Society v. Jones*, [1951] 1 All E.R. 901.

(4) *Cuthbertson v. Irving*, (1859) (4 H. & N. 742; 28 L.J.Ex. 306; 157 E.R. 1034; *affd.* Ex.Ch. (1860) 6 H. & N. 135; 29 L.J.Ex. 485; 158 E.R. 56; *sub nom.* *Irving v. Cuthbertson*, 3 L.T. 335; 35 Digest 336, 781.

(5) *Pargetor v. Harris*, (1845), 7 Q.B. 708; 15 L.J.Q.B. 113; 5 L.T.O.S. 346; 115 E.R. 656; 30 Digest 351, 124.

APPEAL by the plaintiffs, Universal Permanent Building Society, from an order of ROMER, J., dated July 12, 1951.

The plaintiffs, as mortgagees, claimed possession of certain premises from the mortgagor, her trustee under a deed of assignment, and a tenant of part of the premises and two other persons living in the house as the guests or lodgers of the tenant. The tenant was let into possession by the mortgagor before she had completed the purchase of the premises. The purchase was completed by a conveyance dated Dec. 28, 1948, and the property was mortgaged to the mortgagees by a deed dated Dec. 29, 1948. ROMER, J., gave judgment against the mortgagor and her trustee, but held that the mortgagees had constructive notice of the equitable interest of the tenant.

C. Montgomery White, K.C., and Blease for the mortgagees.

Upjohn, K.C., and Hughes-Onslow, for the second, third and fourth defendants.

The first defendant (the mortgagor) and the fifth defendant (the trustee of the mortgagor's deed of assignment for the benefit of creditors) were not parties to the appeal.

SIR RAYMOND EVERSHED, M.R.: This appeal raises a curious, interesting, and, I think, difficult, question. The Universal Permanent Building Society brought these proceedings as mortgagees to obtain relief appropriate to mortgagees where the mortgagor is in default, *viz.*, an order (among other things) for possession of certain premises in Liverpool known as 168, Lodge Lane. The first defendant, Mrs. Doris Cooke, was sued as the mortgagor. She has ceased to take part in the proceedings now. An order for possession against her was made. She was clearly in default under the mortgage. She has fallen on evil days, and the last defendant, Mr. Gourlay, was joined as a trustee under a deed of assignment for the benefit of creditors executed by Mrs. Cooke in March of this year. The order was also made against him, and he, also, is no longer interested. It is as regards the remaining three defendants that the difficulty has arisen, and around them the present contest ranges. The third defendant, Mrs. Lily Gavine, claims to be entitled to remain in possession of part of these premises by virtue of a valid tenancy. It is only a weekly tenancy, and, apart from particular statutory provisions, there would be no point in her claim because notice determining the tenancy could be given. But the Rent Restrictions Acts come in to protect the occupation of tenants such as Mrs. Gavine, and it is conceded that, if her tenancy is one which is good against the mortgagees, she is entitled to rely on the Rent Restrictions Acts and to resist an order for possession against her. The other two defendants, her brother and her daughter, have no interest in these premises in the technical sense, but they are living with Mrs. Gavine as her guests or lodgers. ROMER, J., came to the conclusion that he could not make an order for possession against any of these three defendants, and it is from that refusal that the present appeal has been brought.

In October, 1948, the first defendant, Mrs. Cooke, was minded to acquire these premises and was in negotiation with the then owner, a Mr. Salthouse. For that purpose she was in contact with the mortgagees, from whom she desired to borrow (as she eventually did) a sum of some £1,500 odd to pay for the premises. On Nov. 3, 1948, she entered into a contract with Mr. Salthouse for the purchase of the premises. The completion did not take place until the end of December, but on Dec. 16 Mrs. Gavine went into occupation having, some three days before, paid one week's rent, 25s., in advance. According to her evidence, when she went in she was informed by Mrs. Cooke that Mrs. Cooke had completed the purchase. I mention that fact to dispose of any suggestion that Mrs. Gavine relied on some promise that Mrs. Cooke made consistent only with her having no legal estate in the premises at the time.

There are two questions. The first is of this character. Since Mrs. Gavine's possession, under the bargain she made with her sister, began before the date of the mortgage (and of the completion of the sale to Mrs. Cooke), can Mrs. Gavine assert that she acquired a valid interest or estate in these premises by estoppel and so avoid the result which would otherwise flow from such cases as *Dudley & District Benefit Building Society v. Emerson* (1), a decision of this court that where, as here, the mortgagor's right to grant leases under the Law of Property Act, 1925, s. 99, was excluded by the terms of the mortgage, a tenant deriving title from the mortgagor was disabled from relying on the Rent Restrictions Acts against a mortgagee setting up a title paramount. If the estoppel point is well-founded, the title of the mortgagee is not paramount, for, on this assumption, Mrs. Gavine would have acquired a right, a legal interest in the premises, prior to that of the mortgagees. ROMER, J., rejected

that point, and there then arose a second question. Assuming no legal interest, still Mrs. Gavine was in possession at the date of the mortgage, and can it not be said against the mortgagees that they had constructive notice of an equitable right, and, as such, cannot now claim to evict Mrs. Gavine? It was that point which the learned judge answered against the claim of the mortgagees, and, relying on it, refused the order for possession against the relevant defendants. It was necessary for ROMER, J., to consider in that connection whether the right that Mrs. Gavine had on this hypothesis was an estate contract which could or should have been registered pursuant to the Land Charges Act, 1925, s. 10, so that, in default of such registration (for there was no registration), the mortgagees would be unaffected by the interest of Mrs. Gavine. ROMER, J., thought that the right was not based on a contract which could have been registered, and, therefore, as I have already said, on the principles set out in *Hunt v. Luck* (2), he regarded the mortgagees as fixed with constructive notice of the right of Mrs. Gavine and so refused the order for possession which they sought.

According to the judgment of ROMER, J., the estoppel point turned very much on a decision of HARMAN, J., in *Coventry Permanent Economic Building Society v. Jones* (3). That was a case in all relevant respects similar to the present, save in one. In that case the date of the conveyance to the mortgagor-
lessor and the date of the mortgage to the mortgagees were the same, and, according to Mr. Blease, who appeared as counsel in that case, it was conceded for the purposes of the argument that, in truth, though there were two deeds, there was but one transaction. Being but one transaction, therefore, HARMAN, J., said that there was no *scintilla temporis* during which the mortgagor-
lessor could be treated as having any legal estate or interest in the premises. Whence it followed that no question of an estate or demise by estoppel could arise, for the necessary condition to the estoppel, *viz.*, the subsistence of the legal estate in the *soi-disant* lessor, was absent. In the present case the conveyance to the mortgagor is dated Dec. 28, 1948, and the mortgage is dated Dec. 29, 1948. ROMER, J., expressed no view whether he agreed with the decision of HARMAN, J., in the *Coventry* case (3). As regards that case, he merely said: "I do not regard myself as at liberty to depart from so recent a decision of HARMAN, J." Following it, therefore, he had to consider whether the dates I have mentioned created a distinction sufficient to produce a different result. He said that it did not do so. The relevant part of his judgment is:

"The only difference . . . is that in *Coventry Permanent Economic Building Society v. Jones* (3) the conveyance and the mortgage were both executed on the same day. Here the mortgage was executed one day after the conveyance to Mrs. Cooke, but counsel for the plaintiffs says that it is plain that the purchase and the mortgage were one transaction and not two, so that the case falls within the *ratio decidendi* of HARMAN, J., on that point. Counsel for the occupiers disputes that, relying principally on the fact that the conveyance and mortgage were separated by a space of time which was absent in the other case. I am unable to accept that as a sufficient distinction. It is quite clear that the completion of the purchase and the execution of the mortgage on consecutive days were one transaction, and it would be introducing too much refinement to say that a gap of twenty-four hours distinguished the case before me from that decided by HARMAN, J."

Counsel for the defendants was armed with the necessary material to attack the decision of HARMAN, J., in *Coventry Permanent Economic Building Society v. Jones* (3). In the circumstances we have not heard his argument, nor that of the mortgagees in reply, but, with all respect to ROMER, J., I have been unable to agree that on the facts of this case as proved it can properly be said that in view of the dates there is no distinction between this case and the *Coventry*

case (3), and, in particular, that it can be said to be clear that the completion of the purchase and the execution of the mortgage were one transaction. The only evidence on the matter is that of the assistant secretary of the mortgagees who deposed to the facts stated by him from information he had obtained in his office as secretary. The total purchase price which Mrs. Cooke had to pay was £1,850 and the amount of the advance was £1,550. In his affidavit he says:

"The said property was conveyed to the said [mortgagor] for an estate in fee simple by a conveyance dated Dec. 28, 1948. As above stated, the said [mortgagor] mortgaged the said property to the society on Dec. 29, 1948. The said [mortgagor] was expressed so to mortgage the said property as beneficial owner, and the said mortgagor did not disclose that the property was at the date thereof subject to any tenancy or in the occupation for any estate or interest of any other person."

In that short statement it is nowhere stated that the conveyance and the mortgage were part of a single transaction. No information is given as to the way in which completion took place. One may guess that the mortgagees handed over the £1,550 to the vendor, Salthouse, but it is nowhere stated and it cannot be regarded as certain. Supposing, instead of one day, it was one week. It is not uncommon to see a conveyance in fee simple to A. and then a mortgage by him some little time afterwards. A. may temporarily borrow to enable him to make the purchase and obtain a permanent loan later. I must, I think, accept the evidence as I find it stated by the assistant secretary, and on that evidence I think the court is bound to treat these two transactions as being two independent transactions, the mortgage taking place a day after the conveyance. If that is so, it becomes necessary to consider the result.

Counsel for the defendants pointed out, and counsel for the mortgagees has not really contested this proposition, that deeds take effect from the time of their delivery and that *prima facie* the time of delivery is the date on the deed. That gives this interval of time between Dec. 28 and Dec. 29 during which Mrs. Cooke must be treated as having vested in her the unencumbered fee simple. What is the result? Counsel for the mortgagees argued that there is no room here for the doctrine of feeding the estoppel to operate, since, although Mrs. Cooke had no legal estate in these premises on Dec. 16, when she let her sister into possession, she then had a good equitable right to the fee simple by virtue of her contract, and, having that estate or interest, Mrs. Gavine's possession and the right she acquired, whatever that might be, from Mrs. Cooke, are properly referable to the equitable estate which alone Mrs. Cooke had. In those circumstances, counsel argued that the doctrine of estoppel is excluded. I have already stated that on the facts as proved there is no question here of any actual representation on Mrs. Cooke's part that she only had an equitable right. The facts are to the contrary. But the validity of counsel's proposition rests, I think, putting it briefly, on a statement which is found at the end of the judgment of MARTIN, B., giving the judgment of the Court of Exchequer, in *Cuthbertson v. Irving* (4), where, after examining a number of cases, he states that (4 H. & N. 757):

"... the following propositions may be laid down:—First, if any estate or interest passes from the lessor, or the real title is shown upon the face of the lease, there is no estoppel at all."

In my judgment, when the matter is looked at more closely, and, particularly, when you regard the facts of the case as briefly set out by WIGHTMAN, J., giving the judgment of the Court of Exchequer Chamber, it is plain that by "any estate or interest" MARTIN, B., meant "any legal estate or interest," and that, indeed, is in accordance with what MARTIN, B., had earlier said when

referring to the first of the cases he mentioned, *Pargeter v. Harris* (5). He said (*ibid.*, 754):

"There are some points in the law relating to estoppels which seem clear. First, when a lessor without any legal estate or title demises to another, the parties themselves are estopped from disputing the validity of the lease on that ground . . ."

A Moreover, in *Cuthbertson v. Irving* (4) itself the question arose whether the assignee of a mortgagor, having, at the date of the purported demise, only an equitable title, was able to rely on estoppel against the lessee, and the judgment of the court delivered by WIGHTMAN, J., said (6 H. & N. 139, 140):

B "The answer is, for the plaintiff, because the lessee is estopped from denying that the plaintiff had such a legal estate as would warrant the lease; and as no other legal estate or interest is shown to have been in the lessor, it must be taken as against the lessee, by estoppel, that the lessor had an estate in fee."

I accept, of course, the view that if the *soi-disant* lessor has any legal estate, though a legal estate less in extent than that purported to be granted, the doctrine of feeding the estoppel is excluded, but I do not think it is excluded where the only right the lessor had was an equitable estate or interest. Here, Mrs. Gavine was let into possession. There was no written document, no lease by deed, not even a contract. It purported to be the creation orally of a tenancy, and Mrs. Gavine was given, or was intended to be given, by Mrs. Cooke a legal right to possession of the relevant part of the premises. At the time Mrs. Gavine D was given that right, Mrs. Cooke had no such interest in the premises as would support the giving of the right. True, she was able to make a contract, a promise, to give it. That would be so in the case of every purported demise, but she had no right, so far as the evidence goes, to give Mrs. Gavine the privilege of possession of these premises. It was pointed out that Salthouse should have been aware of it, and that it may be that he should be regarded in some way E as a party to the grant. But there is, again, no evidence about Salthouse save that by the terms of the contract Mrs. Cooke had no right to enter into possession of any part of the premises until completion. If she had, it is possible that different considerations would have applied, but in the absence of any such right it seems to me that this case is indistinguishable from the other cases in which the person put into possession and given what purported to be F a lease is, if the lessor afterwards acquires a legal estate, entitled, by the doctrine of estoppel, to assert and rely on the right purported to be given. The estoppel is, as it is said, fed by the legal interest later acquired by the lessor.

If I am right in saying on the facts here that there was from Dec. 28 to Dec. 29 vested in Mrs. Cooke the fee simple of No. 168, Lodge Lane, it seems to me that the estoppel was fed by that interest and so there came into being G Mrs. Gavine a legal interest or right to possession which was prior in date to the grant of the mortgage, and, therefore, prevented the mortgagees from relying on the *Dudley* case (1) and saying that their title is paramount to that of Mrs. Gavine. The mortgagees must take subject to the weekly tenancy, and subject (which is much more important) to the effect of the Rent Restrictions Acts on that tenancy. I think this case depends on its own facts. It may well be that in other cases it could be shown that, notwithstanding the divergences in date, there was really but one transaction, and, if that is so, then the question would arise whether the decision of HARMAN, J., in the *Coventry* case (3) should be followed. It is a decision which obviously has an appeal to common sense, but in the circumstances it is unnecessary for me to say anything further about it and I express neither affirmation of it nor the contrary. Nor is it necessary for me to express any view on the other matter on which ROMER, J., founded his decision. We have not heard full argument

about it. In the result, though I have arrived at it by a different route, I think the order which was made was right and the appeal, in my judgment, should be dismissed.

JENKINS, L.J.: I agree, and find nothing I can usefully add on the question of the tenancy by estoppel and the feeding of the estoppel. As my Lord has said, the view taken by this court on that part of the case makes it unnecessary to consider here the question whether the interest, had it not been a legal interest, would have required registration or could properly be registered under the Land Registration Act, 1925, in order to preserve its priority. About that I only want to say that the learned judge's decision appears to have been founded, in part at all events, on an assumption that a contract was not capable of registration under the Act unless it was a contract in writing. That assumption the learned judge appears to have made on the strength of what he took to be something in the nature of an admission by counsel for the mortgagees to the effect that an oral contract was not capable of registration as a land charge. Counsel tells us he made no such admission, or, at all events, had no intention of doing so. Be that as it may, it does look as though that part of the learned judge's judgment turns either on an inadvertent admission or on some misunderstanding as to the way in which counsel really meant to put the case. It seems clear that in fact writing is not essential to the registrability of a contract or charge, for s. 10 of the Act provides:

"(3) Where a land charge is not created by an instrument, short particulars of the effect of the charge shall be furnished with the application to register the charge."

I have thought it right to mention this point as it is plain that in the circumstances that part of the learned judge's judgment should not be regarded as authoritative.

MORRIS, L.J.: I am in agreement with the conclusion expressed by the Master of Rolls, and with the reasoning that guided my Lord in arriving at that conclusion.

Appeal dismissed.

Solicitors: *Hyde, Mahon & Pascall*, agents for *Clayton & Gibson*, Newcastle-upon-Tyne (for the plaintiffs); *Le Brasseur & Oakley*, agents for *Shield, Schierwater & Symond*, Liverpool (for the defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Re M. BELMONT & CO., LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), October 15, 1951.]

Company—Registration—Restoration to register—Application to restore by person other than member or creditor—Companies Act, 1948 (c. 38), s. 352 (1).

Company—Practice—Application to have dissolution declared void—Representation of Registrar of Companies—Companies Act, 1948 (c. 38), s. 352 (1).

In July, 1948, a company sold its various undertakings, and the Registrar of Companies, acting under the Companies Act, 1948, s. 353 (5), struck its name off the register with effect from Aug. 19, 1949. On that day notice of the striking-off was published in the "Gazette" with the result that the company became dissolved. At the date of its dissolution the company had been assessed by the Inland Revenue Commissioners to various taxes, but the assessments were under appeal. In consequence of the dissolution of the company, the appeals could not be proceeded with, and the commissioners could not enforce any liability to tax, nor, in the circumstances,

could they proceed by petition under s. 353 (6) of the Act of 1948 as creditors for an order restoring the name of the company to the register. The commissioners, therefore, sought to proceed under s. 352 (1).

HELD: section 352 (1) conferred on the court jurisdiction to order the restoration of the name of the company to the register, and there was nothing in s. 353 to limit that jurisdiction.

Per curiam: In any case under s. 352 (1) which, after investigation, the Attorney-General is satisfied is simple and straightforward and does not require argument on his behalf, it is desirable in the interests of economy that the fact of his consent should be demonstrated by exhibiting to the applicant's evidence a letter stating that the Attorney-General offers no opposition to the motion, rather than that counsel should be briefed merely to consent to the making of the order.

FOR THE COMPANIES ACT, 1948, s. 352 and s. 353, see HALSBURY'S STATUTES, Second Edn., Vol. 3, p. 726.

MOTION for an order under the Companies Act, 1948, s. 352 (1), declaring that the dissolution of a company, struck off the register under s. 353, was void.

A. F. M. Berkeley for the applicants, the Inland Revenue Commissioners.
Denys B. Buckley for the respondent, the Attorney-General, who represented the Registrar of Companies.

WYNN-PARRY, J.: This is a motion under the Companies Act, 1948, s. 352 (1), on behalf of the Inland Revenue Commissioners, persons interested in having the dissolution of the company declared void, for a declaration that the dissolution of the company is void.

The necessity for the applicants to proceed under s. 352 (1) is that at the date of the dissolution of the company (which was effected under s. 353 by the Registrar of Companies striking the name of the company off the register with effect from Aug. 19, 1949) the Inland Revenue Commissioners had assessed the company in various sums for various taxes—excess profits tax, income tax and profits tax—but in each case the assessments were under appeal so that it is at least doubtful whether it could be said that the commissioners were creditors of the company so as to entitle them to proceed by petition under s. 353 (6) for an order restoring the name of the company to the register. Section 352 (1) provides:

“Where a company has been dissolved, the court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the court to be interested, make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.”

It is to be observed that the conditions which must exist before the court has any jurisdiction to make any such order are:—(i) that the company has been dissolved; (ii) that the application should be made within two years of the date of the dissolution; and, (iii) that it shall be made by the liquidator or any other person who appears to the court to be interested. So, a comparatively short time is provided under that sub-section within which the application can be made, but, on the other hand, the application can be made by any member of what may well be a very wide class. In contra-distinction there are to be observed the relevant provisions of s. 353. That section deals with the machinery by which, if a company is in default in filing proper returns with the Registrar of Companies, the latter may strike the name of that company off the register, and shall publish notice thereof in the “London Gazette” with the consequence that on the publication of that notice in the “Gazette” the company becomes

dissolved. It is to be observed that to s. 353 (5), which deals with that result, there is a proviso (b):

“nothing in this sub-section shall affect the power of the court to wind-up a company the name of which has been struck off the register.”

Sub-section (6), which gives a right in certain circumstances to apply for the restoration of the company's name to the register, so far as relevant provides:

“If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the court on an application made by the company or member or creditor before the expiration of twenty years from the publication in the ‘Gazette’ of the notice aforesaid may, if satisfied that the company was at the time of the striking off carrying on business . . . or . . . that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon an office copy of the order being delivered to the registrar for registration the company shall be deemed to have continued in existence as if its name had not been struck off . . .”

So the conditions of an application under sub-s. (6) are (i) that the company shall have been dissolved under the provisions of sub-s. (5), (ii) that the application, which is made by petition instead of by motion as in the case of an application under s. 352 (1), must be made by the company or a member or creditor of the company, and, (iii) that it must be made before the expiration of twenty years from the publication in the “Gazette” of the notice referred to in sub-s. (3) and sub-s. (5). It thus becomes clear why the applicants are constrained to proceed under s. 352 (1) by way of motion for a declaration that the dissolution of the company is void, instead of proceeding by way of petition under s. 353 (6) for the restoration of the name of the company to the register.

The language of s. 352 (1), taken by itself, is clearly wide enough to confer on the court jurisdiction to make the order asked for. It is a section which *prima facie* refers to and is intended to deal with all the cases under the Act in which a company can be dissolved. Reference was made in argument to those various cases. Under s. 208 (1) (d), the court has jurisdiction as part of the machinery for facilitating a reconstruction or amalgamation to provide *inter alia* for the dissolution of a company without winding-up. Section 274 (1) of the Act, which deals with the dissolution of a company, provides:

“When the affairs of a company have been completely wound-up, the court, if the liquidator makes an application in that behalf, shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.”

It is true, as was pointed out by counsel for the applicants, that since 1890 the practice, notwithstanding the various Companies Acts which have been in force between that date and the present time, has been not to make any such application but for the Registrar of Companies two years after the liquidator's release to inquire of the official receiver whether there is any reason why the company should continue to be regarded as being alive, and, if no reason is shown, then to take the necessary steps. But, whatever the practice may be, s. 274 provides a case to which s. 352 (1) would clearly apply. Section 290 deals with the final dissolution in a members' winding-up, and s. 300 deals in a corresponding manner with a creditors' winding-up. By sub-s. (4) of each of those sections it is, in effect, provided that the registrar, on receiving the account and either of the returns mentioned in the respective sections, shall forthwith register them, and on the expiration of three months from the registration of the return the company shall be deemed to be dissolved. Those are clearly cases to which s. 352 (1), too, would apply.

A That brings me to this point. There being, as I have demonstrated, clear provision in the language of s. 352 (1) which would entitle the court to accede to this application, is there anything to be found in s. 353 (which is the only other section to be considered) which would operate to limit in any way the wide jurisdiction which the court has under s. 352 (1)? Section 353 deals with an entirely different procedure. It postulates, as I have already pointed out, a company in default, and contains provisions whereby, after the registrar has invoked the machinery there provided and brought about the dissolution of the company, that dissolution shall in effect be set aside by the restoration of the company's name to the register. It is true that in this case the dissolution was in fact brought about by putting into operation the machinery provided by s. 353.

B There is no authority on the matter one way or the other. The question appears to me to depend solely on a consideration of the language of the two sections read in the light of the other sections to which I have referred. In my judgment, there is not to be found in s. 353 any sufficient ground for saying that by the force of the language of that section the jurisdiction of the court under s. 352 (1) is circumscribed. Indeed, there is, if anything, a pointer the other way to be found in proviso (b) to s. 353 (5), to which I have already referred:

C "nothing in this sub-section shall affect the power of the court to wind-up a company the name of which has been struck off the register."

D That postulates that the court can bring the company sufficiently to life in order to wind it up, and that can be done without any reference to the provisions of sub-s. (6). In my view, s. 352 (1) is unaffected by s. 353, and the effect of declaring a dissolution void under that sub-section where a company has been struck off the register under s. 353 is to bring about the same position as obtained before the dissolution took place. Therefore, under s. 352 (1) there is inherent jurisdiction in the court to order restoration to the register of the name of a company struck off under s. 353.

E It only remains to deal with one short point which was raised by counsel for the Attorney-General. In cases under s. 353 it is plainly necessary that the Registrar of Companies should be represented in order that he may make clear to the court what is the default for which the company is struck off and what are the undertakings which should be required by the court as to filing returns as a condition of making the order asked for under sub-s. (6) of that section. In cases under s. 352 (1) it has been the practice for the Attorney-General to F be represented if only to consent to the order asked for being made. Counsel has submitted that in any case where the Attorney-General is satisfied after investigation that the case is a simple and straightforward one and not requiring any argument on his behalf it would be desirable in the interests of economy that the fact of his consent should be demonstrated by exhibiting to the applicant's evidence a letter stating that the Attorney-General offers no opposition to the motion. In my view, particularly under present-day conditions, G there is everything to recommend that course. For the reasons which I have given I propose to declare that the dissolution of the company is void.

Order accordingly.

Solicitors: *Solicitor of Inland Revenue* (for the applicants); *Treasury Solicitor* (for the respondent).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

STARKEY v. RAILWAY EXECUTIVE.

[COURT OF APPEAL (Cohen, Singleton and Birkett, L.JJ.), October 17, 1951.]

Appeal—Leave granted subject to undertaking to pay costs of appeal in any event—Interference with discretion of appellate tribunal.

Legal Aid—Costs—Assisted person successful plaintiff—Right to order against defendant for full costs—Legal Aid and Advice Act, 1949 (c. 51), s. 1 (7) (b).

The plaintiff, an assisted person under the Legal Aid and Advice Act, 1949, succeeded in an action for damages for personal injuries against the defendants. The judge declined to award her the full costs of the action, solely on the ground that she was an assisted person and limited the order to such costs as she would be required to contribute to the legal aid fund. The plaintiff applied for leave to appeal against the order as to costs. Leave was granted subject to an undertaking by the Law Society, who, as administrators of the legal aid fund, were assisting the plaintiff, to pay the costs of the appeal in any event. On appeal to the Court of Appeal,

HELD: (i) it was improper to seek to impose an undertaking to pay the costs of an appeal in any event, as that would interfere with the discretion of the Court of Appeal as to costs. The utmost that should have been required was an undertaking by the plaintiff not to ask for costs.

(ii) in view of the terms of s. 1 (7) (b) of the Act of 1949, the court must exercise its discretion as to costs without regard to the fact that the successful plaintiff was an assisted person, and, therefore, it was not open to the court to deprive her of her costs solely on the ground that she was an assisted person.

FOR THE LEGAL AID AND ADVICE ACT, 1949, s. 1 (7), see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 534; and FOR THE SUPREME COURT OF JUDICATURE (CONSOLIDATION) ACT, 1925, s. 31 (1) (h), see *ibid.*, Vol. 5, p. 359.

APPEAL by the plaintiff from an order of STABLE, J., dated Mar. 16, 1951, granting conditional leave to appeal against his order as to costs, and from his order, dated Feb. 19, 1951, as to costs of an action by the plaintiff against the defendant.

Granville Sharp, K.C., and *D. B. B. Fenwick* for the plaintiff.

McLusky for the defendant.

COHEN, L.J.: The history of this matter is unfortunate. On Sept. 22, 1949, the plaintiff was injured while travelling on a train belonging to the defendants, the Railway Executive, and in respect of those injuries she brought an action for damages, the writ being issued on Aug. 4, 1950. The action was tried by STABLE, J., at York Assizes on Feb. 13, 1951. He found the defendants liable and gave judgment for the plaintiff for the sum of £308 13s. 5d. Then the question arose as to costs, the plaintiff being an assisted person. STABLE, J., made an order against the defendants for "such costs as an assisted person pays the State", and he added: "The order for costs against the defendants will be limited to the contribution of an assisted person." It seems to me plain that the learned judge was basing his decision solely on the fact that the plaintiff was an assisted person.

The order being one as to costs, the plaintiff took the view that she could not appeal against it without the leave of the judge because of s. 31 (1) (h) of the Supreme Court of Judicature (Consolidation) Act, 1925. On Mar. 16, 1951, counsel for the plaintiff made that application. STABLE, J., took the objection that the plaintiff was not an interested person because she was not under any liability to pay any costs to her solicitors. Counsel for the plaintiff pointed out that under the Legal Aid and Advice Act, 1949, if she had the order which she claimed she was entitled to, those advising her, that is to say, the Law Society, would have power to enforce payment of their full costs, even though the

plaintiff personally might benefit only to a very small extent. Counsel went on: "By accepting legal aid she is in the position that she must, if necessary, be guided by those financing her . . . in going as far as she can to get an order for costs which they then get her to enforce." After further discussion the judge said he would give leave to appeal, but only on the condition that the Law Society, as the persons who, under s. 9 of the Act of 1949, are entrusted with the setting up and administration of the legal aid fund should pay the costs of this appeal in any event. The Law Society were not willing to give any such undertaking, and they appealed from the order giving this conditional leave to appeal. It seems to me that that undertaking, in the form in which the judge required it, was clearly an improper undertaking for which to ask. It used to be the practice at one time for this court, in granting leave to appeal to the House of Lords, to require some such undertaking from the proposed appellant, but the House of Lords pointed out to us that it was not proper for us to seek to interfere with the discretion of their Lordships as to costs on an appeal before them. So it seems to me that the undertaking which STABLE, J., sought to impose was an interference with our discretion as to costs on an appeal which would come before us. The utmost he could have done, I think, was to require an undertaking that they would not ask for costs, leaving it still open to us to make such order as we thought fit. It seems to me, therefore, that we must allow the appeal from that order, and I think we must now go on to deal with the substance of the matter.

It is true that no particular sections of the statute were mentioned by counsel for the plaintiff when he made his submission as to the position regarding costs recoverable by and against an assisted person, but I think he correctly summarised the position. It will be enough for the purposes of this appeal if I refer to s. 1 (7) of the Act of 1949 which is as follows:

"Save as expressly provided by this Part of this Act or by regulations made thereunder . . . (b) the rights conferred by this Part of this Act on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised."

It seems to me that that sub-section is conclusive of this matter. It provides, in effect, that, in considering the costs to be awarded against a person unassisted by legal aid, the court must exercise its discretion without regard to the fact that the successful plaintiff is a legally assisted person. It is plain from the wording of the judgment of STABLE, J., on this point that the only ground on which he deprived the plaintiff of her costs was that she was an assisted person. In those circumstances counsel for the defendants very properly did not seek to support the judge's judgment, and I think we are bound to vary it by ordering the defendants to pay the costs.

SINGLETON, L.J.: The plaintiff was an assisted person. She had not been called on to provide anything towards the costs of the litigation, from which I take it she was virtually a person without means. She succeeded in her action and obtained damages. In the ordinary way a litigant who succeeds in those circumstances would recover her costs, and an application was made for her costs. STABLE, J., did not grant them. If the position is left in that way, the costs of the successful plaintiff will fall to be borne by the legal aid fund set up by s. 9 of the Legal Aid and Advice Act, 1949—in other words, by the taxpayer. Why should the wrong-doer profit by the fact that the plaintiff is an assisted person? If a successful plaintiff is to be deprived of costs because he or she is an assisted person, the wrong-doer gets a benefit from the Act at the expense of the State. I do not believe that that is in accordance with the intention of Parliament. STABLE, J., would seem to have thought that a fully assisted person should recover no costs from a defendant. I see no ground for that. If

the judge is to be read as saying that assisted persons under the Legal Aid and Advice Act, 1949, are not to have any costs if they succeed, then I think it is not a proper exercise of the discretion granted to the judge either under R.S.C., Ord. 65, r. 1, or under s. 31 (1) (h) of the Supreme Court of Judicature (Consolidation) Act, 1925. The judge ought to have granted the plaintiff costs in the usual way. That, I think, follows from s. 1 (7) (b) of the Legal Aid and Advice Act, 1949. I am satisfied that the order suggested by my Lord is right and that both appeals should be allowed with costs.

BIRKETT, L.J.: I agree.

Appeals allowed.

Solicitors: *Clutton, Moore & Lavington* (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

WARD v. SHELL-MEX AND B.P., LTD.

[KING'S BENCH DIVISION (Streatfeild, J.), October 16, 17, 1951.]

Industrial Injury—Medical board—Evidence of member of board in subsequent proceedings—Admissibility—Evidence as to condition of claimant for disablement benefit—Evidence as to conclusions of board—National Insurance (Industrial Injuries) Act, 1946 (c. 62), s. 39 (1).

A workman suffered from eczema which, he alleged, was due to the negligence or breach of statutory duty of his employers in not providing him with adequate protective clothing in his work. He was examined by a medical board under the National Insurance (Industrial Injuries) Act, 1946, s. 39 (1), which issued a certificate of its decision. In an action for damages against the employers the workman proposed to call a doctor who had been a member of the board to give evidence of his condition at the time of the examination and of his conclusions as to the cause of that condition.

Held: while the doctor was a competent witness to give admissible evidence regarding the facts and matters presented before him relating to the workman's condition at the relevant date, he could not give evidence as to the reasons which prompted him to come to the conclusion which resulted in the board issuing the certificate.

Duke of Buccleuch v. Metropolitan Board of Works (1872) (L.R. 5 H.L. 418), applied.

AS TO EVIDENCE BY JUDICIAL OR QUASI-JUDICIAL OFFICERS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 724-727, paras. 799, 800; and FOR CASES, see DIGEST, Vol. 22, pp. 405, 406, Nos. 4125-4142.

Cases referred to:

- (1) *Buccleuch (Duke) v. Metropolitan Board of Works*, (1872), L.R. 5 H.L. 418; 41 L.J.Ex. 137; 27 L.T. 1; 36 J.P. 724; 22 Digest 405, 4134.
- (2) *Hollington v. Heuthorn & Co., Ltd.*, [1943] 2 All E.R. 35; [1943] K.B. 587; 112 L.J.K.B. 463; 169 L.T. 21; 2nd Digest Supp.

ACTION for damages for negligence and breach of statutory duty.

The plaintiff was a labourer employed by the defendant company at their premises at Wandle Wharf, Wandsworth. His duties from Nov. 10, 1949, to Nov. 25, 1949, included the clearing of mud and sludge from the bays at the dockside at the wharf, and he was provided with rubber thigh boots and required to wear them in the performance of that duty. He alleged that the defendant company had failed to provide adequate protective stockings or other protective underclothing, that this amounted to a failure by the defendant company to

provide and maintain a safe and proper system of work, and that by reason of this failure he had suffered injury in the form of eczema to his legs. The plaintiff had been examined by a medical board under the National Insurance (Industrial Injuries) Act, 1946, s. 39 (1), and had received a certificate of the decision of the board. The plaintiff at the hearing of the action sought to call a doctor who was a member of the medical board to give evidence as to the facts of the plaintiff's condition at the time of the examination and as to his (the doctor's) conclusions as to the cause of his condition. The defendant company objected that the evidence was inadmissible.

Rountree for the plaintiff.

G. R. F. Morris for the defendants.

J. P. Ashworth for the Minister of National Insurance, as *amicus curiae*.

STREATFEILD, J.: This issue is one on which there is no authority.

Counsel for the plaintiff desires to call before me a doctor who was a member of a medical board set up under the National Insurance (Industrial Injuries) Act, 1946, s. 38 (1), not only to testify as regards the fact of the plaintiff's condition as it was at the time he examined him in the course of his duties as a member of that board, but also to state his own conclusions as to the cause of that condition and so forth. I have to determine whether that evidence is admissible.

The board is a statutory body consisting of two doctors, and it may be a third doctor, set up under s. 38 (1) and the following sections of the Act of 1946 to determine questions defined, *inter alia*, in s. 36 (1) (c) of the Act and to make an award and give a certificate in accordance with the decision of the board.

It is a statutory body and it consists of experts, because they are experts. Under s. 39 (2) a right of appeal lies from its decision to a medical tribunal which consists also of experts. It seems to me that, although they are experts, when they sit as members of the board or the appeal tribunal they constitute a statutory body rather than individual experts, and their position in their capacity as a judicial or quasi-judicial authority is analogous to that of an arbitrator who is chosen by the parties to determine a question between them. He likewise may be chosen because he is an expert.

Counsel for the Minister of National Insurance, who has given me the benefit of his argument which has been received without objection, has submitted, and I think rightly, that the position of a member of a board under the Act is somewhere between that of an arbitrator and that of a judge. It is well settled that a judge cannot be called as a witness to justify, still less to vary or contradict, his judgment. The position of an arbitrator, whose position is, perhaps, less strong than that of a member of a medical board set up under the Act of 1946, is discussed with elaboration in *Duke of Buccleuch v. Metropolitan Board of Works* (1), where CLEASBY, B. (L.R. 5 H.L. 432) laid down the principles which governed the position of an arbitrator who is required to give evidence concerning matters arising out of his award. His opinion was adopted with approval by LORD CAIRNS (*ibid.*, 462). CLEASBY, B., answers the questions which were before the court in this way (*ibid.*, 432):

“1. That the umpire was a competent witness, like any other person, to prove matters material to the issues.”

So I think here the doctor would be a competent witness so far as any question of competency arises, but the question is: What evidence can he give which is relevant to the issue? The second question was answered by CLEASBY, B., in this way (*ibid.*, 433):

“2. That questions might be properly put to him for the purpose of proving the proceedings before him, so as to arrive at what was the subject-matter of adjudication when the proceedings closed, and he was about to make his award.”

But there is this important qualification (*ibid.*):

"3. That as regards the effect of the award no questions could properly be put to the umpire for the purpose of proving how it was arrived at, or what items it included, or what was the meaning which he intended at the time to be given to it."

Elaborating that, the learned baron proceeded (*ibid.*):

"Being competent generally, it follows that he may be questioned as to what took place before him, so as to show over what subject-matter he was exercising jurisdiction. He might, therefore, prove that a claim was made for compensation in respect of one matter, *A.*, and also in respect of another matter, *B.*, and that both were entertained without objection; or he might prove that claim *B.* was objected to and rejected, or that it was after objection received. He might, in short, give any evidence for the purpose of showing what was the subject-matter into which he was inquiring, and upon which his judgment therefore was to be founded. This would enable us to judge whether he was acting within his jurisdiction or not, for a person exceeds his jurisdiction by prosecuting a judicial inquiry in a matter over which he has no jurisdiction, quite independent of the judgment eventually given. And it deserves notice, that as to this evidence the umpire would be no better witness than any other person, and would not have it in his power afterwards, by his own evidence, to sustain or destroy the award . . . As soon as the award is made it must speak for itself. It must be applied, as in other cases, by extrinsic evidence to the subject-matter, but cannot be explained or varied or extended by extrinsic evidence of the intention of the person making it."

Later, *CLEASBY, B.*, raises a question which is particularly relevant to the present issue (*ibid.*, 434):

"The objection to such evidence would be more striking if, instead of the umpire being appealed to, two arbitrators had joined in an award. Could each have been questioned as to the composition of the award? Although they had agreed as to the result and amount of the award, it would not at all follow that they agreed in the steps by which it was arrived at. Indeed, we know that agreement in such a result is often only arrived at by some concession and compromise, and in case of a difference in the evidence of what was intended, which is to govern and influence the award?"

He there raises the question which would arise where two arbitrators have agreed on an award perhaps as a result of a compromise and he is pointing out the obvious difficulties of calling one of them to explain the reasons why they had come to their conclusion. *LORD CAIRNS* says (*ibid.*, 462):

"The award is a document which must speak for itself, and the evidence of the umpire is not admissible to explain or to aid, much less to attempt to contradict (if any such attempt should be made) what is to be found upon the face of that written instrument."

It seems to me that, as applied to an arbitrator, still more so to one of two arbitrators, that case is extremely illuminating and indicates that, although an arbitrator may be called to give evidence as to what took place in the hearing before him, what issues were raised and so on, it is not competent, nor is it relevant, for him to explain, and still less vary, the award which he has given. That award must stand on its own footing.

Counsel for the plaintiff has drawn my attention to *Hollington v. Hewthorn & Co., Ltd.* (2), which lays down what had long been the practice—that in an action arising out of a collision the fact that the defendant had been convicted before justices of careless or dangerous driving was not relevant in subsequent civil proceedings between the plaintiff and the defendant. Witnesses are not

entitled to state their opinions on a matter which is *sub judice*. They cannot state their own conclusions whether particular driving amounts to dangerous driving or not. That is the question which the court has to decide. There is, of course, the well-known exception of the opinion of experts, but, as I have pointed out, in my view, although this doctor whose evidence is in issue here is an expert and was appointed to this tribunal because he was an expert, the opinion which he there expresses is not so much the opinion of an expert as the opinion of a member of a statutory judicial body. Therefore, in my view, his evidence falls under quite a different principle. He would be an admissible and competent witness to give evidence, as CLEASBY, B., says, only on the facts and matters which were presented before him, but he would not, in my opinion, and I so rule, be enabled to give any evidence as to the reasons which prompted him in coming to the conclusion which resulted in the certificate granted by the medical board under the Act. That certificate—I do not know what it was—stands on its own footing and it cannot be contradicted or explained or varied by a member of that tribunal.

It seems to me, therefore, that this witness who is tendered is bound to be in this position at the hands of one counsel or the other. Either he would support his award in which case the award would speak for itself, or else he will contradict it in which case he could be cross-examined on the very line that CLEASBY, B., said was inadmissible in the *Duke of Buccleuch's* case (1). That being the inevitable result of calling this witness, in my judgment, his evidence ought not to be received.

Judgment for the defendants.

Solicitors: *H. C. L. Hanne & Co.* (for the plaintiff); *Blount, Petre & Co.* (for the defendants); *Solicitor, Ministry of National Insurance* (for the Minister).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

BENJAMIN v. COOPER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Slade and Devlin, JJ.), October 24, 1951.]

Street Traffic—Hackney carriage—Metropolitan police district—Plying for hire "elsewhere than at some standing or place appointed"—Plying for hire in private place—London Hackney Carriages Act, 1843 (c. 86), s. 33—London Passenger Transport Act, 1934 (c. xcvi), s. 112.

The driver of a motor hackney carriage plied for hire on the unenclosed forecourt of an underground railway station which was the private property of the London Transport Executive, and, though frequented by the public, was not subject to a public right of passage. No part of the forecourt had been appointed by any lawful authority as a standing or place in which hackney carriages might ply for hire. The driver was convicted of having plied for hire with a hackney carriage in the metropolitan police district "elsewhere than at some standing or place appointed for the purpose", contrary to s. 33 of the London Hackney Carriages Act, 1843.

HELD: the provisions in s. 112 of the London Passenger Transport Act, 1934, that the precincts of a London transport station shall be deemed to be a street or place applied only to s. 35 of the London Hackney Carriage Act, 1831, and not to s. 33 of the Act of 1843; s. 33 did not apply to plying for hire in a private place: *Skinner v. Usher* (1872) (L.R. 7 Q.B. 423) followed; and, therefore, the driver was not guilty of the offence.

FOR THE LONDON HACKNEY CARRIAGE ACT, 1831, s. 35, the LONDON HACKNEY CARRIAGES ACT, 1843, s. 33, and the LONDON PASSENGER TRANSPORT ACT,

1934, s. 112, see HALSBURY'S STATUTES, Second Edn., Vol. 24, pp. 804, 836, and 943.

Case referred to:

- (1) *Skinner v. Usher*, (1872), L.R. 7 Q.B. 423; 41 L.J.M.C. 158; 26 L.T. 430; 36 J.P. 693; 42 Digest 861, 139.

CASE STATED by Middlesex justices.

At a court of summary jurisdiction sitting at Enfield on June 18, 1951, an information was preferred by the respondent, a police constable, charging the appellant with having plied for hire with a motor hackney carriage on May 23, 1951, at Bramley Road, Southgate, London, elsewhere than at some standing or place appointed for the purpose, contrary to the London Hackney Carriages Act, 1843, s. 33. The appellant contended that s. 33 of the Act of 1843 applied only to plying for hire in a public street or place and that there was no evidence that he had plied for hire at such public street or place. The justices convicted the appellant, who appealed.

Borders for the appellant.

E. H. P. Wrightson for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Middlesex before whom the appellant was charged

"for that he . . . at Southgate in the county of Middlesex did ply for hire with a motor hackney carriage elsewhere than at some standing or place appointed for the purpose, contrary to s. 33 of the London Hackney Carriages Act, 1843."

The appellant is a taxicab driver holding a licence to ply for hire with a hackney carriage. The place in question was Oakwood Underground Station. In front of the entrance to the station, and between it and the main street, is a piece of unenclosed ground, which is the private property of the London Transport Executive, and forms the forecourt of the said station. This forecourt is open to the street and is frequented by the public, but is not subject to any right of passage by them. On May 23, 1951, the appellant was the driver of a motor hackney carriage, which was stationary on this forecourt facing the entrance to the station. He was seated in the cab and the justices have found that he was plying for hire with it. No part of the forecourt has ever been appointed by any lawful authority as a standing whereon hackney carriages may ply for hire, but there is a place so appointed some fifty yards from where the appellant was stationary with his cab, *viz.*, at the side of the station in Chase Road, Southgate. The justices were of opinion that the offence charged had been committed, and they ordered the appellant to pay a small fine.

In my opinion, the justices did not come to a right decision in point of law. The London Hackney Carriage Act, 1831, s. 35, provides:

" . . . Every hackney carriage which shall be found standing in any street or place . . . shall, unless actually hired, be deemed to be plying for hire . . . "

and it imposes by other words in the section an obligation on the driver to accept a fare. The marginal note, which is often a good key to the intention of the section, is:

"Hackney carriages standing in any street to be deemed to be plying for hire, and the driver refusing to go with any person, liable to a penalty of 40s."

Section 35 thus imposed an obligation on a driver who was standing in a street or place to accept a fare if required so to do, and imposed a penalty on him if he refused to do so. The London Hackney Carriages Act, 1843, brought within

the limits of the Hackney Carriage Acts the whole of the metropolitan police district, to which the Act of 1831 did not apply. Section 33 provided:

" . . . Every driver of a hackney carriage who shall ply for hire elsewhere than at some standing or place appointed for that purpose, or who by loitering or by any wilful misbehaviour shall cause any obstruction . . . shall for every such offence forfeit the sum of 20s."

A As is plainly shown by the marginal note and by the clear words of the section, that section was designed to deal with obstruction. The marginal note is:

"Penalty on drivers for loitering or causing any obstruction, refusing to take passengers, demanding illegal fares, etc."

B The section prohibits plying for hire elsewhere than at an appointed standing or place. There are thus two distinct sections dealing with two distinct states of affairs and imposing distinct penalties. The first deals with a driver refusing to take a fare when he is plying for hire in a street or public place, and the second provides a penalty for plying for hire elsewhere than at an appointed standing or place. It was under the Act of 1843 that cab-ranks were first established.

C In *Skinner v. Usher* (1) a cab driver was summoned under s. 33 of the Act of 1843 and for the same offence as the defendant in this case. The court held that the words "ply for hire elsewhere than at some standing or place" meant ply for hire elsewhere than at some public standing or public place and did not affect a man standing or plying for hire in a private place. That was the state of the law when the London Passenger Transport Act, 1934, was passed. By s. 112 of that Act:

D "Any premises comprising a railway station of the board and the precincts thereof and the approaches thereto which are situate within the limits of the London Hackney Carriage Act, 1831, as amended by subsequent Acts shall be deemed for the purposes of s. 35 of that Act to be a street or place."

E That means that, if a cab is standing outside one of the stations of the London Transport Executive (who superseded the London Passenger Transport Board by virtue of the Transport Act, 1947, s. 5 (3), s. 12 (1), and sched. III), it is deemed to be standing in a street or place for the purposes of s. 35 of the Act of 1831 and, therefore, the driver is bound to accept a fare if a fare desires to hire him, and if he does not do so he is liable to a penalty of £2. It is argued that s. 112 overrules the decision in *Skinner v. Usher* (1) and provides in effect that for the purposes of s. 33 of the Act of 1843, which is nowhere referred to in the London Passenger Transport Act, 1934, a person can no longer stand on private property when he is plying for hire, but I can find nothing in the Act of 1934 which in any way overrules *Skinner v. Usher* (1), nor do I think it was intended to overrule that decision. The Act has merely made a cabman guilty of an offence if, while standing outside a London Transport station in his cab, he refuses to take a fare, and that is the offence created by s. 35 of the Act of 1831.

G In my opinion, no offence has been committed here under the Act of 1843, and for these reasons I think the justices came to a wrong decision in point of law and the appeal must be allowed.

SLADE, J.: I agree and for the same reasons.

DEVLIN, J.: I agree.

Appeal allowed.

Solicitors: *A. E. Johnson* (for the appellant); *Solicitor, Metropolitan Police* (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

PAYNE v. RAILWAY EXECUTIVE.

[COURT OF APPEAL (Cohen, Singleton and Birkett, L.JJ.), October 15, 16, 26, 1951.]

Damages—Measure of damages—Service pension—Exclusion in assessment.

The plaintiff, while serving in the Royal Navy, was seriously injured in a railway accident for which the defendants admitted liability. He was invalided from the service and was awarded a disability pension in assessing the amount of which the Minister of Pensions had power to take into account the amount of compensation awarded to the plaintiff *abunde*. Later the plaintiff sued the defendants for damages for negligence and was awarded £3,000 for the loss of future earnings and £2,500 for pain and suffering.

HELD: in assessing damages attributable to loss of earnings the amount of the disability pension must be disregarded.

Judgment of SELLERS, J. ([1951] 1 All E.R. 1034), affirmed.

AS TO DEDUCTION FROM DAMAGES FOR NEGLIGENCE, see HALSBURY, Hailsham Edn., Vol. 23, p. 698, para. 986; and FOR CASES, see DIGEST, Vol. 36, pp. 139, 140, Nos. 933-943, and Digest Supps.

Cases referred to:

- (1) *Baker v. Dalgleish S.S. Co., Ltd.*, [1922] 1 K.B. 361; 91 L.J.K.B. 392; 36 Digest 140, 943.
- (2) *Johnson v. Hill*, [1945] 2 All E.R. 272; 173 L.T. 38; 2nd Digest Supp.
- (3) *Bradburn v. Great Western Ry. Co.*, (1874), L.R. 10 Exch. 1; 44 L.J.Ex. 9; 31 L.T. 464; 36 Digest 127, 839.
- (4) *Hicks v. Newport, Abergavenny & Hereford Ry. Co.*, (1857), 4 B. & S. 403, *n.*; 122 E.R. 510; 36 Digest 139, 935.
- (5) *Shearman v. Folland*, [1950] 1 All E.R. 976; [1950] 2 K.B. 43; 2nd Digest Supp.
- (6) *Dalby v. India & London Life Assurance Co.*, (1854), 15 C.B. 365; 3 C.L.R. 61; 24 L.J.C.P. 2; 24 L.T.O.S. 182; 139 E.R. 465; 29 Digest 343, 2774.

APPEAL by the defendants from a decision of SELLERS, J., dated Apr. 23, 1951, and reported [1951] 1 All E.R. 1034, awarding to the plaintiff £5,500 damages—£2,500 under the head of pain and suffering and £3,000 for the loss of future earnings—for personal injuries sustained in a railway accident. At the time of the accident the plaintiff was a naval rating, and SELLERS, J., held that, in assessing the damages attributable to loss of earnings, a disability pension awarded by the Minister of Pensions to the plaintiff in respect of his injuries should be excluded from consideration. The defendants appealed against the award of £3,000 damages, and contended that the figure under that heading should be £750.

H. H. Edmunds for the defendants.

Fox-Andrews, K.C., and *J. Stevenson* for the plaintiff.

Cur. adv. vult.

Oct. 26. COHEN, L.J.: In April, 1948, the plaintiff was a sailor serving in the Royal Navy. On Apr. 17 he was proceeding by train on leave from Rosyth when he was involved in a railway accident and was very seriously injured. In September, 1949, he was invalided out of the Royal Navy. On Oct. 29, 1949, he was awarded under the Order in Council of Sept. 29, 1949, which corresponds to the Royal Warrant, 1949, applicable in the case of those serving in other branches of His Majesty's Forces, a disability pension of 45s. a week, the degree of his disablement being based on an interim award of one hundred per cent. On Feb. 26, 1951, the degree of disablement was reduced to ninety per cent., the weekly rate of pension being reduced to 40s. 6d. as from Mar. 14,

1951. He had by then married and was entitled to a weekly addition for his wife of 9s. a week. It was also stated at the trial that a child had been born and that on that account he would be entitled to a further addition of 6s. 9d., making a total pension of £2 16s. 3d. per week.

On Oct. 30, 1948, the writ in this matter was issued. At that date the plaintiff was an infant and he and his father were joint plaintiffs, the father's claim being limited to a sum of £100 17s. special damages. The defendants admitted liability and the only issue at the trial before SELLERS, J., on Apr. 11, 1951, was as to the damages. This raised an important question of law which the judge stated in these terms:

“Whether a pension paid to the first plaintiff under the Royal Warrant in respect of the injuries received by him in the accident in question should be taken into account or should be excluded from consideration in calculating the damages to be awarded.”

In his judgment SELLERS, J., split the assessment of the damages under two heads. He awarded £3,000 for loss of future earnings and £2,500 for pain and suffering and the loss of some of the pleasures of life, making a total sum of £5,500. He arrived at the first of these figures (£3,000) on the basis that the pension should be excluded from consideration. He also awarded the plaintiff's father the special damages claimed. After the judgment counsel for the defendants asked the judge to make an alternative assessment on the basis that the pension ought to have been taken into account in assessing the damages, and the judge said that on that basis he would have reduced the sum of £3,000 to £750. From this decision the defendants appeal, and the only question raised on the appeal is whether the judge was right in excluding the pension from consideration when assessing the damages.

This question does not appear to have arisen before in connection with a claim at common law for negligence, but it has arisen in cases under the Fatal Accidents Act, 1846, which provides, in s. 2, that

“ . . . the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought . . . ”

In such cases it is the rule that a pension granted by the Crown to dependants of the deceased should be taken into consideration, notwithstanding that the pension is dependent on the bounty of the Crown. In *Baker v. Dalgleish S.S. Co., Ltd.* (1) SCRUTTON, L.J., said [1922] 1 K.B. 372):

“Just as in assessing the loss by the death the probability of voluntary contribution destroyed by the death of the contributor may be included to swell the claim, so the probability of voluntary contribution bestowed in consequence of the death may be used to reduce the claim by showing what loss the claimant has in fact sustained by the death. Less weight will be given to voluntary contributions than to those made under legal obligation, just because they are voluntary. Still less weight will be given to voluntary contributions in instalments, because they are obviously terminable; and still less weight if the contributor announces he will reduce his contribution by the amount of compensation obtained from a wrongdoer who causes the death. GREER, J., was therefore in my view wrong in excluding as a matter of law from his consideration the voluntary contributions of the Admiralty in consequence of the death; but would have had to take into account the extreme probability of the Admiralty not continuing a pension if compensation could be obtained from the wrongdoer. For it is difficult to believe that a public department would put upon the taxpayer a burden which should be discharged by the wrongdoer whose act caused the death. The appellants who should have supplied

the evidence gave no evidence of any practice of the Admiralty not to consider compensation from the wrongdoer in assessing the pension."

In that case this court, in fact, affirmed the award of the judge on other grounds, but the principle of the case was applied in *Johnson v. Hill* (2) where, as in the present case, there was evidence that it was the practice of the Crown, notwithstanding its rights under art. 51 (1) of the Royal Warrant of Dec. 4, 1943, (corresponding to art. 52 of the Order in Council of Sept. 29, 1949) to take compensation awarded *aliunde* into account against a pension and to withhold or reduce the pension as the Minister of Pensions might think fit, but to grant at least a minimum pension.

In the court below, as before us, counsel for the defendants relied on these cases. He recognised that in cases under the Fatal Accidents Act, 1846, the judge or jury were bound by the terms of the statute and were not acting on strict common law principles. He admitted that a distinction did in certain matters exist between the two classes of cases. Thus, in cases at common law the court refused to deduct accident insurance moneys from the damages otherwise recoverable by the injured plaintiff: see *Bradburn v. Great Western Ry. Co.* (3), whereas prior to the Fatal Accidents (Damages) Act, 1908, such moneys were taken into account in cases under the Act of 1846: see *Hicks v. Newport, Abergavenny & Hereford Ry. Co.* (4). This distinction, he said, was due to the fact that where the moneys were recovered by the injured man himself, they were plainly *res inter alios acta*, whereas in cases under the Fatal Accidents Act, 1846, such moneys were part of the deceased's estate and were necessarily taken into account if the dependants had an interest in that estate. There could be no reason, it was argued, for drawing a distinction between the two classes of case where bounty under the Royal Warrant or Order in Council was concerned. To exclude the pension from consideration would mean that the first plaintiff would make a profit out of the accident, whereas, as was said by ASQUITH, L.J., delivering the judgment of the court in *Shearman v. Folland* (5) ([1950] 1 All E.R. 980):

"The governing principle is that the special damages recoverable (providing some damage is foreseeable) is that directly attributable to the tort, and no more."

SELLERS, J., rejected that argument, considering that the principle of *Bradburn v. Great Western Ry. Co.* (3) applied. He said ([1951] 1 All E.R. 1036):

"The plaintiff has become entitled to the pension by reason of his naval service, it being one of the benefits such service affords. The pension would have been paid if the accident had been without any negligence on the part of the railway company. It was argued for the plaintiff that a pension must be disregarded in making the assessment just as insurance is to be disregarded, and that as a matter of principle a wrongdoer should not get the benefit of the fortuitous circumstance that the plaintiff was serving in the Royal Navy at the time and had consequently received a pension. I agree with that contention. Just as the wrongdoer cannot appropriate to himself the benefit of the premiums paid by the injured party to cover accident risks, so he cannot, I think, appropriate the benefits accruing from the injured party's service which similarly entitles him to those benefits."

I respectfully agree with the judge's conclusion and his reasoning. It seems to me that the accident in this case was not the *causa causans* of the receipt by the first plaintiff of the disability pension, but the *causa sine qua non*. The *causa causans* was his service in the Royal Navy. I arrive at this conclusion all the more readily because the opposite conclusion would, I think, put the Minister of Pensions into an impossible position, for, on the one hand, he would wish to avoid, in the language of SCRUTTON, L.J., putting on the taxpayer a burden which should be discharged by the wrongdoer whose act caused the

injury, and, on the other hand, he would not wish to impose on the injured party a double deduction (a) by the court in assessing the damages, and (b) by the Minister in adjusting the pension—in the case of a sailor under art. 52 of the Order in Council of Sept. 29, 1949. For these reasons, I would dismiss the appeal with costs.

SINGLETON, L.J.: It is somewhat surprising that there is no decision binding this court on the question which now comes before us. Service pensions were formerly in the discretion of the Crown, but such matters now come under the Minister of Pensions, and the position seems to have been changed by the Pensions Appeal Tribunals Act, 1943, s. 11, which gives a person to whom an award has been made a statutory right to receive the sums payable under the award, though the Minister still has power to vary or revoke the award, or to withhold, reduce, or apply any payment thereunder in accordance with any provision of the Royal Warrant, Order in Council, order of His Majesty or scheme. The Order in Council now in force in respect of members of the naval forces is that of Sept. 29, 1949, and art. 52 (1) provides:

“Adjustment of awards in respect of other compensation.—Where the Minister is satisfied that compensation has been or will be paid to or in respect of a person to or in respect of whom a pension or gratuity is being or may be paid or that any compensation which has been or will be paid will benefit such a person, the Minister may take the compensation into account against the pension or gratuity in such manner and to such extent as he may think fit and may withhold or reduce the pension or gratuity accordingly.”

Compensation under art. 52 (3) (a) (ii) includes any lump sum in respect of injury, etc., which is recoverable as damages at common law. It is thus clear that where a person in the position of the plaintiff recovers damages for personal injuries it is the duty of the Minister to consider the case. He may reduce the pension, and it follows that in a proper case it is his duty to do so: see **BANKES, L.J.**, in *Baker v. Dalgleish S.S. Co., Ltd.* (1) ([1922] 1 K.B. 369) and **SCRUTTON, L.J.** (*ibid.*, 373). Evidence was called to show how the Minister deals with such cases in practice, and, no doubt, that gives satisfactory results in general. It does not follow that the Minister is bound to follow that practice in all cases. So far as I see, there is nothing to prevent him from reducing the pension to a nominal amount in a case in which a man receives a very large sum as damages, though it is unlikely that he would go so far, as the pension arises out of the man's terms of service. The important fact is that there is reserved to the Minister the right to “withhold or reduce the pension . . . accordingly.”

The argument for the defendants was based chiefly on decisions under the Fatal Accidents Act, 1846. I do not consider that they provide any guide to the question now before the court. That view is supported by the judgments in *Bradburn v. Great Western Ry. Co.* (3). The headnote reads:

“In an action for injuries caused by defendants' negligence, a sum received by the plaintiff on an accidental insurance policy cannot be taken into account in reduction of damages.”

The judgments to which I would refer are those of **BRAMWELL, B.**, and **PIGOTT, B.** **BRAMWELL, B.**, said (L.R. 10 Exch. 2):

“The jury have found that the plaintiff has sustained damages through the defendants' negligence to the amount of £217, but it is said that because the plaintiff has received £31 from the office in which he insured himself against accidents, therefore the damages do not amount to £217. One is dismayed at this proposition. In *Dalby v. India & London Life Assurance Co.* (6) it was decided that one who pays premiums for the purpose of

insuring himself, pays on the footing that his right to be compensated when the event insured against happens is an equivalent for the premiums he has paid; it is a *quid pro quo*, larger if he gets it, on the chance that he will never get it at all. That decision is an authority bearing on the present case, for the principle laid down in it applies, and shows that the plaintiff is entitled to retain the benefit which he has paid for in addition to the damages which he recovers on account of the defendants' negligence. As to the case of *Hicks v. Newport, etc., Ry. Co.* (4), that was an action brought under Lord Campbell's Act, and the ruling is quite correct. The statute had laid down no rule as to the mode of calculating the damages to be given in respect of the right of action which it created. The rule was first laid down in this court, and that rule was, that the damages were to be a compensation to the family of the deceased equivalent to the pecuniary benefits which they might have reasonably expected from the continuance of his life. If, therefore, the person claiming damages was put by the death of his relative into possession of a large estate, there was no loss; he was a gainer by the event; and similarly, whatever comes into the possession of the family who have suffered by the death of their relative by reason of his death must be taken into account. But that has no bearing on the case of a person suing upon his common law right for injuries caused to him by the defendants' negligence."

PIGOTT, B., said (*ibid.*, 3):

"I am of the same opinion. The plaintiff is entitled to recover the damages caused to him by the negligence of the defendants, and there is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him. He does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it."

Under the Fatal Accidents Act, 1846, the damages awarded represent the pecuniary loss to the widow or dependants arising from the death of the deceased. In an action for damages for personal injuries different considerations arise, as BRAMWELL, B., pointed out. In such a case the damages assessed cover pain and suffering, loss of amenities of life, and loss of earnings, past and prospective. And, from another point of view, I draw attention to the words of PIGOTT, B. (*ibid.*):

"... there is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him."

Equally, it can be said that the pension awarded to the plaintiff in the present case is due to his contract, or to his terms of service, with the Admiralty. In certain circumstances a man serving in the Navy may become entitled to a pension. That is a factor which enters into the question of his pay. If there were no pension rights, it is reasonable to assume that the pay would be higher. Why, then, should the pension enure for the benefit of a wrongdoer? I myself should be prepared to adopt the reasoning of PIGOTT, B., and to hold that the plaintiff does not receive the pension because of the accident "but because he has made a contract providing for the contingency." None the less, I prefer to base my judgment in this case on another ground. The strength of the defendants' case lies in the submission that a plaintiff should not be allowed to obtain payment twice in respect of the same injury. I do not think that that position arises if damages at common law are assessed on the ordinary principles and if the Minister of Pensions takes those damages into consideration and

applies art. 52 of the Order in Council accordingly. As I have said, he may withhold or reduce the pension, and in this connection he is entitled to bear in mind that the pension arises out of service with the Crown. There is in it something over and above the element of injury. I find it difficult to see that it can be set against future loss of earnings, for under art. 10 the degree of disablement, on which the amount of pension depends, is to be assessed without taking into account the earning capacity of the member of the Royal Navy in his disabled condition in his own or any other specific trade or occupation.

Evidence was given to show that the present practice of the Minister is that on an award of damages the disability pension is abated, or reduced, by the annuity value of twenty-five per cent. of the total damages recovered. If that practice was binding on the Minister, and if in a particular case it was shown that it worked out unfairly, there might be some ground for saying that it should be taken into account in assessing damages, subject to what I have said earlier. It is not suggested that the practice generally followed is binding. No doubt, it accords with justice and fairness in normal cases, but there is no reason why the Minister should adhere to it in every case. He has the right, and, as I think, the duty, to consider each case on its merits. Nor do the defendants ask for a notional, or nominal, reduction on the ground that, as the plaintiff has a pension, he is in a better position than one who has not. They ask boldly for a reduction of £2,250. It seems to me that their claim must fail. The difficulties of assessing damages are great enough without adding complications. If the submission of the defendants is right, it would apply equally if damages had to be assessed before the award of a pension in the case of an injured person to whom normally a pension would be awarded. Consider the position of a judge who had to direct a jury on the assessment of damages if the pension had not been awarded and there was uncertainty as to the degree of disablement and as to the amount of pension as well as to reduction which the Minister might think it right to make later on account of the damages given. It will be seen at once that this would give rise to uncertainty, if not to impossibility of arriving at a measure of justice. Moreover, a plaintiff cannot come back to the court and ask for a further award on the ground that his pension has been assessed at a lower figure than was anticipated. The same or like considerations apply if in assessing damages regard is paid to a pension without knowledge of the reduction in pension which the Minister will make because of the damages awarded. It seems to me that it is for these reasons that the Order in Council was drafted so as to leave it to the Minister to take the damages awarded as compensation into account to such extent as he may think fit and to withhold or reduce the pension accordingly. This points conclusively against the contention of the defendants. The wrongdoer cannot be heard to say: "Reduce the damages because of the pension," when the Order in Council gives the Minister the right to withhold or reduce the pension because of the award of damages. There is no question of double payment, for it is to be assumed that the Minister will make any proper reduction in pension if damages are awarded. The wording of art. 52 of the Order in Council of Sept. 29, 1949, appears to me to make it clear that a negligent defendant cannot escape any part of his liability to damages by reason of the fact that the plaintiff is entitled to a service pension under the provisions of the Order. I am in favour of dismissing the appeal.

BIRKETT, L.J.: I agree with the two judgments which have just been delivered.

Appeal dismissed.

Solicitors: *M. H. B. Gilmour* (for the defendants); *Pennington & Son*, agents for *Lemon, Humphreys, Parker & Mather*, Swindon (for the plaintiff).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

PARRINGTON v. PARRINGTON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pearce, J.), October 17, 18, 24, 1951.]

Variation of Settlement—"Post-nuptial settlement"—Bond—Transfer to wife of joint property—Bond by her to pay by instalments—Relevant circumstances to be taken into account—Matrimonial Causes Act, 1950 (c. 25), s. 25. 1950 (c. 25), s. 25.

The parties were married in 1920 and in 1947 they bought premises in their joint names and conducted a hotel on them. In 1950 they agreed to separate, and on Aug. 30, 1950, they signed two documents. One was a deed of transfer whereby, in consideration of the sum of £1,500, the husband and the wife jointly transferred the premises and the liabilities under a mortgage thereof to the wife alone and the husband guaranteed the wife's future obligations under the mortgage. The other document was a bond by the wife to pay £950 to the husband by specified monthly instalments. The recitals of the bond referred to the fact that the consideration for the transfer was £1,500 of which £550 had already been paid and to the agreement that the remainder should be paid by monthly instalments. In 1951 the wife was granted a decree of divorce, and she then applied for variation of the bond as being a post-nuptial settlement within the Matrimonial Causes Act, 1950, s. 25. It was agreed that the purchase of the hotel in 1947 was a "post-nuptial settlement," within the meaning of s. 25.

HELD: the two deeds of Aug. 30, 1950, were one transaction whereby each of the parties, on agreeing to separate, arranged to make some provision for the other; as the matter with which they were then dealing (*viz.*, the conveyance of the hotel premises to them jointly in 1947) was a post-nuptial settlement, the transaction dealt with their relationship as spouses rather than as business partners; and, therefore, the bond was a post-nuptial settlement, within s. 25 of the Matrimonial Causes Act, 1950, and the registrar had jurisdiction to vary it if he thought fit.

Per curiam: to determine whether a document was a "post-nuptial settlement" within the meaning of s. 25 of the Act of 1950, the court was entitled to take into consideration the relevant facts to find out what was the substance of the transaction.

AS TO VARIATION OF SETTLEMENTS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 800-809, paras. 1274-1292; and FOR CASES, see DIGEST, Vol. 27, pp. 517-533, Nos. 5576-5778.

Cases referred to:

- (1) *Smith v. Smith*, [1945] 1 All E.R. 584; 114 L.J.P. 30; 173 L.T. 8; 2nd Digest Supp.
- (2) *Halpern v. Halpern*, [1951] 1 All E.R. 315; [1951] P. 204.
- (3) *Prinsep v. Prinsep*, [1929] P. 225; 98 L.J.P. 105; 141 L.T. 220; Digest Supp.
- (4) *Lort-Williams v. Lort-Williams*, [1951] 2 All E.R. 241; [1951] P. 395.
- (5) *Melvill v. Melvill & Woodward*, [1930] P. 159; 99 L.J.P. 65; 143 L.T. 206; Digest Supp.
- (6) *Joss v. Joss*, [1943] 1 All E.R. 102; [1943] P. 18; 112 L.J.P. 19; 167 L.T. 419; 2nd Digest Supp.
- (7) *Gunner v. Gunner & Stirling*, [1948] 2 All E.R. 771; [1949] P. 77; [1948] L.J.R. 1904; 2nd Digest Supp.
- (8) *Brown v. Brown*, [1936] 2 All E.R. 1616; [1937] P. 7; 105 L.J.P. 103; 155 L.T. 418; Digest Supp.
- (9) *Hubbard (otherwise Rogers) v. Hubbard*, [1901] P. 157; 70 L.J.P. 34; 84 L.T. 441; 27 Digest 520, 5623.

(10) *Bosworthick v. Bosworthick*, [1927] P. 64; 95 L.J.P. 171; 136 L.T. 211; Digest Supp.

APPLICATION for the variation of a post-nuptial settlement.

- The wife, having obtained a decree of divorce, sought to vary a bond on the ground that it was a post-nuptial settlement within the meaning of the Matrimonial Causes Act, 1950, s. 25. The bond, which was dated Aug. 30, 1950, referred to a deed of transfer of the same date whereby the husband and the wife jointly transferred to the wife alone, in consideration of the sum of £1,500, hotel premises which they had bought in 1947 in their joint names. The wife had paid to the husband £550 of this sum, and by the bond she agreed to pay the remainder by specified monthly instalments. The husband contended that the bond was not a post-nuptial settlement within the meaning of s. 25, and, therefore, the registrar had no jurisdiction to vary it.

John Gardner for the wife.

Tolstoy for the husband.

Cur. adv. vult.

- Oct. 24. **PEARCE, J.**, read the following judgment. In this case the wife is applying for a variation of a post-nuptial settlement under the Matrimonial Causes Act, 1950, s. 25, which reproduces s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, and a similar provision in earlier Acts. The parties were married in 1920. There is a son of fifteen and an adopted son now grown up. In July, 1947, they bought premises at Willesden for £5,000 in their joint names and together carried on a private hotel there. The wife paid £1,200 of the purchase price and the balance was raised on mortgage. It is agreed by both sides that that purchase was a post-nuptial settlement within the decision of *Smith v. Smith* (1). The marriage became unhappy. In March, 1950, they agreed that they would separate and that the wife would have the hotel business for herself and pay the husband £1,500 by instalments. She then paid him £550 down as part of the £1,500 and (to use the husband's own words in his affidavit) "thereupon I left the hotel as arranged." On Aug. 30, 1950, they signed two documents. One was a deed (to which the mortgagees were also a party) by which "in consideration of the sum of £1,500," the receipt of which was acknowledged, the husband and wife jointly transferred the premises and the liabilities under the mortgage of July, 1947, to the wife alone. The husband was released from obligations and covenants in the mortgage except the covenants for title to and assurances of the property, but guaranteed her future obligations under it. The other document was a bond by the wife to pay £950 by instalments of £16 13s. 4d. each month. The recitals of the bond referred to the deed of transfer, to the fact that the consideration for the transfer was £1,500, to the agreement that it should be paid by instalments of £550 down and £16 13s. 4d. each month, and to the fact that £550 had already been paid. In May, 1951, the wife obtained a divorce on the ground of the husband's adultery. She then applied to vary the bond as a post-nuptial settlement so as to extinguish or diminish her future liability to pay to the husband the monthly instalments.

- There is considerable dispute on the merits between the parties. The preliminary point of law was taken before the registrar that he had no jurisdiction to consider a variation since the transaction was not a post-nuptial settlement. That point is referred to me. Counsel for both parties agree that it has no great practical effect if the husband has any means. If the registrar, after considering what is financially just between the parties on the merits, thinks that the payments are unjust in the present situation, he can, even though he has no jurisdiction to vary the bond, order the husband to pay instalments equal to those payable under it. The deed would then for practical purposes be ineffective. Counsel for the wife, relying on *Smith v. Smith* (1) and *Halpern v. Halpern* (2),

argues that the transaction in the deeds of Aug. 30, 1950, is a "post-nuptial settlement" within the meaning that those and previous cases have given to those words. He also argues that the transaction amounts to a deed of separation between the parties and, as such, amounts to a post-nuptial settlement. Counsel for the husband argues that I must disregard the admitted agreement to separate and all the other external circumstances except the fact that the parties were married and had two children, that I must look at the deeds alone, and that the deeds can only be post-nuptial settlements if they satisfy two necessary tests, *viz.*, they must (a) refer to and be identifiable with the marriage, and (b) they must make provision for a spouse. He contends that these deeds do not refer to the marriage or make provision for a spouse, since the repayment of a debt is not the making provision for a spouse. Further he argues that this is not a separation deed, and, even if it is, it does not become a post-nuptial settlement unless it satisfies the above tests.

A large number of cases have been cited to me, all relevant, but none of them dealing with circumstances very similar to those in this case. The principles to be deduced from the earlier cases are set out clearly in *Prinsep v. Prinsep* (3), *Smith v. Smith* (1), *Lort-Williams v. Lort-Williams* (4) and *Halpern v. Halpern* (2). It is clear that the words "post-nuptial settlement" are to be given a liberal construction wholly different from the more restricted meaning that would be given to them in a conveyancing instrument or in other contexts. In *Prinsep v. Prinsep* (3) HILL, J., considered whether the settlement in that case was a post-nuptial settlement which could be varied by the court. In a passage which has often been approved, and never, I think, rejected, he said ([1929] P. 232):

"Is it upon the husband in the character of husband or in the wife in the character of wife, or upon both in the character of husband and wife? If it is, it is a settlement on the parties within the meaning of the section [s. 192 of the Act of 1925]. The particular form of it does not matter. It may be a settlement in the strictest sense of the term, it may be a covenant to pay by one spouse to the other, or by a third person to a spouse. What does matter is that it should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state."

In *Smith v. Smith* (1) DENNING, J., said ([1945] 1 All E.R. 586) that the principle that runs through the cases is:

"... that where a husband makes a continuing provision for the future needs of his wife in her character as a wife, which is still continuing when the marriage is dissolved, the provision is a 'settlement' which can be brought before the court to see whether the provision should continue now that she has ceased to be a wife. The same applies to a provision by a wife for her husband or by each or either for both. The provision usually takes the form of periodical payments either with the intervention of trustees as in an ordinary marriage settlement, or without them as in a separation deed or a bond; but it may take other forms. The transfer of an investment into a wife's name whether it be a house or shares, or an annuity, seems to me to be in its nature just as much a continuing provision for her future needs as is a periodical payment."

Counsel for the husband relies on *Prinsep v. Prinsep* (3) and *Melwill v. Melwill & Woodward* (5) as showing that I must not take account of the admitted facts of the agreement to separate or of the circumstances in which the hotel was bought, which circumstances admittedly bring the purchase of the hotel within the definition of a post-nuptial settlement for the purposes of s. 25 of the Act of 1950. In *Prinsep v. Prinsep* (3) HILL, J., said ([1929] P. 236):

"On the question whether a settlement is a settlement within s. 192 [of the Act of 1925], the motive of the settlor seems to me immaterial, except so far as it is given effect to by the terms of the deed."

In *Melville v. Melville & Woodward* (5) LORD HANWORTH, M.R., said ([1930] P. 173):

"I do not think it possible to accept the view that one must ascertain the intention of the lady from exterior circumstances. I think one ought to look at the terms of the settlement itself."

ROMER, L.J., said (*ibid.*, 179):

A "In my opinion, one is not entitled to regard the motive with which settlements are entered into; and in deciding the question whether a settlement is an ante-nuptial settlement or a post-nuptial settlement, that question must be decided by reference to the settlement alone, and not by any consideration of the motives which prompted it."

B Those three *dicta* were directed to arguments of counsel in the cases in question that in the particular circumstances it was unlikely that the respective settlors wished to benefit the petitioners. In those cases there were deeds which clearly constituted settlements and the motives of the settlor were held to be irrelevant in considering the effect of those deeds. I do not think the *dicta* were intended to lay down the principle that in ascertaining whether any transaction is a post-nuptial settlement under this section the court must shut its eyes to the surrounding circumstances. So to hold would be in strange contrast with the policy of the court, so clearly laid down in the cases, that the words of the section [s. 192 of the Act of 1925, and now s. 25 of the Act of 1950] must be construed liberally.

In *Joss v. Joss* (6) HENN COLLINS, J., said ([1943] 1 All E.R. 104):

D "There are no such indications expressed on the face of this settlement. But does that conclude the matter? I think not. It is the substance and not the form which must be regarded, and for the purpose of construing the settlement, I must put myself in the position of the settlor, and take as, in effect, recited, the relevant facts, including his then existing marriage and the existing issue of that marriage."

E In *Gunner v. Gunner & Stirling* (7) WALLINGTON, J., said ([1948] 2 All E.R. 778):

"There may be other accompanying documents, or there may be evidence of oral declarations and of suggestions made and accepted and of facts which show that, whatever the terms of the policy may be when

F construed strictly, the intention of the parties is to create, in effect, a settlement variable under this section . . ."

It is true that in that case the document under consideration was not a deed but a policy. In some cases (such as *Halpern v. Halpern* (2)) it seems clear that the judges have taken surrounding circumstances into account in arriving at their decision.

G In my opinion, I am entitled, as HENN COLLINS, J., did in *Joss v. Joss* (6), to put myself in the position of the settlor and take the relevant facts as being recited in the deed, not for the purpose of inquiring into the motive of either party or of contradicting the deed by consideration of some motive that I might infer from such facts, but merely to find out what was the substance of the transaction. Those facts would, in my view, include the fact that the purchase of the hotel was a post-nuptial settlement and the fact that the parties had agreed to separate, and had in fact separated, as part of the transaction. In *Brown v. Brown* (8) and in *Hubbard (otherwise Rogers) v. Hubbard* (9) there is some support for the contention of counsel for the husband that the matter has been concluded once and for all by the wife buying out the husband for £1,500, and that, therefore, there cannot be here an existing marriage settlement. In *Smith v. Smith* (1) DENNING, J., said that he found those two cases hard to reconcile with the principle that runs through the rest of the cases on this subject. He then

defined that principle in the passage ([1945] 1 All E.R. 586) which I have already quoted. I find the same difficulty in regard to *Brown v. Brown* (8) and *Hubbard (otherwise Rogers) v. Hubbard* (9), but the case before me is, I think, distinguishable from them. In *Brown v. Brown* (8) one spouse had bought an annuity for the other by payment of a lump sum and had no further liability or interest in the transaction. In *Hubbard (otherwise Rogers) v. Hubbard* (9) the husband had assigned a house to a trustee for the wife and the trustee had assigned it to her absolutely. But in the case before me the wife will, for some years to come, have to make payments under the bond and the husband will remain liable as guarantor in respect of the wife's obligations under the mortgage, if she should make default. I do not think it can properly be said that the transaction is wholly over and done with on either side and that the original post-nuptial settlement constituted by the purchase of the hotel has ceased to exist.

The bond must be taken in connection with the transfer (to which it specifically refers and which in turn refers to the original conveyance to both spouses). A bond can constitute a post-nuptial settlement: see *Bosworthick v. Bosworthick* (10). The fact that the payments under it are not an annuity, but will come to an end in some years, does not, in my view, prevent this bond from having that character. The two deeds are one transaction whereby the parties, on agreeing to separate, arranged that the husband should make some provision for his wife by transferring to her the hotel and guaranteeing her future obligations and that in return she should make some continuing (though not permanent) provision for him. It is not suggested that there was, nor was it likely that there would be, any precise valuation of what his saleable rights in the hotel might be. It was an adjustment of their financial affairs that seemed just to them and was agreed. It is argued that it was a purely business transaction and that it was as partners, not as spouses, that they signed these deeds. I do not agree. The matter with which they were then dealing was a post-nuptial settlement. They had been conducting the hotel as husband and wife, not as mere business partners. That arrangement had to be altered because as spouses they were unable to continue living together. In the resulting transaction under which they made the re-arrangement they did not lose their capacity of spouses. It was really in essence a "husband and wife" transaction. Even if it was predominantly a business transaction and related in a lesser degree to the marriage, it would, I think, on the authorities be a post-nuptial settlement. But in this case the transaction dealt predominantly with their relationship as spouses rather than as business partners. I do not accept the argument of counsel for the wife that the deed or deeds can be regarded as a separation deed, but, as I am in his favour on his first point, there is no need to consider that argument in detail. Accordingly, I hold that the bond is a post-nuptial settlement. The registrar has jurisdiction to vary it if after consideration of the merits he thinks fit.

Order accordingly.

Solicitors: *Lee, Ockerby & Co.* (for the wife); *Edgar H. Hiscocks* (for the husband).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

R. v. FOLKESTONE AND AREA RENT TRIBUNAL.

Ex parte SHARKEY.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Pilcher, JJ.),
October 11, November 2, 1951.]

*Rent Control—Rent tribunal—Jurisdiction—Security of tenure—Reference to
tribunal after notice to quit—Furnished Houses (Rent Control) Act, 1946*
(c. 34), s. 5—*Landlord and Tenant (Rent Control) Act, 1949* (c. 40), s. 11 (1).

On May 4, 1951, a landlord gave the applicant, a weekly tenant of two furnished rooms, notice to quit expiring on May 13. On May 10 the applicant applied to the rent tribunal to have the rent reduced and for an extension of the period within which the notice to quit should not take effect. The tribunal reduced the rent, but refused to entertain the application as to security of tenure. On a motion by the applicant for an order of *mandamus*,

HELD: reading together s. 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949, and s. 5 of the Furnished Houses (Rent Control) Act, 1946, as required by s. 11 (5) of the Act of 1949, s. 11 (1) of the Act of 1949 was not intended to create a power, but only extended the power which the tribunal had under s. 5 of the Act of 1946, and, therefore, s. 11 (1) did not give the tribunal power to hear an application by the tenant to extend the period within which a notice to quit should not take effect where the notice to quit had been served by the landlord on the tenant before the tenant referred the tenancy to the tribunal.

Francis Jackson Developments, Ltd. v. Hall ([1951] 2 All E.R. 74), distinguished.

FOR THE FURNISHED HOUSES (RENT CONTROL) ACT, 1946, s. 5, see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1089; and FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 11, see *ibid.*, p. 1107.

Cases referred to:

(1) *International Bridge Co. v. Canada Southern Ry. Co.* *Canada Southern Ry. Co. v. International Bridge Co.*, (1883), 8 App. Cas. 723; 42 Digest 664, 745.

(2) *Hart v. Hudson Brothers, Ltd.*, [1928] 2 K.B. 629; 97 L.J.K.B. 804; 139 L.T. 663; 92 J.P. 170; 44 Digest 133, 26.

(3) *Phillips v. Parnaby*, [1934] 2 K.B. 299; 103 L.J.K.B. 575; 151 L.T. 400; 98 J.P. 383; Digest Supp.

(4) *Francis Jackson Developments, Ltd. v. Hall*, [1951] 2 All E.R. 74; [1951] 2 K.B. 488; 115 J.P. 384.

MOTION for an order of *mandamus* directed to the respondent rent tribunal commanding them to hear an application by the applicant for an extension of the period within which a notice to quit the tenancy of two furnished rooms should not take effect, pursuant to s. 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949. The tribunal refused the application on the ground that they had no jurisdiction under s. 11 because the reference of the tenancy to the tribunal was made after the notice to quit had been given.

D. G. A. Lowe for the applicant.

J. P. Ashworth for the tribunal.

Cur. adv. vult.

Nov. 2. LORD GODDARD, C.J.: At all material times the applicant was the lessee on a weekly tenancy of two furnished rooms at No. 67, Rancorn Road, Margate. On May 4, 1951, he was served by the lessors with a notice to quit on May 13 or on such other date seven days after the service of the notice on which his tenancy could lawfully be determined. On May 10, that is to say, after he had been served with the notice to quit, but before the period fixed by

the notice had expired, he referred his contract of tenancy under s. 2 of the Furnished Houses (Rent Control) Act, 1946, to the Folkestone and Area Rent Tribunal with a view to getting his rent reduced. On the same day he also applied to the same tribunal for an extension of the period within which the notice to quit should not have effect. He purported to make this application under s. 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949. Both applications were heard by the tribunal on June 5. The applicant was successful in getting his rent reduced from 30s. to 15s. per week, but the tribunal refused to deal with his application for an extension of the period within which the notice to quit served on him should not have effect, holding that the provisions of s. 11 of the Act of 1949 did not apply to the case. It is in respect of the refusal of the tribunal to deal with this second matter that the applicant moves this court to grant an order of *mandamus*.

Section 11 (1) of the Act of 1949 is in the following terms:

"Where a contract to which the Act of 1946 applies has been referred to a tribunal under that Act, and the reference has not been withdrawn, the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired, apply to the tribunal for the extension of that period: Provided that an application shall not be made under this section where the tribunal have directed, under para. (a) of the proviso to s. 5 of the Act of 1946, that a shorter period shall be substituted for the period of three months specified in that section as the period before the end of which a notice to quit shall not have effect."

Sub-section (5) provides that

"This section shall be construed as one with the Act of 1946 . . . " and it will be observed that the marginal note to the section is "Power of tribunal under Act of 1946 to extend security of tenure." The marginal note to s. 5 of the Furnished Houses (Rent Control) Act, 1946, is "Provision as to notice to quit served after reference to tribunal." That section provides:

"If, after a contract to which this Act applies has been referred to a tribunal by the lessee or by the local authority (either originally or for re-consideration), a notice to quit the premises to which the contract relates is served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter, the notice shall not take effect before the expiration of the said three months: Provided that— (a) the tribunal may, if they think fit, direct that a shorter period shall be substituted for the said three months in the application of this section to the contract that is the subject of the reference; and (b) if the reference is withdrawn, the period during which the notice is not to take effect shall end on the expiration of seven days from the withdrawal of the reference."

It appears to be reasonably clear that the object of s. 5 in the Act of 1946 is to deal with the case where the landlord, by way of retaliation for his tenant having taken his case to the tribunal, serves him with a notice to quit. The Act provides that, if a notice to quit is served after a reference, whether before or after the decision of the tribunal, the notice shall not take effect before the expiration of three months unless the tribunal thinks fit to substitute a shorter period than three months. Under the Act of 1946 the maximum security that the tenant could get was three months, and by the clear words of the section only where the notice to quit was served after the reference. In my opinion, s. 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949, was intended to give the tribunal power to extend that period of three months, but, reading the two sections together, I think that that power can only be exercised where the notice to quit was served after the reference to the tribunal. I think the opening words of s. 11 (1),

"Where a contract to which the Act of 1946 applies has been referred to a tribunal under that Act . . ."

A mean no more than where the situation has arisen to which s. 5 of the Act of 1946 applies. It is intended, not to give a new power to a tribunal, but only to extend the power already given by the Act of 1946. In my opinion, therefore, the tribunal came to a right decision and the application for an order of *mandamus* must be refused.

B HILBERY, J.: The question which has to be answered is whether, on a proper construction of s. 11 of the Act of 1949, the tribunal was right in holding that that section did not give it power to hear an application by the tenant to extend the period at the end of which a notice to quit would expire, where the notice to quit which was the subject of that application had been served by the landlord on the tenant before the tenant referred his tenancy to the tribunal. It was argued for the applicant that the words in s. 11 (1),

C "the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired"

D were wide enough to include a case where the notice to quit in question had been served, as in the present case, before the reference of the tenancy to the tribunal. It was said that, if Parliament had otherwise intended, it would be expected that the language of the opening words would be the same as the plain words used in s. 5 of the Furnished Houses (Rent Control) Act, 1946, the section which originated the statutory extension of the contractual period of a notice to quit. By s. 11 (5) of the Act of 1949 it is expressly enacted:

"This section shall be construed as one with the Act of 1946, and references in this section to that Act shall be construed as references to that Act as extended by s. 6 of this Act."

E The canon of construction where two Acts are to be read together was stated by the EARL OF SELBORNE, L.C., in *International Bridge Co. v. Canada Southern Ry. Co.* *Canada Southern Ry. Co. v. International Bridge Co.* (1), in the passage of his speech where, referring to two Acts there in question, he said (8 App. Cas. 727):

F "It is to be observed that those two Acts are to be read together by the express provision of the seventh and concluding section of the amending Act; and therefore we must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy, making it necessary to hold that the later Act has to some extent modified something found in the earlier Act."

G That canon of construction was applied to the Weights and Measures Acts of 1878 and 1926 in *Hart v. Hudson Brothers, Ltd.* (2) and in *Phillips v. Parnaby* (3). It is the canon applicable in this case.

H Applying it, and, therefore, reading s. 11 of the Act of 1949 and s. 5 of the Act of 1946 as if they were in one Act, it becomes reasonably clear that s. 11 (1) is not intended to create a power, but is only extending a power which a tribunal would have when acting under s. 5 of the Act of 1946. In other words, where, after a reference to the tribunal under the earlier Act, the lessor had given the lessee a notice to quit before the decision of the tribunal was given or within three months thereafter and the notice to quit was, therefore, not to take effect before the expiration of those three months, the tribunal under the earlier Act could not alter that period except by shortening it, but in future such a tribunal in those circumstances by s. 11 (1) was given power to extend the period. That this is the right construction is, I think, shown by the wording of the whole of s. 11 (1). In the first place, the opening words

"Where a contract to which the Act of 1946 applies has been referred . . ."

suggest that what is thereafter being provided is to follow after a contract has been referred. In the next place, the new power which is given to the lessee by the words which follow expressly deal (*inter alia*) with a situation which could only exist under and by virtue of s. 5 of the Act of 1946 and because that section is continuing in force and of full effect. The section continues:

" . . . the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired, apply to the tribunal for the extension of that period."

Three situations are there being covered by the new section. The security given by the old Act ended three months after the decision unless the tribunal had shortened that period. After the three months the extension ended, the landlord could give a contractual notice to quit, and the tribunal had no power to extend the period given by the contractual notice. Section 11 (1), therefore, begins by giving the tribunal acting in a reference pending before it under the provisions of s. 5 of the Act of 1946 power to extend the period given by the contractual notice to quit. Next, it gives to such a tribunal so acting power to extend the statutory three months given to the tenant who had referred his tenancy to the tribunal under the Act of 1946, so as to protect him from a notice to quit at the end of three months, but leaves alone the old power which the tribunal already had to shorten the statutory extension. Lastly, such a tribunal is given power to give more than one extension. There is no manifest discrepancy between s. 11 (1) of the Act of 1949 thus construed and s. 5 of the Act of 1946. Indeed, everything in s. 11 (1) thus construed only furthers the purpose of the section of the earlier Act, which was to give protection to a tenant who had referred his tenancy contract to a tribunal against a landlord using his contractual power in retaliation to get rid of such a tenant.

The further powers given by s. 11 (1) enable the tribunal to extend the period given by a notice to quit served after a tenant's reference to the tribunal if he applies at any time during the currency of such a notice, even after the decision of the tribunal on the reference as to rent has been given. Reliance was placed on a statement made in the course of the judgment in the Court of Appeal given by DENNING, L.J., in *Francis Jackson Developments, Ltd. v. Hall* (4) that the application made to the rent tribunal in that case was effective. The Court of Appeal was only considering whether the objection made to the application was an objection which rendered the application ineffective and the court was holding it did not. The point which we are deciding was not before or decided by the court in that case. In my opinion, in the case before us the tribunal rightly decided that it had no power to hear the applicant's application and this motion for an order of *mandamus* should be dismissed.

PILCHER, J.: We were told by counsel that a number of conflicting decisions had already been given by rent tribunals throughout the country on the precise point which we have had to consider in this case. This is not surprising, because, speaking for myself, I have felt the greatest difficulty in making up my mind as to the proper meaning to be attached to s. 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949.

There is, in my view, a great deal to be said for the argument that the sub-section, which has to be read in conjunction with s. 5 of the Furnished Houses (Rent Control) Act, 1946, was intended not only to extend the automatic security conferred by s. 5 of the Act of 1946 on lessees served with a notice to quit after they had made a reference, but also to extend security of tenure to lessees who make a reference after receiving notice to quit, provided that they make application during the currency of the notice to quit as provided by the sub-section. The words in the sub-section which provide for the time at which the notice

shall take effect, namely, "whether by virtue of the contract, of the Act of 1946 or of this section" do not, in my view, assist the argument of either side. The wording of the marginal note to s. 11 would, in my view, apply equally well whether the section is given wider or more limited application. I was impressed by the argument advanced on behalf of the applicant that, if it had been intended to restrict the application of the section to cases in which the lessee already had an automatic, but limited, security of tenure under s. 5 of the Act of 1946, nothing would have been easier than to say so, as was done in that Act. I was also impressed with the fact that the sub-section provides that the lessee may "at any time when a notice to quit has been served" and not expired, make application to the tribunal. The words "at any time" are of the most general character, and would, if read literally, be wide enough to cover a case in which the service of notice to quit preceded the date of the reference.

Feeling, as I did, that the wording of s. 11 (1) was, to say the least, ambiguous, I did not feel that it was proper to dismiss entirely from consideration the case of *Francis Jackson Developments, Ltd. v. Hall* (4), to which we were referred by counsel for the applicant. In that case the Court of Appeal were considering an appeal by landlords which involved, among other matters, determination of the point whether an application by a tenant under s. 11 (1) of the Act of 1949 for security of tenure was a nullity. The facts of the case disclosed that the notice to quit had been given before the tenant made a reference for reduction of rent under the Act of 1946. On behalf of the landlord it was argued that the application was a nullity on the ground that it was bad in point of form. This argument was rejected. The point was not, however, taken that the tribunal had no right to entertain an application under s. 11 (1) by a lessee who had received notice to quit before he made his reference. Giving the judgment of the court, DENNING, L.J., said ([1951] 2 All E.R. 78):

"The application of Sergeant Perkins on Dec. 7, 1950, was, in our opinion, an effective application under s. 11 of the Act of 1949, and gave him security of tenure until the application was heard or withdrawn."

While I recognise that the question as to the right of a lessee to make an application under s. 11 (1) of the Act of 1949 when his reference to a rent tribunal has been made after receiving notice to quit does not appear to have been argued in this case, I feel bound to pay some attention to the fact that the Court of Appeal did not itself take this point and appears to have assumed that such an application by a tenant was effective. But though the considerations to which I have referred have weighed with me, I respectfully agree with the judgments already delivered, that there is very considerable force in the view that the opening words of s. 11 (1) were intended to govern the whole section and to restrict its application to cases already covered by s. 5 of the Act of 1946. In my view, the meaning of s. 11 (1) is by no means clear. If I had been called on to construe it by myself, I should, I think, have felt some hesitation in accepting the argument for the respondents. In view, however, of the ambiguity of the wording of the section and the doubts which I have felt I do not feel justified in differing from the clear and decided views expressed by LORD GODDARD, C.J., and HILBERY, J.

Application refused.

Solicitors: *Jaques & Co.*, agents for *Malcolm Borg & Borg*, Margate (for the applicant); *Solicitor, Ministry of Health* (for the tribunal).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

DEAN v. BRUCE.

[COURT OF APPEAL (Somervell, Denning and Hodson, L.JJ.), October 26, 1951.]

Rent Restriction—Standard rent—Contractual tenancy at rent lower than standard rent—Termination of contractual tenancy—Right of landlord to increase rent to amount of standard rent—Estoppel—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (1).

In July, 1942, a landlord let certain premises, the standard rent of which was stated in the rent book to be £36 8s. a year. In October, 1950, the landlord discovered that the true standard rent of the premises was £60. He gave the tenant notice to quit, thus terminating the contractual tenancy, and demanded rent in future at the rate of £60. The tenant contended that the landlord was estopped from demanding the increased rent, and that he (the tenant) was entitled to remain in possession as statutory tenant at the old rent.

HELD: a term of the original contract of tenancy whereby the rent charged would be less than the standard rent was not a term "consistent with the provisions of" the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, within the meaning of s. 15 (1) of that Act, and, therefore, the tenant, on retaining possession of the house, was not entitled under the sub-section to the benefit of that term.

Dicta of MAUGHAM, L.J., in Phillips v. Copping ([1935] 1 K.B. 25), and 2 All E.R. 421), applied.

Dictum of DENNING, L.J., in Combe v. Combe ([1951] 1 All E.R. 769), explained.

Per DENNING, L.J.: Once a contractual tenancy is at an end and the tenant remains in possession by virtue of the Rent Acts, the rent of the house is regulated by the Acts and is not affected by an estoppel.

AS TO STANDARD RENT, see HALSBURY, Hailsham Edn., Vol. 20, p. 312, para. 369; and FOR CASES, see DIGEST, Vol. 31, pp. 564-566, Nos. 7117-7132, and Digest Supps.

Cases referred to:

- (1) *Duffy v. Palmer*, [1924] 2 K.B. 35; 93 L.J.K.B. 548; 131 L.T. 401; 31 Digest 567, 7139.
- (2) *Phillips v. Copping*, [1935] 1 K.B. 15; 104 L.J.K.B. 78; 152 L.T. 175; Digest Supp.
- (3) *Regional Properties, Ltd. v. Oxley*, [1945] 2 All E.R. 418; [1945] A.C. 347; 114 L.J.K.B. 473; 173 L.T. 201; 2nd Digest Supp.
- (4) *Combe v. Combe*, [1951] 1 All E.R. 767; [1951] 2 K.B. 215.

APPEAL by the landlord from an order of His Honour JUDGE CROTHWAITE made at Liverpool County Court on July 4, 1951, dismissing an action for possession for non-payment of rent.

The tenant contended that the landlord, having represented at the beginning of the tenancy that the standard rent of the premises was £36 8s. a year, he was estopped from claiming that the standard rent was otherwise than that figure.

I. H. M. Jones for the landlord.

G. Newman for the tenant.

SOMERVELL, L.J.: On July 6, 1942, the landlord let premises to the tenant at 14s. a week, the standard rent being shown accordingly in the rent book as £36 8s. There were various increases of rates which entitled the landlord to increase the rent under the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 3 (2), and at the material date the rent had been increased to 14s. 9d. In October, 1950, it was found by the landlord that a mistake had been made and that the original standard rent had been £60

instead of £36 8s. Notice to quit was served on the tenant, which brought the contractual tenancy to an end, and at the same time notice of increase of rent to the new standard rent was given. If the tenant desired to remain, as he did, in occupation of the premises, he remained as a statutory tenant.

The point taken was contained in para. 5 of the defence as follows:

A "The defendant [tenant] states that in or about July, 1942, the plaintiff [landlord] or his agent represented in writing to the [tenant] that the standard rent of the said premises was £36 8s. per annum, and, relying on this representation, the [tenant] became the tenant of the said premises and the [landlord] is now estopped from claiming that the standard rent is otherwise than as aforesaid."

B Section 15 (1) of the Act of 1920, which states the conditions of a statutory tenancy, provides:

C "A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled to give up possession of the dwelling-house only on giving such notice as would have been required under the original contract of tenancy, or, if no notice would have been so required, on giving not less than three months' notice."

D One can understand the argument, which succeeded in the Divisional Court in *Duffy v. Palmer* (1), that if, under a contract of tenancy, the agreed rent is £10 whereas the standard rent is £15, the tenant can maintain that under s. 15 (1) the rent of £10 is the figure the benefit of which he is entitled to rely on as statutory tenant. But that was negatived by this court in *Phillips v. Copping* (2) when it was decided that where a dwelling-house has been let at a rent lower than the standard rent a landlord is entitled, on terminating the tenancy, to give notice raising the rent to the standard rent. MAUGHAM, L.J., referred to the provisions of s. 15 (1) and to the first three sections of the Act of 1920 and said ([1935] 1 K.B. 25):

F "They cannot mean that a tenant is entitled to hold the premises at a rent lower than the standard rent. If that had been intended it would have been easy to express it in clear terms, and I think s. 1, s. 2 and s. 3 indicate the contrary. In my opinion this right of a landlord on the expiration of a legal tenancy to raise the rent to the standard rate was his right at common law and it has not been interfered with by the Act. According I agree that *Duffy v. Palmer* (1) was wrongly decided . . . "

G There are also words which assist in *Regional Properties, Ltd. v. Oxley* (3). That was a case in which the figure in the original contractual agreement was the standard rent, but there was a provision for reduction if it was paid punctually, and the question was whether that provision for a rent below the standard rent if it was paid punctually was one the benefit of which the tenant, when he became statutory tenant, could claim. The House of Lords held that he could not do so. LORD RUSSELL OF KILLOWEN said ([1945] 2 All E.R. 421):

H "The proviso in question cannot, as it stands, fit into the statutory tenancy at an annual rent of £92 1s. 6d., but apart from this verbal difficulty, I am of opinion that any term of the original tenancy which, if imported into the statutory tenancy would or might in any way affect the amount of the standard rent which is fixed by the Act, cannot be treated as a term which is consistent with the provisions of the Act . . . I think the true question to ask oneself in a case like this is not whether the term is contained in a *reddendum* but: Will the importation of this term into the statutory tenancy affect in any way the amount of the standard rent which

the statute fixes? If it does it is not consistent with the provisions of the Act, and it is not within s. 15 (1)."

Those cases show that provisions in a tenancy agreement under which the contractual rent is, or may be, less than the statutory rent are inconsistent with the provisions of the Act, and are not, therefore, provisions to the benefit of which the tenant is entitled. It seems to me that what applies to an express provision of the contractual tenancy must apply *a fortiori* to a representation which, it is said, led to the contractual tenancy being entered into. The representation here is in the rent book, and from one point of view might well have been regarded as a provision of the tenancy. But its effect during the period of the contractual tenancy we have not to consider one way or the other. It seems to me that any legal effect which it has is exhausted when the contractual tenancy came to an end and the tenant wished to remain under and in accordance with the provisions of the Rent Acts. One of those provisions is that he is liable to pay the standard rent. For these reasons I think this appeal should be allowed.

DENNING, L.J.: The only way in which counsel for the tenant could seek to support the judgment was on the ground of an estoppel. As he relied on my judgment in *Combe v. Combe* (4) I ought, perhaps, to explain that I was there only considering what is sometimes called a promissory or equitable estoppel. In the present case, if there was an estoppel at all, it would be a simple estoppel on the ground that the landlord made a representation of fact that the standard rent was £38 a year on which the tenant relied. But I do not think that any estoppel applies here, for this reason. Once the contractual tenancy is at an end and the tenant remains in possession by virtue of the statutes, the rent of the house is regulated by the statutes and is not affected by terms or conditions or estoppels. On giving proper notice the landlord can raise the rent to the full amount permitted by the statute. I agree that this appeal should be allowed.

HODSON, L.J.: I agree.

Appeal allowed.

Solicitors: *Hyman Isaacs, Lewis & Mills*, agents for *Samuel Dean & Co.*, Liverpool (for the landlord); *Stanley & Co.*, agents for *I. Levin & Mannheim*, Liverpool (for the tenant).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

Re HAVES (deceased). HAVES AND ANOTHER *v.* HAVES AND OTHERS.

[CHANCERY DIVISION (Harman, J.), October 18, 1951.]

Satisfaction—Of debt by legacy—Annuity under deed secured on realty—Bequest of annuity of similar amount—No direction to pay debts.

On July 24, 1944, after the presentation by his wife of a petition for the dissolution of their marriage, the testator entered into a deed, described as a settlement, by way of compromise of the wife's claims for alimony and maintenance, whereby he covenanted with the wife that he or "his executors or administrators will as from Feb. 21, 1944, and until the death or marriage again of the wife pay to the wife the weekly sum of £3 on the Monday in every week." By a conveyance of even date (recited in the settlement) the testator conveyed to trustees certain yearly rent-charges on trust to sell the same and to hold the proceeds as security for the due performance of the testator's covenants. The wife covenanted not to claim alimony or maintenance against the testator other than was provided for by the settlement. On Oct. 11, 1944, the marriage was

dissolved, and on Nov. 11, 1944, the testator re-married. By his holograph will dated June 23, 1947, the testator, who died on Feb. 16, 1950, made certain specific and pecuniary bequests, devised his house to his second wife for her life or widowhood, and further provided: "To my wife Doris [the second wife] £5 a week as long as she remains my widow and if she re-marries she then receives £2 a week for life To Daisy Haves [his former wife] I give £3 a week so long as she remains unmarried." There was no further mention of the testator's former wife in the will, which appointed trustees but no executors, and gave no directions as to the payment of debts. The will failed to dispose of the capital of the testator's residuary estate.

HELD: the annuity bequeathed to the testator's former wife, being charged on the corpus of the estate, was as great a benefit as the covenanted annuity, and, therefore, there being nothing in the will to rebut the presumption, the testamentary annuity must be taken to be in satisfaction of, and not in addition to, the covenanted annuity.

AS TO SATISFACTION OF A DEBT BY A LEGACY, see HALSBURY, Hailsham Edn., Vol. 13, pp. 171-175, paras. 158-160; and FOR CASES, see DIGEST, Vol. 20, pp. 478-480, Nos. 2033-2049.

Cases referred to:

- (1) *Talbott v. Shrewsbury (Duke)*, (1714), Prec. Ch. 394; Gilb. Ch. 89; 2 Eq. Cas. Abr. 352; 24 E.R. 177; 20 Digest 480, 2041.
- (2) *Re Manners*, [1949] 2 All E.R. 201; [1949] Ch. 613; [1949] L.J.R. 1574; 2nd Digest Supp.
- (3) *Horlock v. Wiggins. Wiggins v. Horlock*, (1888), 39 Ch.D. 142; 58 L.J.Ch. 46; 59 L.T. 710; 20 Digest 481, 2064.

ADJOURNED SUMMONS to determine *inter alia* whether the bequest in the will of the testator to his former wife, Daisy Haves, of £3 per week so long as she remained unmarried was (a) in satisfaction of the weekly sum of £3 payable on the Monday in every week until her death or re-marriage under a settlement dated July 24, 1944, and made between the testator, his said former wife, and two trustees, or (b) in addition to the weekly sum under the settlement.

R. C. Seddon for the plaintiffs, administrators and trustees.

H. C. Easton for the fourth and fifth defendants, the widow and the child of the testator's second marriage, interested under the will and on intestacy.

Ferns for the sixth defendant, the testator's former wife.

G. M. Maddocks, K. Backhouse and D. B. Mailard for other persons beneficially interested in the estate.

HARMAN, J.: This testator was married twice. He had children by the first wife and one child by the second. The first marriage was dissolved in 1944 on a petition presented by the wife. On that occasion, by way of compromise of the wife's pending claim to alimony and maintenance, a deed of covenant was entered into between the parties and two trustees, who were two children of the first marriage. After reciting the presentation of the petition, that the parties had agreed to compromise the wife's claim for alimony and for her future maintenance, and that the testator had conveyed certain real securities into the names of the trustees, the husband covenanted with the wife and the trustees that he or his personal representatives would, until the death or marriage again of the wife, "pay to the wife the weekly sum of £3 on the Monday in every week." In addition there was given to the wife a capital sum of £500, with which I need not concern myself, and it was declared that the trustees should stand possessed of the proceeds of any sale of the real securities as a security for the due performance by the husband, his executors or administrators, of the covenants on the part of the husband thereinbefore contained. In return, the wife covenanted with the testator that she would not, either in the proceedings or

otherwise, make any claim for alimony or maintenance against the husband otherwise than intended to be thereby and by the said conveyance of even date provided and secured. The deed was agreed by the wife to be a final settlement of her rights against him.

The testator's will, which is dated June 23, 1947, is in his own handwriting, and is a very curious and imperfect document. As I have construed it, it deals with his residuary estate, although he does not so describe it, but does not dispose of the ultimate capital of his residue, with the result that there is intestacy to that extent. The testator made a number of specific bequests of shares. He made a gift of money to his son by his second wife, and a gift of a house to the second wife during her widowhood. He then constitutes the residue, which he calls a trust fund, and goes on:

"To my wife Doris [his second wife] £5 a week as long as she remains my widow and if she re-marries she then receives £2 a week for life To Daisy Haves [his first wife] I give £3 a week as long as she remains unmarried."

That is the only mention of his first wife in the will. There are a number of other annuities and some legacies. There is no direction to pay debts and the will does not appoint executors.

The question is whether the will, being later than the deed of covenant, operates in satisfaction of the covenanted annuity. It is said that the presumption does not arise because the gift by the will is not so advantageous as the covenanted sum. The covenanted sum is £3 payable on the Monday in every week. The will provides for £3 a week payable from the testator's death, and it seems to me that so far the two provisions are the same, but the covenanted sum is supported by the real securities in the hands of the trustees as security for the due performance of the covenant. This fact is said to make the covenant a better right than that under the will, but, in my judgment, that is not so. The gift by will is of a plain annuity, which is, therefore, charged, not on any particular assets, but on the whole *corpus* of the testator's estate, including the real securities which under the deed are securities for the covenanted sum, and which, subject to due payment of that sum, fall into the residue of the testator's estate. It is not, therefore, right to say that that which is given by the will is not so good as that which is given by the deed.

That being so, it cannot be said that the presumption does not arise. This presumption goes back to *Talbott v. Shrewsbury (Duke)* (1). It is said in JARMAN ON WILLS, 7th ed., p. 1136, to be easily rebutted, and it is true that it has not been very much liked, and I think it is clear that in *Re Mannors* (2), which is the latest case on the subject, the court was not willing to apply the principle unless it felt bound to do so. In that case there was a provision about the payment of debts, which has already been held to be a very strong circumstance—even though the strength of it has, perhaps, diminished slightly in recent years—against that presumption. SIR RAYMOND EVERSHED, M.R., referring to *Horlock v. Wiggins* (3), said ([1949] 2 All E.R. 204):

"BOWEN, L.J.'s language is (39 Ch.D. 147): 'The will directs payment of the bequest after payment of the testator's just debts, and the £100 in the separation deed was a debt existing when the will was made.' In that passage BOWEN, L.J., clearly indicated that that circumstance is one which is of great importance, to put it no higher, in considering whether the rule applies or not."

That decision seems to have turned on the circumstance that there was a direction to pay debts, and that circumstance is absent here. I am told by counsel that they have not been able to find any case where the presumption has not operated in the absence of a direction of some sort to pay debts. However that may be, I think the real point here is whether the one provision

is as great as the other, because it seems to me that, if the presumption arises, there is nothing to rebut it in this will. In my judgment, the presumption does arise. If I were left free, I should suppose that the testator did not intend to double his payments to the lady who had been his wife, it is true, but who had divorced him and had agreed to accept £3 a week in full settlement of all her rights of maintenance. What he was thinking of when he made his will, whether he had forgotten for how long the covenant was to continue and imagined it would not subsist after his death, I do not know, but this is not a case where I feel that, if there were no presumption, I should come to the conclusion that he did not intend to satisfy his obligations by the disposition in his will. The inclination I have is the opposite, and, as that agrees with the presumption, I hold that there is satisfaction here of the debt by the legacy.

Order accordingly.

Solicitors: *Wm. Furness & Son*, Manchester (for the plaintiffs and all the defendants except the fourth and fifth); *A. L. Hamwee & Co.*, Manchester (for the fourth and fifth defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

Re ADOPTION APPLICATION No. 52/1951.

[CHANCERY DIVISION (Harman, J.), October 16, 17, 1951.]

Adoption—Residence in England—Application by wife of colonial civil servant—Applicant living with husband in Nigeria and returning to England for periods of leave—Intention to rejoin husband in Nigeria, with adopted infant, after obtaining order—Adoption Act, 1950 (c. 26), s. 2 (5).

An application for an adoption order under the Adoption Act, 1950, was made by a district officer in the colonial service and his wife. The husband's work involved his being permanently in Nigeria, except for three months' leave every fifteen months when he returned to England, his native country. The wife lived with the husband in Nigeria, returning to England with him when he came on leave. They usually stayed with his or her parents while in England, but they had recently purchased a house in England and they intended to live here permanently after the husband's term of service should come to an end, which, in the normal course, would be after seven years. Wishing to adopt an infant, they arranged with an adoption society for it to be put in their care when they returned to England in July, 1951. The application for the adoption order was made by the wife after the infant had been in her care and possession for three months, as required by s. 2 (6) (a) of the Act of 1950, the husband having been obliged to return to his duties in Nigeria. The wife intended to join the husband in Nigeria, taking the infant with her, as soon as possible after obtaining the order.

HELD: whether an applicant resided in England, within the meaning of s. 2 (5) of the Act of 1950, was in each case a question of fact; "resident," within the meaning of the Act, denoted some degree of permanence, and, while it did not necessarily mean that the applicant had his home in this country, it meant that he had his settled headquarters here; on the facts of the present case, the wife was not resident in England; and, therefore, under s. 2 (5) an adoption order could not be made in her favour.

FOR THE ADOPTION ACT, 1950, s. 2 (5) and (6), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 469.

Cases referred to:

- (1) *Ex p. Breull, Re Bowie*, (1880), 16 Ch.D. 484; 50 L.J.Ch. 384; 43 L.T. 580; 4 Digest 38, 322.

- (2) *Levene v. Inland Revenue Comrs.*, [1928] A.C. 217; 97 L.J.K.B. 377; 139 L.T. 1; 13 Tax Cas. 486; Digest Supp.
- (3) *Inland Revenue Comrs. v. Lysaght*, [1928] A.C. 234; 97 L.J.K.B. 385; 139 L.T. 6; *sub nom. Lysaght v. Inland Revenue Comrs.*, 13 Tax Cas. 511; Digest Supp.
- (4) *Re W.*, (1946), unreported.

ADJOURNED SUMMONS for an order authorising the applicants, a husband and a wife, to adopt an infant under the Adoption Act, 1950.

The husband having returned to his duties in the Nigerian Colonial Service before the application was heard, he abandoned his application. The wife remained in England and persisted, but, as she intended to join her husband in Nigeria as soon as possible after obtaining the order, taking the infant with her, the question arose whether she was resident in England within the meaning of s. 2 (5) of the Act of 1950 so as to enable the court to make an order in her favour. It was contended by the wife that she had complied with s. 2 (5) as she was resident in England during the three months preceding her application, during which time the infant had been continuously in her care and possession, as required by s. 2 (6) (a). On behalf of the Official Solicitor, acting as guardian *ad litem* of the infant, it was contended that to be resident in England within the meaning of s. 2 (5) the applicant must have no immediate intention of being resident elsewhere.

Denys B. Buckley for the applicants.

W. F. Waite for the Official Solicitor (acting as guardian *ad litem* for the infant).

HARMAN, J.: This is a matter in which I should be disposed to reserve my judgment, but it is a matter of urgency for the applicant, and, as I have come to a conclusion, I propose to state it and not to wait to put it in the form I would wish it to take if I had had more leisure. It is an application for an adoption order under the Adoption Act, 1950. The application is made in the names of two persons, a husband and wife, who ask for authorisation to adopt the infant jointly. In view of the facts I should have no hesitation in acceding to the application on its merits, but the question which confronts me *in limine* is whether I have the jurisdiction to do so.

The material facts are these. The husband occupies a position in Nigeria. He is a district officer in the Nigerian Colonial Service. That involves his living permanently in Nigeria during the term of his service. Every fifteen months he gets leave, which is of three months' duration or thereabouts, according to his term of service. During that time he comes back to England which is his native country. In the past his wife has accompanied him to Nigeria and there consorts with him, and she comes back here when he comes back on leave. In the past, during those three-monthly periods, they have lived either with his parents or with her parents while they were in England. During a leave which the husband has just completed they purchased a cottage where they intend to set up their home, and they have bought some furniture for it. They have not yet taken possession of it, although they are in a position to do so. The husband's term of service will, in the normal course, come to an end in about seven years, and he and his wife intend, when that event happens, to return to live permanently in England. Being without children, they determined to adopt a child. They found one which was suitable, and it was put into their care by one of the adoption societies when they came home on leave at the beginning of July, 1951. The three months' period, which I shall refer to more particularly in a moment, having elapsed at the beginning of the present sittings, they were in a position, having complied with the other formalities which the Adoption Act, 1950, imposes, to apply to the High Court for leave to make the adoption, but, before the matter came on, the Official Solicitor, acting as guardian *ad litem* of the child, as he always does in these

applications, expressed the view that it was not possible for an order to be made in favour of the male applicant, on the ground that he had returned to his duties in Nigeria before the order had been made. His wife, however, stayed behind on purpose to qualify, intending to leave this country with the child and take him to Nigeria as soon as possible after the order was made.

A It seemed to me that that raised questions of great difficulty, because, under s. 2 (5) of the Act of 1950, the adopter must be a person resident in this country, and one is immediately confronted with the difficulty of construing the word "resident." The legislation relating to adoption starts with the Adoption of Children Act, 1926, which was the principal Act until 1950. Section 2 (5) of the Act of 1926 provided:

B "An adoption order shall not be made in favour of any applicant who is not resident and domiciled in England or Wales or in respect of any infant who is not a British subject and so resident."

In the original sub-section, therefore, residence and domicile were connected. That sub-section was amended by the Adoption of Children (Regulation) Act, 1939. That Act dealt chiefly with adoption societies, but, by s. 8 (2), as amended by the Postponement of Enactments (Miscellaneous Provisions) Act, 1939, s. 2 C (2), a new sub-section was substituted for s. 2 (5) of the Act of 1926. It reads:

"An adoption order shall not be made—(a) in favour of any applicant who is not both domiciled in England and Wales or in Scotland and resident in England or in Wales, or (b) in respect of any infant who is not both a British subject and resident in England or in Wales."

D In the Adoption Act, 1950, this was put differently. Section 1 (1) of the Act of 1950 provides that an application may be made only by a person domiciled in England or Scotland. There is nothing about residence in s. 1. Section 2, which deals with the restrictions on making adoption orders, does not deal with domicile, as domicile is a pre-condition applying to the applicant, but by s. 2 (5):

E "An adoption order shall not be made in England unless the applicant and the infant reside in England, and shall not be made in Scotland unless the applicant and the infant reside in Scotland."

Then, by s. 2 (6):

F "An adoption order shall not be made in respect of any infant unless—(a) the infant has been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order; and (b) the applicant has, at least three months before the date of the order, notified the welfare authority within whose area he is for the time being resident of his intention to apply for an adoption order in respect of the infant."

G The effect of s. 2 (5) and s. 2 (6) (a) is, apparently, that there must be physical custody of the infant by the applicant for three months in England because otherwise it is not possible to satisfy s. 2 (6) (a). By s. 8 (1) an application for an adoption order may be made to the High Court or to any county court or

"... court of summary jurisdiction within the jurisdiction of which the applicant or the infant resides at the date of the application."

H Thus, residence at the date of the application is expressly mentioned in that sub-section. By s. 27 (1) (b) an adoption society is prohibited from placing the infant "in the care and possession of a person resident abroad, unless a licence has been granted," so that residence abroad and residence in England are obviously quite distinct states of things for the purpose of the Act. Section 27 (2) refers to the delivery of the infant "into the care and possession of a person resident in Great Britain," and s. 28 (1) contains a reference to "a person who is resident in Great Britain" in connection with the supervision which welfare

authorities are directed to have in cases pending an adoption. By s. 28 (4) a person into whose care and possession an infant has been placed is called a "custodian," and, by s. 32 (1) and s. 32 (2), if he changes his residence while the infant is in his care and possession, he has to give notice of the change to the welfare authority of the area where he has been residing and of the area into which he is moving. Section 34 deals with the functions of child protection visitors, who have the duty of inspecting the homes of custodians residing in the area of the authority employing the visitor. Section 39 (1) and s. 39 (2) refer to a person "resident abroad," and s. 40 (1) refers to "a British subject resident abroad."

Throughout the Act, therefore, one has "resident in England," or "resident in Great Britain," and "resident abroad" as being two things which are the converse one of the other, and that seems to make it difficult to suppose that under this Act, unlike the fiscal Acts, a person may be resident in two places. For the purpose of the Income Tax Acts a person may be resident in one place for one part of the year and in another place for another part of the year by virtue of the fact that he has two residences available to him and he has a habit of resorting for more than temporary purposes to two jurisdictions, but that does not seem to fit the scheme of the Adoption Act, 1950. So one comes back to the construction to be given to s. 2 (5), which prohibits the making of an adoption order unless the applicant resides in England. It has been pointed out to me by counsel that "resides" is an ambiguous term. The authority for that, if authority be needed, is *Ex p. Breull. Re Bowie* (1), a bankruptcy case, where JAMES, L.J., said (16 Ch.D. 486):

"There are cases in which it has been judicially decided, and I think rightly, that the words 'residence' and 'business' have no actual definite technical meaning, but that you must construe them in every case in accordance with the object and intent of the Act in which they occur."

COTTON, L.J., agreed with that statement, adding (*ibid.*, 487):

"They are ambiguous words, and may have different meanings according to the position in which they are found."

I think one may usefully look at a definition of the word "reside" which VISCOUNT CAVE, L.C., cited in *Levene v. Inland Revenue Comrs.* (2), where he said ([1928] A.C. 222):

"... the word 'reside' is a familiar English word and is defined in the OXFORD ENGLISH DICTIONARY as meaning 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place'."

Inland Revenue Comrs. v. Lysaght (3) decided that the question whether a person was "resident" in the United Kingdom for the purposes of the Income Tax Act, 1918, was a question of fact for the commissioners.

In the present case also, in my judgment, it is a question of fact: Does the applicant, the wife, reside in England? My first impression is that she clearly does not; neither does the husband. They reside in Africa, where his work is. They come home to England for a holiday and stay with her parents or his. They intend to stay in a house of their own in the future. They intend to come and reside here when his work is done and he can retire from his service. It is admitted that the husband does not reside here, because he has not persisted in his application, but the suggestion is that, if and when he comes back here for a week, or lands here in an aeroplane and is physically present here, he can be said to reside here. That seems to me a difficult proposition. Counsel for the applicants did not, I think, wish to go quite as far as that. He admitted that some degree of permanence was necessary, and that a mere transient visitor who happened to be here when the application was made did not, by that fact,

satisfy the qualification of residence required by the Act of 1950, but he said that the *quantum* of residence was a matter of degree, that residence for the time being was enough, and that while the applicants were on leave here, they were for the time being resident here. I should say they were for the time being staying here, and I do not think the two things are the same.

A The difficulty has really arisen out of a judgment of EVERSLED, J., in *Re W.* (4). This was a considered judgment and it has given rise to the present position. In that case there was a joint application by a colonial civil servant and his wife to adopt a child. The applicants owned a house in England in which they lived during the periods when they were home. There is, however, one difference between that case and the one now before me, in that in *Re W.* (4) the wife intended to remain in England after the child was B handed to her care, and not to return to Africa with her husband. It was, therefore, clear that on any view she was resident in this country and there was no objection to making, as the learned judge did make, an order in her favour. The real difficulty in that case was whether or not he could make an order in favour of the husband. It was argued that the husband had a home here, that for fiscal purposes he was resident here because, having a home available, he C was resident here in any year he set foot in this country, according to the well-known ruling of the Income Tax Commissioners on that subject. The learned judge found himself unable to say that he resided here. After referring to the income tax decision, which I think he regarded as artificial, the learned judge said:

D “As I construe [the Adoption of Children Act, 1926,] residence in fact within the jurisdiction is referable to the power given to the court to impose conditions on the making of an order as specified, for example, in s. 4 of the Act of 1926. I therefore come to the conclusion that I am unable to make an order in the male applicant’s favour.”

He went on in these terms:

E “When the male applicant returns to this country, the order can be varied and made in favour of both applicants.”

I should take those words to mean that, when the husband had finished his service abroad and returned to live permanently in this country, he would be qualified as a person resident here, but, I am told, a different view was taken by a judge in chambers, for, when the husband returned on leave in 1948, an F order was made in his favour although he intended to go back to Africa shortly thereafter. As a result, apparently, of that case, a practice has grown up in the last two years under which, for an adoption order to be made, it has been necessary only to find that the applicant was physically within the borders of the country at the moment when the order was made. On the other hand, even if his residence, his home, and his avocations were admittedly here, the order could G not be made in his favour if he was out of the country on the morning when the judge happened to be asked to make the order. Indeed, it was lately suggested to me that a university don, who had left the country for some two months to deliver some lectures, was not a person qualified to have an order made in his favour, because he was not resident here at the time of the application for the order.

H I cannot believe that any view which leads to such a conclusion is right. A more sensible meaning than that must be given to the word “resident.” Counsel for the applicants suggests that it can be found in the period of three months imposed by s. 2 (6) (a) of the Act of 1950 as the period during which the applicant must be here and in possession and charge of the child, and that that is the kind of residence which is meant. He contends that it is enough if the applicant lives here for three months or so before the order is made, because he is then resident here for the time being. Counsel for the infant suggests that the

applicant must not only be resident here, but must have no immediate intention of being resident elsewhere. It is a striking fact that a child which is adopted does not become a ward of court, nor is the court bound to make any conditions whatever about where the child shall reside in the future. Having satisfied itself that the adopters are suitable persons, that they have the means, and, I suppose, the accommodation, which is likely to lead to the child's advantage, the duty of the court is finished. Counsel for the applicants contends that it does not in the least matter if the applicant goes abroad immediately after the order is made. As a matter of merits, of course, it matters very much. As a matter of jurisdiction, I think it does not matter. One must be able to postulate at the critical date that the applicant is "resident," and I think that that is a question of fact. "Resident" denotes some degree of permanence. It does not necessarily mean that the applicant has a home of his own, but it means that he has his settled headquarters in this country. It seems to me dangerous to try to define what is "resident." It is very unfortunate that it is not possible to do so, but, in my judgment, the court must ask itself in every case: Is the applicant resident in this country? In the present case, when I ask myself that question in respect of the wife, I can only answer: "No. She is merely a sojourner here during a period of leave. Like her husband, she is resident in Nigeria where his duties are and whither she accompanies him, in pursuance of her wifely duties." I do not think the applicants in this case are residents in England at present, although they may be hereafter.

I much regret having to arrive at this conclusion, particularly in view of the fact that during the last two years three orders, I think, have been made on a footing which seems to be inconsistent with the judgment which I have just felt bound to deliver. I hold that there is no jurisdiction to make an order in favour of the female applicant, any more than I can make it in favour of the male applicant. I consider the course which has been followed in recent years wrong, *viz.*, that, because an officer in the colonial service or a person employed in any other avocation abroad comes back to this country on a purely temporary holiday, he is a person in whose favour an order can be made. I feel bound to refuse the application.

Application refused.

Solicitors: *Boulton, Sons & Sandeman* (for the applicants); *Official Solicitor* (for the infant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

Re GANSLOSER'S WILL TRUSTS. CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA *v.* CHILLINGWORTH AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.JJ.), October 19, 22, 1951.]

Will—Class gift—Time of ascertainment of class—Joint tenancy or tenancy in common—Gift of residue to "relations" of testator and his wife subject to wife's life interest.

The testator, who died without issue on Sept. 4, 1929, was a naturalised British subject within the Straits Settlements and domiciled in Italy at the time of his death. By his will, made on Apr. 15, 1929, he directed that his residuary estate should "... be divided as follows, *viz.*: one half to my wife's relations one half to my own relations but not till the death of my wife. Until then my wife shall have the unrestricted use of the income of my ... estate. I advise my trustees ... to communicate with ... solicitors, Oxford, who will and can help my trustees in ascertaining my wife's surviving relations and in the case of my relations the banking

institution [in Württemberg] can be relied upon to supply all necessary information." The testator's estate consisted entirely of personalty, partly in England and partly in Singapore. Under Italian law, on which the construction and effect of the will depended, the law operative in the Straits Settlements at the time of the testator's death applied in regard to the dispositions made by the will, and, under that law, the gifts to "relations" were to be construed in the same manner as in England before 1926, so that "my wife's relations" should be taken to mean the wife's next of kin according to the Statutes of Distribution (22 & 23 Car. 2, c. 10, and 1 Jac. 2, c. 17). The testator's wife died on Sept. 8, 1949. The questions now arose (i) at what date should the wife's next of kin according to the Statutes of Distribution be determined, and (ii) in what manner should they take.

HELD: (i) the general rule that the ascertainment of the next of kin of the propositus according to the Statutes of Distribution should take place at the death of the propositus was excluded by the language and scheme of the will, which showed that the testator's intention was that both his wife's relations and his own relations should be ascertained at the same time, namely, at his death, and, therefore, the class of the wife's relations who were to take one half share of the residue was to be ascertained when the will came into operation at the testator's death and would consist of the persons who would have taken her undisposed of personal estate under the Statutes of Distribution had she died at the same date as the testator.

Gundry v. Pinniger (1852) (1 De G. M. & G. 502), distinguished.

(ii) as there was no reference in the will itself to the Statutes of Distribution and as the rule that the word "relations" was to be limited to the next of kin of the propositus according to the statutes was imported merely to save the gift from invalidity through vagueness, there was no justification for applying the reference to the statutes beyond the point necessary to avoid uncertainty, and, therefore, as the gift of the half share of residue to the wife's relations contained no words of severance, it was to be treated as operating to create a joint tenancy, and the persons entitled to the gift, as ascertained according to the statutes, would take as joint tenants.

Eagles v. Le Breton (1873) (42 L.J.Ch. 362), approved.

Bullock v. Downes (1860) (9 H.L. Cas. 1), distinguished.

Decision of VAISEY, J. (ante, p. 231), affirmed.

AS TO TIME OF ASCERTAINING CLASS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 268-271, paras. 318-321; and FOR CASES, see DIGEST, Vol. 44, pp. 879-886, Nos. 7364-7429, and pp. 892, 893, Nos. 7504-7515.

Cases referred to:

- (1) *Doe d. Thwaites v. Over*, (1808), 1 Taunt. 263; 127 E.R. 834; 44 Digest 891, 7487.
- (2) *Re Nightingale*, [1909] 1 Ch. 385; 78 L.J.Ch. 196; 100 L.T. 292; 44 Digest 877, 7330.
- (3) *Bullock v. Downes*, (1860), 9 H.L. Cas. 1; 3 L.T. 194; 11 E.R. 627; 44 Digest 876, 7328.
- (4) *Eagles v. Le Breton*, (1873), L.R. 15 Eq. 148; 42 L.J.Ch. 362; 44 Digest 973, 8276.
- (5) *Re Nash*, (1894), 71 L.T. 5; 44 Digest 884, 7408.
- (6) *Gundry v. Pinniger*, (1852), 1 De G.M. & G. 502; 21 L.J.Ch. 405; 18 L.T.O.S. 325; 42 E.R. 647; *affg.* 14 Beav. 94; 20 L.J.Ch. 635; 44 Digest 879, 7364.

APPEAL from an order of VAISEY, J., dated June 7, 1951, and reported *ante*, p. 231.

The testator, Gustav Gansloser, made his will on Apr. 15, 1929, and died without issue on Sept. 4, 1929, having been married once only, namely, to the

wife named in his will. The will, which was a holograph document unwitnessed, was admitted to probate and proved by the Chartered Bank of India, Australia and China, the executors named therein, on Mar. 10, 1930, as being a valid will by the laws of Italy in which country the testator was domiciled at the time of his death. The estate consisted wholly of personalty, partly in England and partly in Singapore. By an order made by LUXMOORE, J., on Apr. 27, 1932, in former proceedings in the matter of the testator's estate, it was declared *inter alia* (a) that at his death the testator was a naturalised British subject within the Straits Settlements, and (b) that the construction and effect of the will depended on the law of Italy, in which country he was domiciled at the time of his death, and that under the Italian law the law operative in the Straits Settlements at his death applied. By the will the testator directed that his residue was "to be divided as follows, *viz.*: one half to my wife's relations one half to my own relations but not till the death of my wife." The testator's wife died on Sept. 8, 1949.

The summons in the present proceedings was taken out by the executors to determine *inter alia* who were the persons entitled to a half share of the testator's residuary estate expressed in the will to be given to his wife's relations and whether the persons entitled took as joint tenants or tenants in common. It was established by evidence in the proceedings that under the law operative in the Straits Settlements at the time of the testator's death gifts to "relations" were to be construed in the same manner as in England before 1926 and that the English authorities on the matter would be followed. VAISEY, J., held, *inter alia*, that the persons entitled to the one half of the testator's residue expressed to be given to the wife's relations were the persons who under the Statutes of Distribution (22 & 23 Car. 2, c. 10, and 1 Jac. 2, c. 17) would have been entitled to her personal estate if she had died intestate in respect thereof on the day of the testator's death immediately after him and those statutes had been applicable to the distribution of her personal estate, such persons to take as joint tenants and not as tenants in common. The appeal from his decision was brought by the eighth, ninth and tenth defendants, who were the children of Frank Chillingworth, a brother of the testator's wife, who survived the testator and predeceased the wife. It was contended by the appellants that the wife's relations who were to take a half share of the residue were to be ascertained in accordance with the Statutes of Distribution at her death, and not at the death of the testator, and that the persons thus ascertained were to take *per stirpes* in accordance with the statutes, or, alternatively, if it were declared that the wife's relations were to be ascertained at the death of the testator, that the persons who were entitled took as tenants in common *per stirpes* in accordance with the statutes.

F. E. Skone James for the eighth, ninth and tenth defendants.

K. J. T. Elphinstone for the executors.

J. L. Arnold for the first defendant, Percy Chillingworth, a brother of the testator's wife.

Bathurst for the second, third, fourth, fifth, sixth and seventh defendants (the children of Thomas Chillingworth, a brother of the testator's wife, who predeceased the testator).

R. R. A. Walker for the eleventh defendant, John Butler Chillingworth (a half-brother of the testator's wife).

The twelfth, thirteenth, fourteenth and fifteenth defendants (relations of the testator) and the sixteenth and seventeenth defendants (personal representatives of a brother of the testator's wife who survived the testator and predeceased the wife, a widower without issue) did not appear.

Denys B. Buckley for the Custodian of Enemy Property (the testator's relations being at present resident in Germany).

SIR RAYMOND EVERSHED, M.R.: By his will the testator appointed the Chartered Bank of India, Australia and China to be his executors and directed:

"The remainder of my estate, wherever situated, and it is at present entirely in the hands of the Chartered Bank of India, Australia and China . . . I desire to be divided as follows *viz.*: one half to my wife's relations one half to my own relations but not till the death of my wife. Until then my wife shall have the unrestricted use of the income of my said estate. I advise my trustees, the Chartered Bank of India, Australia and China, London, to communicate with Messrs. Thomas Mallam & Co., solicitors, Oxford, who will and can help my trustees in ascertaining my wife's surviving relations and in the case of my relations the banking institution . . ."

He then names an institution in Würtemberg and says that it "can be relied upon to supply all necessary information."

The testator's wife died in September, 1949, so that there was an interval of twenty years between his death and hers. The question before us concerns the effect of the provision in the will for the division of the estate between his wife's relations and his own relations. The problem is of a two-fold character.

It is conceded that the word "relations" in a context such as that with which we are concerned is given a restricted significance so as to save the gift from total invalidity, but the questions which we have to consider are: (i) whether the class so restricted is to be ascertained at the date of the wife's death or at the date of the coming into operation of the will, *viz.*, the husband's death; and (ii) having answered question (i), how, among the class so ascertained, is the estate to be distributed?

On the first point, the nature of the restriction imposed by the law is set out in JARMAN ON WILLS, 7th ed., p. 1601, THEOBALD ON WILLS, 10th ed., p. 246, and HAWKINS ON WILLS, 3rd ed., p. 135. It is stated thus in THEOBALD ON WILLS, 10th ed., p. 246:

"But the terms 'relations' . . . are of indefinite meaning, and the courts, when compelled to determine the persons to take, have restricted them to relations capable of taking within the Statutes of Distribution, both as regards realty and personalty."

One of the cases cited in support of that statement is *Doe d. Thwaites v. Over* (1), which contains a passage in the judgment of MANSFIELD, C.J., that finds a prominent place in the statement of the principle in HAWKINS ON WILLS, 3rd ed., p. 135. MANSFIELD, C.J., said (1 Taunt. 269):

" . . . although relation is a word of very vague and general import, yet it has obtained a certain degree of ascertained meaning in the courts where questions of this sort have arisen with respect to personal property; that is, it means those who are entitled to take as relations under the Statute of Distributions. This rule of interpretation has been adopted to control the more extensive and lax sense of the word. The term then having obtained this construction in courts of equity, I do not see why it should not obtain the same construction in courts of law . . ."

On both the questions which I have formulated, the argument of counsel for the appellants was, I think, fundamentally to this effect. Since there is imported by the courts this artificial reference to the Statutes of Distribution, one must go, so to speak, the whole way and extract from the introduction of the reference all the necessary inferences which one would extract if the testator had himself said, instead of "relations," something to the effect that the division was to be among the persons entitled under the Statutes of Distribution. Thus (contended counsel for the appellants) two things follow: (i) that the class of persons to be benefited can be ascertained only by looking at the state of affairs at the death of the propositus—in this case, at the wife's death—as the Statutes of

Distribution, which are applicable to the distribution of persons dying intestate, can have no sensible application to a person still living; (ii) the method of distribution to the class which has been ascertained is to be in accordance with the Statutes of Distribution—in other words, in this case the persons found to be entitled *per stirpes* under the statutes are to take as tenants in common.

The appellants, the eighth, ninth and tenth defendants, are the children of Frank Chillingworth, a brother of the testator's wife, who survived the testator but predeceased the wife. If, therefore, we were to ascertain the class to take under this formula at the testator's death he would be within the class, and, if the distribution was strictly in accordance with the directions in the statutes, his share would, I think, be a sixth and would have become vested in him. If, on the other hand, the method of distribution is not by following the statutes but by following the rule normally applicable to class gifts, *i.e.*, if they take as joint tenants, then Frank became excluded since there was no severance of the joint tenancy and he died before the time of distribution arrived. His three children, on the other hand, would be entitled as next of kin in their own right if the class is to be ascertained, not at the death of the testator, but at the death of the wife. The first defendant, Percy Chillingworth, a brother of the testator's wife, was living at all material dates and, therefore, takes under the will, on any view, but, on balance, he preferred to support the appellants. The burden of supporting the judgment of VAISEY, J., was undertaken by counsel for the second, third, fourth, fifth, sixth and seventh defendants, the children of Thomas Chillingworth, a brother of the testator's wife, who had predeceased the testator. Arithmetically, the interest of Thomas's children was much better if they could sustain in all respects the judgment of VAISEY, J. John Butler Chillingworth, a half-brother of the testator's wife, was living at all material dates, but, on consideration, he thought it better to take no part in the argument.

To return to the first question which I formulated, from the passage which I read from the judgment of MANSFIELD, C.J., in *Doe d. Thwaites v. Over* (1) which is cited in the text-books, it becomes clear that the court has adopted what is called a "rule" for the purpose of saving from invalidity, through vagueness, a gift expressed in favour of a class which would be so wide, according to its proper meaning, as to be incapable of any sensible or possible ascertainment. Therefore, the question in the present case must be: What is the effect of the impact of the rule on the particular language of this will? I agree with counsel for the appellants that in an ordinary case, and apart from something in the context which would lead to a different result, if a fund is given to "A's relations," by which, by the operation of the rule, is meant those relations who would be comprehended in an application of the Statutes of Distribution, then, *prima facie*, one would find who constituted the class at A's death, since it is only on that event that the Statutes of Distribution properly provide an answer to the question notionally put. But it must be clear, I think, that the testator who uses this loose phrase may well, by the context in which the phrase is used, produce the result that the class is to be ascertained albeit by reference to the Statutes of Distribution, yet at some date other than that at which in ordinary circumstances the Statutes of Distribution would come into operation, and I agree with VAISEY, J., that in this case the language used by the testator himself is such as to require that the class is ascertained, not at the wife's death, but at the testator's own death. It creates, of course, an added artificiality, but I do not think that that is a sufficiently significant point to outweigh the inferences which, I think, flow from the language which is used. There has been some discussion whether this rule (and I have so far tried to avoid using language which would prejudice the matter) is regarded as a rule of convenience or a rule of construction—it being assumed that there is some antithesis between the two. Of course, in a sense it is a rule of construction, *i.e.*, it is a rule which the courts apply in construing wills which use the word "relations" in such a context as the present. It is equally a rule of convenience in the sense that

it is a rule which the courts apply under compulsion of the argument *ab inconvenienti*, because on any other view the will would be rendered nugatory. But I am not satisfied that, treating it as a rule of construction in the sense in which I have used the expression, one has to read the will as though the testator had not used the word "relations," but had himself inserted, in some language which has not been very precisely defined, a specific reference to the Statutes of Distribution. At any rate, I am unable to accept the view that, be it a rule of construction in that or in any other sense, the application of it overrides the inferences which I have already mentioned from the context in this particular will.

The first point to note is that the testator "desires" his estate "to be divided as follows," and then the two halves are designated in the language which I have mentioned. *Prima facie* it would be, I think, surprising to suppose that the testator intended the executors to set to work at once to find out the class of persons entitled to one half, but to wait for a long time—twenty years—before they started to discover who was entitled to the other half. It seems to me that the language contemplates the ascertainment once and for all, at his death, of the persons who will constitute the classes ultimately entitled to his estate. That, I think, is supported by the next few words which follow, ". . . but not till the death of my wife." I think, if the idea had been that, as regards part of the residue, the persons to take were not to be, and could not be, discovered until the wife's death, that is a very remarkable way of giving effect to the intention. The testator, I think, contemplates an immediate operation of discovering the classes, and then he adds that, although those are the classes to take, they are not to enjoy the property until the death of his wife and until that event she is to have the unrestricted use of the income. Some attention was also directed to the piece of advice which the testator incorporated in the will:

"I advise my trustees, the Chartered Bank of India, Australia and China, London, to communicate with Messrs. Thomas Mallam & Co., solicitors, Oxford, who will and can help my trustees in ascertaining my wife's surviving relations and in the case of my relations the banking institution . . . can be relied upon to supply all necessary information."

Counsel for the appellants pointed to the distinction between "my wife's surviving relations" and "my relations" as indicating that the wife's relations were persons who would not be ascertained at the same time as those of the testator. I think that is extracting rather a lot from the word "surviving," and, against it, there is the circumstance that the firm in Oxford, it is said, "will and can help my trustees." The present tense may be said to be inconsistent with the notion that the ascertaining of who the relations were was something that was to be postponed for, perhaps, a long period of time. At any rate, I come to the conclusion arrived at by the learned judge that this class of relations in the case of the wife (as in the case of the testator's own relations) was to be ascertained when the will came into operation at his death.

That leaves what I have thought the more difficult question—and, having regard to the answer which I give to the first, the matter becomes in a sense more artificial. Having found this class of person, how is the distribution to take effect? The opinion of VAISEY, J., was that, just as is the case with any other class in whose favour a gift is made without any words of distribution, the general rule is that they take as joint tenants. I am unable to satisfy myself that that view is not correct. I think that counsel for the children of Thomas Chillingworth is right when he says that the effect (for this purpose) of the application of the so-called rule is that one gets, instead of the phrase "my wife's relations," a class consisting of a number of persons who have been *ex hypothesi* ascertained—A, B, C, D, E and F—and, there being nothing else, no words of distribution or severance, that class, so ascertained, according to

the ordinary rules, take as joint tenants. I think that that is the right analysis, but it is not an easy matter, and the numerous decisions to which our attention has been directed have created in my mind a feeling of difficulty, because, accepting that view, there must now be taken to be a fine distinction in cases of this type. I console myself by reflecting that, on any view, they are very fine distinctions so far as I can see, and, when one reaches the realms of artificiality which has been achieved in this case by applying this rule and construing the will so as to discover the class at a date which makes it a wholly artificial class, it is, perhaps, not surprising to find the distinctions which the cases illustrate. This much is clear. It all depends on the extent and significance of the reference that the rule instructs one to make to the Statutes of Distribution. As I have indicated, counsel for the children of Thomas Chillingworth contends that the reference does no more than provide that, the term "relations" being obviously too loose, one should take it as meaning a much smaller class of relations, a class which is capable of ascertainment, *viz.*, the class of relations which is the subject-matter of the legislation in the Statutes of Distribution. The reference to the statutes (he says) does no more than enable one to discover the class and says nothing thereafter as to how one should proceed. On the other hand, counsel for the appellants and for Percy Chillingworth say that, once the Statutes of Distribution are introduced, by implication (or by application of the so-called rule of convenience, which is the same thing) one must go the whole way and say that the statutes provide for the method of distribution as well as the constitution of the class. And the argument, I think, is most forcibly put when reference is had to the classes of case in which a testator has directed that his property, or some fund left by him, should go "to my next of kin under the Statutes of Distribution," for that formula, be it observed, indicates sufficiently the class to take, but in terms says nothing about the method of distribution among the class.

In *Re Nightingale* (2) the gift was for practical purposes in that form, and NEVILLE, J., laid it down that in such a case it was necessary and proper that one should extract from the reference to the Statutes of Distribution both the constitution of the class and the method of distribution among the class. After a reference to *Bullock v. Downes* (3) (in which, again, there was express reference to the Statutes of Distribution), NEVILLE, J., said ([1909] 1 Ch. 388):

"In my opinion the rule which was there referred to was that where there is a gift to a class to be ascertained by reference to the Statute of Distributions the shares are *prima facie* to be in accordance with the statute as well as the objects of the gift. Of course a contrary intention may be expressed by the will."

Then, after stating that the rule was a matter of inference, he concluded his judgment in this way (*ibid.*):

"I think, therefore, that no distinction ought to be founded upon the various forms of expression which one finds used in cases where the class are to be ascertained by a reference to the Statute of Distributions. I may repeat what I have often said before, that where a rule of construction exists it seems to me the worst possible policy to draw nice distinctions between the words used. It seems to me the rule should be taken in as universal a way as possible in order that persons interested under wills may have some reasonable chance of knowing what the courts will hold to be their interpretation. I think, therefore, that I can draw no distinction between the words used in this case and the words used in the numerous cases that have been cited to me in which it has been held that a gift to a class to be ascertained by reference to the Statute of Distributions [*sic*] is a gift to them as tenants in common and not as joint tenants."

There is obviously great force in the argument that, if the rule of convenience is a rule which inferentially introduces the Statutes of Distribution as the means

of ascertaining the objects of the gift, then it is an unreal and fine distinction to say that, because there is no express reference by the testator himself to the statutes, therefore, in such a case as this the objects are to take as joint tenants, whereas, in the case where there is an express reference of some kind to the statutes by the testator, the distribution is to be in accordance with the statutes. On the other hand, in the class of case in which the persons to take are next of kin as distinct from next of kin according to the statutes, it is conceded that the general rule would apply, namely, that the class take as joint tenants. I mention that last case because it appears that in any event there will be fine distinctions, distinctions, perhaps, no more sensible than the distinction between the two classes of case illustrated, on the one hand, by *Re Nightingale* (2) and, on the other, by the present case.

Against the weight of the judgment of NEVILLE, J., in *Re Nightingale* (2), must be set *Eagles v. Le Breton* (4), which has this marked advantage in this matter that it is a case—and, indeed, the only case so far as researches have discovered—in which it may be said that the point with which we are now concerned was directly raised. The relevant language of the will in *Eagles v. Le Breton* (4) was:

“At the death of my sisters, Anne Peppin and Jane Coucher, the residue of my property is to pass to my relatives in America.”

On the question whether the “relatives in America” were a class capable of ascertainment, and, if so, how, the answer was: By applying the rule which is admittedly applicable in the present case. To use the language of LORD ROMILLY, M.R. (42 L.J.Ch. 362):

“... it was settled that under a gift of this description the class was to be ascertained at the testator's death; also that ‘relatives’ meant the persons who would take under the Statutes of Distribution.”

Then the question arose how this class would take, and counsel for the legal personal representatives of relatives who survived the testatrix, but died during the sisters' lives, is reported as arguing in exactly the sense that counsel for the appellants argued before us. He said:

“It is admitted in this case that the word relatives means the persons who would take under the Statutes of Distribution; that being so, they must take in the shares and in the manner in which they would take under the statutes. They take therefore as tenants in common. Whenever you have either an express or an implied reference to the statutes, the next of kin take as tenants in common. It is only under gifts without reference to the statutes that the class take as joint tenants, the class being then reckoned by the rules of the civil law.”

But that argument was rejected by LORD ROMILLY, M.R., who said (*ibid.*, 363):

“It was true that when there was an express reference to the statutes, they would take as tenants in common in the shares in which they would have taken on an intestacy. But when there was no express reference to the statutes the case was different. There was nothing then to prevent the ordinary rule from applying, that under a gift to a class without words of severance, all the members of the class take as joint tenants.”

In *Re Nash* (5) DAVEY, L.J., spoke of that decision in terms indicating a little doubt about its soundness in one (though not the presently material) respect, but he had looked at a report of the judgment in the LAW REPORTS (L.R. 15 Eq. 148),* which was very much briefer than the report which I have read from the LAW JOURNAL and contained a mistake, a manifest error (not relating

* A correction of the mistake appears in the *errata* at the beginning of the volume (*viz.*, that “the class was to be determined at the death of the tenant for life” instead of “at the death of the testatrix”).

to this particular point), and I think that DAVEY, L.J., was plainly misled by the mistake. I can find no warrant for suggesting that the report of *Eagles v. Le Breton* (4) in the LAW JOURNAL is not in all respects a correct report of what LORD ROMILLY, M.R., decided. Nor am I able to say that *Eagles v. Le Breton* (4) is made in some way inapplicable here because the class of relations in that case was limited by reference to their residence in America. It is true that it added a further artificiality, but no greater artificiality than in this case, nor, in principle, as far as I can see, was the gift there any different from a gift, for example, to the relations other than specified persons. Certainly the *ratio decidendi* was in no way based on the American qualification which the participants had to have. Although this decision appears not to have been in accordance with the view MR. JARMAN indicated [see, e.g., JARMAN ON WILLS, 7th ed., p. 1603] I cannot find that it has ever been doubted in any later case (save by DAVEY, L.J., in the circumstances which I have mentioned) as a valid authority, and it has, therefore, stood, and may well have been applied and adopted in other cases, over a period now extending to nearly eighty years. It was not cited in *Re Nightingale* (2), and if, therefore, the language of NEVILLE, J., might appear to cover such a case as *Eagles v. Le Breton* (4), I think it must be taken with the qualification that his attention had not been directed to something which would have required him to limit the scope of his own judgment. At any rate, narrow though the distinction may be, I am not disposed to say, after this length of time, as we were invited to do, that *Eagles v. Le Breton* (4) ought to be treated as wrongly decided, and since it is far nearer to the present case, and is, in truth, directly bearing on it, I think this court should now follow it. It accords, I think, with a principle no less sensible than that which NEVILLE, J., enunciated. There is here, according to the language of the testator himself, no reference to the Statutes of Distribution. The statutes are introduced because a court, to save the will, is compelled so to construe the word "relations." But to read into this word not only a reference to the statutes for the purposes of discovering the objects, but also a direction that the division is to be in such shares and in the manner in which the persons concerned would take under the statutes seems to me to be asking a great deal and to be going beyond what the rule, strictly so-called, authorises—particularly in a case in which, like the present, the class which is so ascertained is artificially ascertained by reference to the death, not of the propositus, but of the testator. As a general principle, gifts to classes without words of distribution are treated as gifts to the classes as joint tenants.

For those reasons, I have reached the same conclusion as that of VAISEY, J., and I think that, accordingly, the answer to the question is: That the class of "wife's relations" is to be ascertained by asking who would have been the persons who would have taken her undisposed of personal estate under the Statutes of Distribution had she died at the same date as the testator, and that those persons so ascertained take, like any other class, as joint tenants and not otherwise. As a result, the appeal fails, and, in my judgment, should be dismissed.

JENKINS, L.J.: I agree. It is common ground that the persons referred to in the will as "my wife's relations" and as "my own relations" must be taken to mean the next of kin of the testator's wife and himself respectively, according to the relevant Statutes of Distribution. It is also common ground that the law to be applied in the construction of this will is English law as it stood before the property legislation of 1925, and, in particular, before the passing of the Administration of Estates Act, 1925. Two questions, which have been debated before us, arise with respect to the half of the estate given by the testator to his wife's relations, the first being at what date should the wife's relations (that expression being interpreted in the way I have mentioned) be ascertained, and the second, in what manner should those persons take, whatever

the proper date of ascertainment may be? The first of these questions involves consideration of what is sometimes known, I think, as the rule in *Gundry v. Pinniger* (6). That rule comes to this, that, inasmuch as the proper time for the operation of the Statutes of Distribution in relation to the estate of any person is the death of that person, therefore, *prima facie*, the reference to next of kin according to the statutes involves by implication the ascertainment of those persons at the proper time, namely, the death of the person whose next of kin according to the statutes are referred to. There is no doubt, I think, that this rule is *prima facie* of general application and should be followed unless there is something in the terms of the particular will under consideration which shows it was not intended that the ascertainment of the next of kin of the propositus according to the statutes should take place as at the death of the propositus.

In the present case I agree with SIR RAYMOND EVERSHED, M.R., that the language and scheme of the will make it sufficiently plain that the testator's intention was that both his wife's relations and his own relations should be ascertained at one and the same time, namely, as at the testator's death. My reasons for that view are these. The testator's direction is:

" . . . I desire [the remainder of my estate] to be divided as follows
viz.: one half to my wife's relations one half to my own relations . . . "

That, on the face of it, is a direction for an immediate division to be effected at the testator's death and to be effected once and for all. It is a division to be made as to one half to his wife's relations and as to one half to his own relations—that is to say, to the next of kin according to the statutes of two different people, the testator himself and his wife, who may or may not survive him. In view of this direction for immediate distribution, it seems to me that *prima facie* the proper conclusion must be that those persons, the objects of the distribution, are to be ascertained at one and the same time, namely, the testator's own death. I think that that conclusion is reinforced by what follows. The testator continues: " . . . but not till the death of my wife." Those words were relied

on in argument as equivalent to a gift of a life interest to the wife preceding the direction to divide which should, it was said, be regarded as if it had been expressed as a gift in remainder expectant on the wife's death. In my view, however, there is for the present purpose a real distinction between a disposition in that form and the language actually used by this testator. I regard the word "but" as highly significant. The testator, having directed a division which, according to its terms, is capable of being immediately carried out, goes on to say that this operation is to be postponed until a certain date. That he does by the words: " . . . but not till the death of my wife." Moreover, if the gift of "one half to my wife's relations" is to be construed as a gift "to my wife's next of kin according to the statutes ascertained as at her death," the words " . . . but not till the death of my wife," though not on that construction

deprived of all meaning, would not, as it seems to me, be wholly appropriate. Finally, there is the passage at the end of the will advising the trustees to communicate with a firm of solicitors at Oxford, with the statement that this firm

" . . . will and can help my trustees in ascertaining my wife's surviving relations . . . "

It seems to me that that does, to some extent, support the conclusion to which I have come, for it suggests that on the death of the testator his trustees could write to the solicitors in question and receive information as to the wife's relations then living. That, to my mind, is the implication of this passage, and it suggests that the relations of the testator's wife who were to be entitled to take under the gift were persons who could be ascertained at the testator's death. For these reasons, in my judgment, there is enough in this particular will to exclude the so-called rule in *Gundry v. Pinniger* (6), with the result that the wife's

relations and the testator's own relations should both be ascertained at one and the same time, that is to say, as at the death of the testator, and that it would be wrong to postpone the ascertainment in the case of the share given to the wife's relations until the subsequent event of the wife's death.

It remains to consider the second question, *viz.*, in what manner should the wife's relations take? That involves a consideration of what is sometimes called the rule in *Bullock v. Downes* (3), the effect of that rule being that, where there is a gift by reference to the Statutes of Distribution, those statutes determine not only the persons who are to take but also the shares and the manner in which they should take. As was said by NEVILLE, J. ([1909] 1 Ch. 387), in *Re Nightingale* (2), to which my Lord has already referred:

"This case depends upon what is the true rule of construction recognised by the House of Lords in the case of *Bullock v. Downes* (3). That there was a rule recognised in that case there can be no doubt, and the question is what is the extent of it."

To narrow the question down in its application to the present case, the problem is whether the rule extends to a case in which there is no express reference at all to the Statutes of Distribution—a case in which the gift itself, so far as the language of the will goes, is simply a gift to "relations." That is a question on which there is little helpful authority and on which there seems to be some difference of opinion amongst the writers of the text-books. In the existing somewhat unsatisfactory state of the authorities, I agree with my Lord that the proper course is to follow *Eagles v. Le Breton* (4) to which he has referred. In that case, LORD ROMILLY, M.R., said (42 L.J.Ch. 363):

"... when there was no express reference to the statutes the case was different. There was nothing then to prevent the ordinary rule from applying, that under a gift to a class without words of severance, all the members of the class take as joint tenants. That being so, and some having died without severing, the survivors would take the whole."

That decision commends itself to me as being in accordance with common sense and with the basic principles of the construction of wills. The rule, whether it be called a rule of construction or a rule of convenience, under which the word "relations" is held to be limited to the next of kin of the propositus according to the statutes, is an artificial rule which the court in its benevolence has adopted to prevent a testator's disposition failing from uncertainty. That was considered sufficient justification for imputing a wholly conventional and artificial intention to the testator by limiting his meaning of the word "relations," or the meaning he might attach to the word "relations," to the next of kin according to the statutes. The alternative of uncertainty was the justification for the procedure. But, that procedure having been gone through and the problem of uncertainty thus resolved, I cannot see what justification there can be for going on to impute to the testator a further entirely artificial intention that the fund, or subject-matter of the gift, should be divided amongst the next of kin according to the statutes in the shares and manner provided for by the statutes. That is a matter with which uncertainty has nothing to do, and in a case of this kind, where there is a gift to "relations," and the reference to the Statutes of Distribution is imported simply and solely by force of the benevolent rule of the court, I think there is no sufficient justification for applying it beyond the point necessary to avoid uncertainty. Once that is done, I would hold the rule to be exhausted, and that the gift, limited by force of the rule to persons answering the description of the next of kin according to the statutes, should take effect like any other gift—that is to say, if, as here, it is a gift without words of severance, it should be treated as operating to create a joint tenancy. There is nothing in the authorities, so far as I can see, to preclude us from following *Eagles v. Le Breton* (4) in the present case, and, as

the reasoning in that judgment commends itself to me as being sound law and good sense, in my view, it should be followed. Accordingly, I agree with my Lord that this appeal fails, with the result he has indicated.

MORRIS, L.J.: I find myself in full agreement with the judgments which have been delivered.

Appeal dismissed.

A Solicitors: *Lethbridges* (for the appellants, the eighth, ninth and tenth defendants); *Linklaters & Paines* (for the executors); *J. D. Langton & Passmore* (for the first defendant); *Gordon, Dadds & Co.* (for the second, third, fourth, fifth, sixth and seventh defendants); *Robins, Hay & Waters*, agents for *Ffooks & Grimley*, Sherborne (for the eleventh defendant); *Treasury Solicitor* (for the Custodian of Enemy Property).

B [Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

NOTE.

C *Re AMORY (deceased). WESTMINSTER BANK, LTD. v. BRITISH SAILORS' SOCIETY INCORPORATED AT HOME AND ABROAD AND OTHERS.*

[CHANCERY DIVISION (Roxburgh, J.), October 24, 25, 1951.]

D *Practice—Originating summons—Parties—Construction summons—Parties in same interest represented by separate counsel—Costs—R.S.C., Ord. 65, r. 1.*

ADJOURNED SUMMONS.

E By her will, a testatrix bequeathed £100 free of duty to the Bristol Sailors' Society of 34, Prince Street, Queen Square, Bristol. By a codicil to her will she directed her executors to pay a share of her residuary estate to the Bristol and Area Discharged Prisoners Aid Society and the Bristol Sailors' Society, Prince Street, Bristol, in equal shares. There being at the date of the death of the testatrix no society called the Bristol Sailors' Society at the address indicated, the gifts to that society were claimed by the British Sailors' Society Incorporated at Home and Abroad, which had three hostels for seamen in the Bristol area. The executors, therefore, issued an originating summons, joining as defendants the said British Sailors' Society Incorporated, Mrs. R., a person interested as a residuary legatee and one of the next of kin, and the Attorney-General, to determine whether, on the true construction of the will, the legacy of £100 was a valid gift to the British Sailors' Society Incorporated, and if not, whether it was a valid charitable gift or void for uncertainty or for any other reason. The executors also asked that, if necessary, a scheme be directed, and raised corresponding questions relating to the share of residue. A representation order in relation to other residuary legatees and next of kin was asked for. In March, 1950, when the summons came before the master, he suggested that the summons should be amended by joining all persons interested in residue. Three further defendants were joined and appeared by the solicitors representing Mrs. R. On Nov. 7, 1950, the British Sailors' Society Incorporated filed an affidavit disclosing for the first time that, until 1931, the society had had an office at 34, Prince Street, Queen Square, Bristol. Separate counsel was briefed on behalf of each defendant.

H **ROXBURGH, J.,** said that the original parties to the summons were the proper and only necessary parties. It might not be proper to make a representation order as regards the residuary legatees, but it had, at least for many years, been the practice where the question was one of pure construction and nothing else (especially when the relevant question related,

as here, to only £100) to make as defendant one person who was plainly interested in arguing against the legacy. The refusal of a representation order was not of much importance, because, if the court were prepared to decide the question (and HIS LORDSHIP could recall no occasion on which the court had refused to decide such a question in the circumstances indicated), the executors were amply protected. The additional defendants (having no interest as next of kin) were concerned only to argue, as counsel for Mrs. R. had argued, that the legacy of £100 failed, and, having regard to the affidavit filed in November, 1950, that was almost unarguable. Yet each of them was separately represented by counsel. A

The Treasury Solicitor had taken counsel's opinion and had received clear advice to the effect that there was little doubt what the result of the summons would be in view of the affidavit of Nov. 7, 1950. He (HIS LORDSHIP) did not suggest that the Treasury Solicitor had any duty to communicate to the master or anybody else what counsel had said, but if, in a case of that sort, where counsel had indicated that on the new evidence there was little doubt what the result would be, the Treasury Solicitor gave no hint to the master, but merely told him that the Attorney-General was satisfied with the evidence, there arose a question how far the Attorney-General ought to be guaranteed his costs out of the estate after he had received such a clear intimation from counsel. B C

Three unnecessary briefs had been delivered. It was a prevailing fallacy that in such circumstances the unnecessary defendants were entitled to have their costs paid out of the estate or by the plaintiffs. He referred to R.S.C., Ord. 65, r. 1, and said that no defendant beneficiary had a right to costs as between solicitor and client out of anything or against anybody. The fact that it was the practice usually to make some such order was responsible for two practices which he regarded as most deleterious—one was adding unnecessary parties and the other was delivering unnecessary briefs. While he thought the result in the present case, *viz.*, that so many counsel had appeared in a case which was to all intents and purposes unarguable, was deplorable, it was true that when one began to analyse the conduct of each person in the case there was not a great deal to criticise. He bore that fact in mind. It was not a case in which he thought he ought to make anybody pay costs, but, if he ordered the costs of seven counsel to be paid out of the residuary estate as between solicitor and client in a case which was almost unarguable, he would be giving encouragement to two abuses, *viz.*, the addition of unnecessary parties and the delivery of unnecessary briefs. As regards the unnecessary parties, the fact that a person was added as a party did not in any degree require him to appear, still less to brief counsel for the hearing, and if, when added, the person concerned was satisfied that he had no claim, why should he attend? He had the right to attend, but if he attended what right had he to costs? D E F

HIS LORDSHIP ordered the British Sailors' Society Incorporated at Home and Abroad to pay the costs of all parties (except those of the three unnecessary defendants) as between party and party down to Nov. 7, 1950 (the date of the filing of the society's evidence). The costs of the plaintiffs, Mrs. R., and the Attorney-General were directed to be taxed as between solicitor and client and (except so far as paid by the society) paid out of the estate. The society's costs to be taxed as between solicitor and clients from Nov. 7, 1950, down to judgment, and to be paid out of the estate. There would be no order as to the costs of the remaining three defendants. G H

R.D.H.O.

Re FITZPATRICK (deceased). BENNETT AND ANOTHER *v.*
BENNETT AND ANOTHER.

[CHANCERY DIVISION (Harman, J.), October 24, 25, 1951.]

Administration of Estates—Expenses—Carriage of foreign chattels to England—Payment by specific legatee.

By her will, dated Oct. 15, 1938, the testatrix appointed executors and bequeathed all her jewellery and personal chattels as defined in the Administration of Estates Act, 1925, to her sister absolutely and free of duty, giving her residuary estate to other persons. By a codicil dated July 10, 1943, the testatrix declared that her residence was in Monaco, and she bequeathed to her said sister all her possessions at Monaco. By the said codicil she also appointed the sister an additional executrix. The testatrix died on Apr. 30, 1944, in Monte Carlo, but domiciled in England. The administration of the estate in Monaco having been completed on behalf of the executors by an official of the Monegasque court, the sister and another executor went to Monaco and arranged for the carriage and insurance in transit of the Monegasque chattels of the testatrix.

HELD: there was no duty on the executors to arrange the carriage of the chattels, and, therefore, the costs could not be charged against the residuary estate, but must be borne by the specific legatee.

Re Scott ([1915] 1 Ch. 592), applied.

Re Hewett (1920) (90 L.J.Ch. 126), not followed.

Cases referred to:

- (1) *Re Scott*, [1915] 1 Ch. 592; 84 L.J.Ch. 366; 112 L.T. 1057; 21 Digest 130, 959.
- (2) *Re Grosvenor*, [1916] 2 Ch. 375; 85 L.J.Ch. 735; 115 L.T. 298; 23 Digest 393, 4632.
- (3) *Re De Sommery*, [1912] 2 Ch. 622; 82 L.J.Ch. 17; 107 L.T. 253, 823; 21 Digest 130, 958.
- (4) *Re Hewett*, (1920), 90 L.J.Ch. 126; 23 Digest 475, 5442.

ADJOURNED SUMMONS to determine, *inter alia*, how certain expenses incurred by two of the executors in arranging for the carriage of certain chattels forming part of the estate of Dame Ada Florence Fitzpatrick, deceased, from Monaco to England ought to be borne as between a legatee specifically entitled to the chattels and those interested in the residuary estate.

Plowman for the plaintiffs, the executors.

H. E. Francis for the first defendant, the specific legatee.

McMullen for the second defendant, interested in the residuary estate.

HARMAN, J.: The question is whether the costs of transporting these chattels to England and of insuring them in transit ought to be borne by the residuary estate or by the specific legatee, Mrs. Bennett. At first sight, I should have thought clearly the latter. Foreign assets do not vest in executors *virtute officii*. If there are debts and no sufficient assets in England to meet them, it may be the duty of English executors to possess themselves of any foreign assets, but, if that is not the case, they can assent to the foreign assets without bringing them to this country. They need only satisfy themselves that they have sufficient assets to pay the debts here.

That is, as I understand, what LORD COZENS-HARDY, M.R., said in *Re Scott* (1). In that case there were foreign assets in France, *viz.*, various pictures, engravings and works of art which were given to Lady Sackville, and the question arose who should bear the French duty in respect of the chattels and the cost of transporting them to England. LORD COZENS-HARDY, M.R., said ([1915] 1 Ch. 606):

"It is said that it is the duty of an executor, where there is a specific bequest of property which is in a foreign country, to go to that foreign

country and to procure the specific article, to pay what is necessary in order to get it, and to bring it back to this country. Each one of us has asked, I think, for a statement by any text-writer to support that proposition. I can find none, and it is conceded there is none. Is there anything in principle which can justify it? I think not, for many reasons, but the one that strikes me most is this. When there is a specific legacy the first duty of the executor is to consider whether he assents to it or not. If he assents to it the property passes out of him and is in the specific legatee, and from that moment the executor cannot possibly interfere with the possession of the chattels, cannot claim them from anybody else, and the legatee who has the legal title is the person to recover them, and to do what is necessary."

That seems to me to be right and to cover the present case. PHILLIMORE, L.J., said much the same thing (*ibid.*, 610):

"I know of no authority that the executors are bound to bring a chattel to the testator's domicile, or to bring it from foreign parts in order to deliver it to the legatee. If the argument is worth anything it would involve this, that whenever chattels specifically bequeathed are locally situated in some foreign country, and there is a duty of any sort payable on these chattels by reason of the death of the testator, it falls to the executors to redeem these chattels, to ransom them, as it were, from the foreign country, and bring them away and deliver them safely to the legatee. By this time of day if there were any such duty upon executors there would have been authority for it, and I decline to hold that there is any such duty."

Those observations seem to me to be categorical. They were followed in *Re Grosvenor* (2) by ASTBURY, J., who cited also the decision of PARKER, J., in *Re De Sommers* (3). Although *Re Grosvenor* (2) was different from *Re Scott* (1) in its facts, it shows that the learned judge accepted the latter case as being the law.

My attention was drawn to *Re Hewett* (4) before RUSSELL, J., where the learned judge said (90 L.J.Ch. 128):

"... the reasonable and proper view is that the executors here are entitled to pay, and indeed should pay, all the costs of packing these articles [in Hong Kong and Shanghai] and having them conveyed to the country where the executors are for the purpose of having them distributed among the persons entitled."

I cannot, however, suppose that anything which fell from the lips of RUSSELL, J. (as he then was), can overrule the categorical statements of the Court of Appeal in *Re Scott* (1) which does not appear to have been cited to him. I must, therefore, hold that it is not the duty of the executors as such to go to Monaco, where incidentally they have no standing at all, and obtain these chattels and bring them back here. All they needed to do was to assent, which they must be taken to have done. The executors having assented, the specific legatee must go and get the chattels. If an assenting executor, having become a trustee, incurs expense at the request of the specific legatee he is entitled to be indemnified as a trustee is always so entitled. Therefore, in my judgment, these costs must be borne by the specific legatee.

Order accordingly.

Solicitors: *Bircham & Co.* (for the plaintiffs); *Callingham, Griffith & Bate* (for first defendant); *Boyce, Evans & Sheppard* (for second defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re POMFRET'S SETTLEMENT. GUEST AND ANOTHER *v.*
POMFRET AND ANOTHER.

[CHANCERY DIVISION (Roxburgh, J.), October 31, November 1, 1951.]

Settlement—Capital or income—Casual profit—Compensation for damage to house during military occupation.

A Under a strict settlement dated May 13, 1935, real property, including a dwelling-house, was vested in V.P. as tenant for life unimpeachable of waste. In October, 1939, the house was requisitioned by or on behalf of the military authorities, who remained in occupation till 1946 when V.P. obtained compensation under the Compensation (Defence) Act, 1939, s. 2 (1) (b), in respect of damage done to the property.

B HELD: the moneys were casual profit belonging in equity to V.P. as tenant for life, and no part of it ought to be treated as capital moneys.

Re Williams' Settlement ([1922] 2 Ch. 750), applied.

AS TO CASUAL PROFITS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 644-653, paras. 924-934; and FOR CASES, see DIGEST, Vol. 40, p. 656, Nos. 1953-1956.

Cases referred to:

C (1) *Re Williams' Settlement*, [1922] 2 Ch. 750; 92 L.J.Ch. 101; 128 L.T. 110; 40 Digest 656, 1955.

(2) *Re Barrington*, (1886), 33 Ch.D. 523; 56 L.J.Ch. 175; 55 L.T. 87; 11 Digest 248, 1500.

D ADJOURNED SUMMONS to determine whether, on the true construction of the documents constituting a compound settlement, *viz.*, a trust instrument dated May 13, 1935, and a settlement on marriage dated Feb. 4, 1936, or either of them, a sum of £7,007 0s. 8d. paid under the Compensation (Defence) Act, 1939, s. 1 (1), to the first defendant, Virgil Pomfret, as compensation under s. 2 (1) (b) of that Act in respect of freehold property which was subject to the trusts of the compound settlement belonged in equity to the tenant for life or constituted capital moneys.

E *McMullen* for the plaintiffs, the trustees.

F. B. Alcock for the first defendant, the tenant for life.

R. J. S. Thompson for the second defendant, one of the remaindermen.

F ROXBURGH, J.: By a settlement dated May 13, 1935, an estate known as the Mystole estate was settled by way of strict settlement. The tenant for life is and was at all material times Virgil Pomfret. Since the property legislation in 1925 he cannot have a legal life estate. His life estate must be equitable, but he is, by cl. 3 of the settlement, made unimpeachable of waste. On the settled estate was a house which, in October, 1939, was requisitioned by or on behalf of the military authorities and rent was paid. In the summer of 1946 the military authorities gave up occupation. Very considerable damage was then found to have been done during the occupation and in respect of it over £7,000 was obtained by the tenant for life by way of compensation. In 1948 the house was sold for £5,500 and it leaps to the eye that the price would have been much greater, how much greater one cannot tell, if the damage in question had not been done.

G The question arises whether the tenant for life, who, under the Compensation (Defence) Act, 1939, s. 2 (3), was, undoubtedly, the proper claimant for compensation, which was, therefore, properly received by him, is under any equitable obligation to treat any part of it as capital held on the trusts of the settlement? If I were unfettered by authority, I should have no doubt what my decision ought to be. It is quite plain that the damage done during the occupation seriously depreciated the value of the house with the result that it realised far less than it would otherwise have realised. Why in those circumstances no part of the compensation should be attributed to capital, apart from authority, I

should be at a loss to understand. It is true that the tenant for life is without impeachment of waste, but it does not seem to me that this is a question of waste by the tenant for life. The waste was by the military authorities who, under statutory powers, took possession of the trust property, and if, as I assume, the compensation was exactly equivalent to the damage done, and if, as I should have thought, one ought to treat the inheritance and the compensation money as an entity, there has been no waste. There has been neither profit nor loss. Again, were it not for authority, I should find difficulty in understanding how this sum could be called a casual profit. It may be casual, though, apart from damage in war time, damage of this sort is frequently done. I am prepared to think it is casual, but why is it a profit? If the compensation money is precisely equivalent to the damage done, there is neither profit nor loss. If the compensation money exceeds the amount of the damage done, there may be some profit, but the profit is the difference between those two figures.

I consider myself, however, to be bound by the decision in *Re Williams' Settlement* (1) which arose under the Indemnity Act, 1920, and, in my view, was indistinguishable from the present matter. A park which was subject to a strict settlement was occupied by the military authorities. The compensation was awarded under the Indemnity Act, 1920, for damage sustained by reason of that occupation. There was nothing in the Act providing what was to be done with the compensation when it had been received. The *ratio decidendi* of the judgment of SARGANT, J., is to be found where he said ([1922] 2 Ch. 757):

"Assume that the military authorities had been in the position of private individuals and had not had the protection of the Royal Prerogative. If then they had entered and injured the park and thereupon the tenant for life not being impeachable of waste had sued and recovered damages, *Re Barrington* (2) shows that any damages so recovered would have been retainable by the tenant for life and would not have belonged to the successive owners of the settled land notwithstanding the damage to the inheritance. So by analogy it seems to me that the compensation awarded in respect of the damage done by the Crown might well have been intended to follow the same rule. If that be so, that may explain the absence from the Indemnity Act, 1920, of any provision that amounts paid by way of compensation for injury to settled property are to be held on account of the persons successively entitled. Further, in my opinion, the money received in respect of the damage to the park is a casual profit. It is hard to think of anything of a more casual nature. It is something received by reason of an event which I hope is not likely to recur, at any rate for many years to come. On general principle, therefore, and upon consideration of the origin of this particular sum of money and of the absence of any provision in the Indemnity Act providing for any other destination for this money, I hold that the tenant for life being unimpeachable of waste is entitled to retain the amount recovered by him as compensation for the injury to the park."

I am unable to see any difference between that case and the present which would enable me to reach a different conclusion. It is all very well for me or for counsel to suggest that this money was not a profit, but SARGANT, J., has held that it was. It is useless to argue that *Re Barrington* (2) does not really support SARGANT, J.'s conclusion. On that point I express no opinion because I could not say, even if I thought it did not, that it did not, because SARGANT, J., has said that it does. Counsel for the remaindermen has suggested that there are four reasons why I should not consider myself bound by *Re Williams' Settlement* (1). He says the compensation is not a casual profit. That I have already dealt with. Secondly, counsel says that there is an essential difference between *Re Williams' Settlement* (1) and the present case, *viz.*, that in *Re Williams'*

Settlement (1) the tenant for life had a legal life estate, whereas, of course, in the present case, he has only an equitable life estate. In my judgment, the decision in *Re Williams' Settlement* (1) does not turn on that point. In stating his reasons, SARGANT, J., does not even mention that the tenant for life was legal tenant for life, though, in fact, he was. What the decision does turn on is his unimpeachability of waste which, according to the reasoning of SARGANT, J., is the relevant consideration in connection with this subject-matter. Thirdly, it was submitted by counsel that the effect of the Indemnity Act, 1920, was merely to compensate the claimant for his own personal loss whereas the compensation to be awarded under the Compensation (Defence) Act, 1939, is compensation for damage to the inheritance. The argument that the Act of 1920 was confined to claims in respect of the claimant's own personal loss was put forward in *Re Williams' Settlement* (1) by counsel on one side and opposed by counsel on the other side, and it is plain that SARGANT, J., did not accept it. If he had, it would obviously have been the first ground of his decision. Moreover, the very way in which he states his conclusion shows that he was regarding the money as payable in respect of damage to the inheritance. Therefore, I do not feel able to distinguish *Re Williams' Settlement* (1) on that ground.

Lastly, counsel relies on the Settled Land Act, 1925, s. 81, which, of course, was not in force at the date of the decision in *Re Williams' Settlement* (1). I do not think he can find much comfort in that section. It provides:

"Any money which after the commencement of this Act arises from settled land otherwise than under this Act . . . and which ought, as between the persons interested in the settled land, to be or to have been treated as capital, shall . . . be deemed to be or to represent capital money arising under this Act . . ."

To rely on that section is to beg the question. If the compensation ought, as between the persons interested in the settled land, to be treated as capital, then the section would apply, but the section cannot assist the court in determining what ought to be treated as capital. Counsel suggested that the effect of that section was to give me a discretion unfettered by any previous authority. If I thought that it gave me such a discretion, I should certainly decide in his favour, but I cannot believe that the section gives me any such discretion. Accordingly, I must decide, with great reluctance, that this compensation money belongs in equity to the tenant for life.

Declaration accordingly.

Solicitors: *A. F. & R. W. Tweedie* (for the trustees); *Long & Gardiner* (for the tenant for life); *Lawrance, Messer & Co.* (for the remaindermen).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

NOTE.**T. F. MALTBY, LTD. v. PELTON STEAMSHIP CO., LTD.**

[KING'S BENCH DIVISION (Devlin, J.), October 18, 19, 1951.]

Indemnity—Contract to discharge ship—Agreement by shipowners to indemnify stevedores against claims for personal injury by employees—Stipulation against use of “improper or inadequate gear”—“Gear”—“Ship’s gear”—Use by stevedore’s foreman of defective ship lamp-holder for unsuitable purpose—Liability of shipowners to injured employee of stevedores.

ACTION by stevedores on a contract of indemnity.

In a contract with a company of stevedores for the discharge of a ship, ship-owners undertook that, in lieu of paying the stevedores “the cost of the insurance of your employees engaged in such work . . . (and upon your agreeing to the stipulations hereinafter contained), we will indemnify you in respect of all claims relating to personal injury by accident to your employees arising out of and in the course of the work of discharging the said vessel by ship’s or stevedore’s gear, it being stipulated and agreed that you shall take reasonable precautions to prevent accidents and to comply with all statutory requirements, also have all your gear regularly and properly tested and not use improper or inadequate gear.”

In rigging up an apparatus known as a tripping line to assist the discharge of cargo, one of the stevedore’s foremen negligently fixed a block and pulley to a lamp-holder, which had been constructed at the same time as the ship to provide light for the open hatchways and consisted of an iron rod running fore and aft from a crosspiece between the two Sampson posts. The lamp-holder was unsuitable for the purpose and the bolts securing it to the crosspiece were rusty and they broke with the result that the block and pulley fell and injured one of the stevedore’s workmen who recovered damages from the stevedores.

Marven Everett for the plaintiffs.

Berryman, K.C., and *W. G. Wingate* for the defendants.

DEVLIN, J., stated the facts and said that the decision in *Woolfall & Rimmer, Ltd. v. Moyle* (1) made it impossible for the shipowners to contend that the negligence by the foreman brought them within the first part of the stipulations. They were, therefore, driven to rely on the additional clause which was not in the policy of insurance that was considered in *Woolfall’s* case (1), and to rely on the words:

“you shall also have all your gear regularly and properly tested and not use improper or inadequate gear.”

There was here no question of gear not being regularly and properly tested, so that the material words were “not use improper or inadequate gear.”

The submission of counsel for the shipowners was, first of all, that “gear” in that phrase covered “ship’s gear,” because the earlier part of the paragraph referred to “discharging the said vessel by ship’s or stevedore’s gear” and the reference to testing was limited to “your gear,” whereas in the phrase on which he relied there was no limiting “your.” It was, therefore, urged that there was an absolute obligation on the stevedores not to use any improper or inadequate gear, whether it was their own or whether it was the ship’s, and the lamp-holder was improper or inadequate, and so the stevedores failed.

Counsel for the stevedores had advanced two points. The first was that the lamp-holder was not “gear” in any sense of the term. If that were so, then, of course, the exception did not apply. There was great force in that argument. It was true that in one sense of the term—perhaps in any sense—one ought to regard the derricks and the Sampson posts as part of the ship’s discharging gear,

even though they were part of the permanent structure of the ship, and on this basis it was said that a lamp-holder intended to be used in lighting up the holds and running on a crosspiece between the two Sampson posts was also part of the ship's discharging gear. He thought, however, that one must have regard to some extent to the use being made of the particular object. The mere fact that the lamp-holder happened to be suspended from a crosspiece that ran between the two Sampson posts and that the two Sampson posts were an essential part of the machinery of discharging by derricks was not, in his view, conclusive. Counsel for the stevedores suggested that the lamp-holder was no more a part of the ship's gear than any hook suspended from a building to which a block and tackle was affixed would be part of the gear of the block and tackle. He (his Lordship) was inclined to think that anything like a lamp-holder ought not to be described as part of the ship's gear where it was used merely for fixing a block and tackle, for which purpose one might use equally well any part of the ship that was sufficiently high and could not possibly be said to be part of the discharging gear, but he did not propose to decide the case entirely on that rather narrow ground.

The phrase "you shall take reasonable precautions," must be construed, under the decision of the Court of Appeal in *Woolfall's* case (1) as, in effect, saying: "You, the owner of the business, shall take reasonable precautions" and in construing the words: "You shall not use improper or inadequate gear," the same meaning must be attached to the word "you." It did not mean "You, through your foreman, shall not use improper or inadequate gear." It meant "You, as owner of the business, shall not use improper or inadequate gear." As soon as it was established that "you" meant the owner of the business only and did not embrace all his servants and agents, it followed that the word "use" must be given the wider meaning, not of physical use, but of use in the business. Use in the business, however, did not necessarily include gear which did not belong to the owner of the business and was only incidentally made use of by one of the stevedore's servants. The question was whether it could properly be said that the lamp-holder was gear used by the stevedores as owners of their business in the course of their business. In other words, in the business sense of the word "use," could the stevedores as owners of the business be said to be using the lamp-holder as part of their gear? He thought the answer to that was "No."

The test in each case would be: "Ask the ordinary business man, the owner of a business: 'Do you use this piece of gear in the course of your operations?'" If he hired the Port of London Authority's gear regularly, no doubt he would say: "Yes," but if the reference was merely to a tool that was borrowed incidentally by a foreman, he would say: "No." It was always a difficult matter to determine which side of the line any particular case fell, but he thought that this case fell on the side indicated.

AS TO LIABILITY UNDER A CONTRACT OF INDEMNITY, see HALSBURY, Hailsham Edn., Vol. 16, p. 17, para. 14.

Case referred to:

(1) *Woolfall & Rimmer, Ltd. v. Moyle*, [1941] 3 All E.R. 304; [1942] 1 K.B. 66; 111 L.J.K.B. 122; 166 L.T. 49; 2nd Digest Supp.

Solicitors: *Gardiner & Co.* (for the plaintiffs); *Botterell & Roche* (for the defendants).

F.A.A.

GORST v. GORST.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), June 4, October 11, 12, 25, 1951.]

Divorce—Connivance—Termination—General consent to husband's adultery—Forgiveness and condonation—Subsequent adultery without consent.

In October, 1949, the wife gave a general consent to the husband's adultery, but excluded from her consent adultery with Miss N. The husband began to commit adultery with Miss N. in January, 1950, when he told his wife, untruly, that he was associating with another woman. The wife begged him to give up the other woman, and in March, 1950, he told his wife, again untruly, that he had done so. Believing the husband was telling the truth the wife forgave him his past adultery and attempts were made between the parties to resume marital intercourse. The husband continued his adultery and this was later discovered by the wife who filed a petition for divorce on the ground of the adultery.

HELD: the wife had withdrawn her consent to the husband's adultery and had forgiven his past adultery before the petition was filed; her connivance had spent itself; and so for the purposes of the present suit she had not connived at adultery within the meaning of s. 4 of the Matrimonial Causes Act, 1950.

Dictum of LORD WESTBURY, L.C., in Gipps v. Gipps & Hume (1864) (11 H.L. Cas. 13), not followed.

AS TO CONNIVANCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 674-676, paras. 995-999; and FOR CASES, see DIGEST, Vol. 27, pp. 327-332, Nos. 3062-3122, and Digest Supps.

Cases referred to:

- (1) *Lovering v. Lovering*, (1792), 3 Hag. Ecc. 85; 162 E.R. 1089; 27 Digest 326, 3053.
- (2) *Hodges v. Hodges*, (1795), 3 Hag. Ecc. 118; 162 E.R. 1100; 27 Digest 330, 3088.
- (3) *Timmings v. Timmings*, (1792), 3 Hag. Ecc. 76; 162 E.R. 1086; 27 Digest 339, 3195.
- (4) *Gipps v. Gipps & Hume*, (1864), 11 H.L. Cas. 1; 33 L.J.P.M. & A. 161; 10 L.T. 735; 11 E.R. 1230; 27 Digest 458, 4756.
- (5) *Churchman v. Churchman*, [1945] 2 All E.R. 190; [1945] P. 44; 114 L.J.P. 17; 173 L.T. 108; 2nd Digest Supp.
- (6) *Rogers v. Rogers*, (1830), 3 Hag. Ecc. 57; 162 E.R. 1079; 27 Digest 327, 3061.
- (7) *Phillips v. Phillips*, (1844), 1 Rob. Eccl. 144; 3 Notes of Cases 444; 163 E.R. 993; *affd.* P.C., (1847), 5 Notes of Cases 435; 27 Digest 328, 3072.
- (8) *Lloyd v. Lloyd & Leggeri*, [1938] 2 All E.R. 480; [1938] P. 174; 107 L.J.P. 90; 159 L.T. 258; 102 J.P. 353; Digest Supp.
- (9) *Allen v. Allen & D'Arcy*, (1859), Sea. & Sm. 84; 30 L.J.P.M. & A. 2; 27 Digest 327, 3063.
- (10) *Woodbury v. Woodbury*, [1948] 2 All E.R. 684; [1949] P. 154; [1949] L.J.R. 40; 2nd Digest Supp.

PETITION for divorce by the wife on the ground of the husband's adultery with a woman named.

The petition, which was undefended, was heard on June 4, 1951, before KARMINSKI, J., and was adjourned in order that counsel for the King's Proctor might be heard on the issue of connivance.

The parties were married in 1945. The husband was unable to consummate the marriage and this led to a breakdown in his health in 1947, when he had to go to a mental hospital for observation, but eventually the marriage was consummated and a child was born in 1949. After the birth of the child the husband's

attempts to renew sexual intercourse were for the most part unsuccessful, and in October, 1949, he suggested that, if he were sexually successful with another woman, his inhibitions with regard to his wife would probably be cured. At first the wife refused to consider the suggestion, but, fearing another breakdown in the husband's health, she reluctantly consented, although she believed the attempt with another woman would not be successful. The husband then suggested that he should make his attempt with a Miss Nichol, the woman named in the petition, who was well known to the parties. This suggestion was abhorrent to the wife, and she told her husband so in clear terms. The husband then told his wife that he had found another woman whose name he refused to disclose and that he was no longer seeing Miss Nichol. No sexual intercourse took place between the parties from October, 1949, until March, 1950, when the husband informed the wife that he had given up the other woman. She forgave him and attempts were made to renew sexual intercourse, but these were only partially successful. In June, 1950, the husband said that he had only just given up the other woman, and in September, 1950, he confessed that the other woman had all along been Miss Nichol. He said he could not give her up, and asked his wife's leave to see her two or three times a week. The wife refused. The husband left the wife in October, 1950, and had since cohabited with Miss Nichol. The wife petitioned for divorce on the ground of adultery.

A. R. Ellis for the petitioner.

Colin Duncan for the King's Proctor.

Cur. adv. vult.

Oct. 25. KARMINSKI, J., read the following judgment in which he

D stated the facts and continued: I have found that the wife consented to the husband's adultery before its inception, but that she clearly excluded from her consent his adultery with Miss Nichol. The adultery alleged in these proceedings is adultery with Miss Nichol and with no other woman. This question now arises: Can a petitioner give a consent to adultery excluding a person or class of persons and thereafter escape a finding of E connivance if the adultery has been committed with the person or persons excluded? There have been many passages in decided cases and in the text-books which suggest that adultery with one person which has been connived at excludes all relief in respect of subsequent adultery with another. Counsel for the King's Proctor agreed that the principle thus stated is too wide and suggested in its place the proposition that once the court has found connivance F it must investigate all the circumstances, including the lapse of time between the adulteries, and then decide whether or not the connivance has spent its force before the subsequent adultery has been committed.

I believe this to be the true view. Two cases can be cited to illustrate the point. In *Lovering v. Lovering* (1) a husband alleged adultery by his wife with B, which was not disputed by her. Shortly before this adultery the husband had G noticed great familiarities in his house between his wife and another man, his apprentice, whom he had allowed to continue in the house. There followed, as LORD STOWELL (then SIR WILLIAM SCOTT) stressed, proved criminality with another man, nearly contemporary. Dismissing the petition, LORD STOWELL summed up the matter in the following terms (3 Hag. Ecc. 87):

H "The case then comes almost to this. Can a man, consenting to adultery with A., but not consenting to adultery with B., take advantage of that adultery, and say to the Ecclesiastical Court, '*Non omnibus dormio.*' This is language not to be endured. The Ecclesiastical Court requires two things—that a man shall come with pure hands himself, and shall have exacted a due purity on the part of his wife: and if he has relaxed with one man he has no right to complain of another. I think, in this case, the husband is not entitled to relief, having consented to the turpitude of his wife. I dismiss the suit."

In so expressing himself I do not think that LORD STOWELL meant to state that in no circumstances and after no lapse of time could a spouse ever rid himself of the taint of connivance. Indeed, the contrary view was expressed by SIR WILLIAM WYNNE in *Hodges v. Hodges* (2). That case was decided in the Arches Court of Canterbury nearly three years after *Lovering v. Lovering* (1), and it is at least of interest to note that in *Hodges v. Hodges* (2) leading counsel for the petitioner was SIR WILLIAM SCOTT himself, though his argument is not reported and it looks possible that SIR WILLIAM WYNNE overlooked *Lovering v. Lovering* (1) and also *Timmings v. Timmings* (3). In *Hodges v. Hodges* (2) the material point was this. The husband had connived at the respondent wife's adultery prior to 1785, when they separated. The adultery complained of by the husband was with another man and began in 1789. SIR WILLIAM WYNNE found on those facts that the connivance was not proved. As reported, his reasons are not very clearly stated, but I think his decision was based on the length of time between the adulteries and the inference that the connivance of 1785 had spent its force by 1789.

The doctrine that connivance at adultery with one person precludes relief on the ground of adultery with another finds its greatest support in some observations to be found in *Gipps v. Gipps & Hume* (4). In his speech LORD WESTBURY, L.C., used the following expressions (11 H.L. Cas. 13):

"If a husband is proved to have connived at the adultery of his wife with A., he cannot obtain a dissolution of marriage on account of her adultery with B.; nor if he has connived at adultery committed by his wife with a particular person at one time, can he complain of adultery committed with the same person at a subsequent time."

These observations, however, were, in my view, *obiter*, since they were not necessary to the decision of the case then before their Lordships. LORD CHELMSFORD (*ibid.*, 28) appeared to dissent from LORD WESTBURY's observations, but pointed out (*ibid.*, 29) that he was confining himself to the case before him which was that of a husband who had sold his right to a separation to the wife's paramour and could not thereafter obtain relief on the grounds of her adultery with the same individual. Mr. Gipps made no charge against his wife of adultery with anyone except Mr. Hume. He had taken money from Mr. Hume and had then left his wife to resume her adulterous association with him. While the principle suggested by LORD WESTBURY, which I have quoted, must be regarded with respect, I am not bound by it and do not propose to follow it.

Having discussed the principles of law involved, I must now apply them to the facts of the present case. The wife gave a general consent to the husband's adultery in October, 1949. I find that his adultery with Miss Nichol began not later than January, 1950, when he told his wife that he had found another woman, though the exact date cannot be ascertained with certainty. The husband told the wife that the woman was not Miss Nichol, but this was untrue. The wife begged the husband to give up the other woman, and in March, 1950, the husband told the wife, though again untruly, that he had done so. Acting in the belief that the husband was telling her the truth, the wife forgave him and attempts were made to renew sexual intercourse. In short, I find that the wife condoned the adultery at which she had connived in the erroneous belief that the adultery had ceased. The husband continued his adultery, and this was later discovered by the wife. I have to ask myself whether the wife's connivance had spent itself. The question is not an easy one to answer, but after full consideration I am of the opinion that it had, since she withdrew her consent to his adultery and forgave his past adultery before the present petition was filed. I am satisfied that the wife has not connived at the husband's adultery within the meaning of s. 4 of the Matrimonial Causes Act, 1950, and I pronounce a decree *nisi* of dissolution accordingly.

Solicitors: *Hunters* (for the petitioner); *The King's Proctor*.

Decree nisi.

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

Re ROSE (deceased). ROSE AND OTHERS *v.* INLAND
REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Roxburgh, J.), October 10, 11, 15, 16, 19, November 2, 1951.]

Estate Duty—Gift inter vivos—Date when made—Shares transferred before Apr. 10, 1943—Transfers registered after that date.

A By a transfer dated Mar. 30, 1943, the deceased, in consideration of his love and affection for his wife, transferred to her ten thousand shares of £1 each in a limited company to hold subject to the several conditions on which he held the same at the time of the execution thereof. By another transfer of the same date, the deceased, in consideration of the payment

B of 10s., transferred a similar number of the said shares to his wife and R. to hold subject to the same conditions. By a settlement of the same date, made between the deceased, of the first part, the wife, of the second part, and the wife and R. (as trustees), of the third part, trusts were declared of the second block of shares in favour of the wife and the son of the deceased. Under the articles of association of the company the directors were empowered, in their absolute and uncontrolled discretion and without assigning

C any reason, to decline to register any proposed transfer of shares. The deceased was governing director of the company and as such had full and uncontrolled authority to determine who should be admitted from time to time to be a shareholder of the company. The other directors were the deceased's wife and R. The two transfers and the settlement were executed

D by all parties between Mar. 30, 1943, and Apr. 5, 1943, and the share certificates of both blocks of shares were thereafter held by R. The transfers were not registered until June 30, 1943, and it was agreed that (having regard to the transitional provisions contained in the Finance Act, 1946, sched. XI, Part II) all the shares would be liable to estate duty under the Finance Act, 1894, s. 2 (1) (c), unless before Apr. 10, 1943, there had been *bona fide* dispositions of the shares purporting to operate as immediate

E gifts *inter vivos*.

HELD: by virtue of the transfers of Mar. 30, 1943, the deceased had done all in his power to deprive himself of the title to the shares and to vest it in the donees or their trustees, and, therefore, although the transfers were not registered until June 30, 1943, the gifts were complete on the execution of the transfers so as to pass beneficial interests to which the court would have compelled the deceased to give effect, and the shares were not liable

F to duty.

Re Williams ([1917] 1 Ch. 1), *Re Rose* ([1948] 2 All E.R. 971), and *Nanney v. Morgan* (1887) (37 Ch.D. 346), applied.

Richards v. Delbridge (1874) (L.R. 18 Eq. 11), considered.

G AS TO LIABILITY OF GIFTS INTER VIVOS TO ESTATE DUTY, see HALSBURY, Hailsham Edn., Vol. 13, pp. 237-240, paras. 227-229; and FOR CASES, see DIGEST, Vol. 21, pp. 10-14, Nos. 45-67.

Cases referred to:

- (1) *Milroy v. Lord*, (1862), 4 De G.F. & J. 264; 31 L.J.Ch. 798; 7 L.T. 178; 45 E.R. 1185; 25 Digest 530, 206.
- H (2) *Richards v. Delbridge*, (1874), L.R. 18 Eq. 11; 43 L.J.Ch. 459; 25 Digest 537, 259.
- (3) *Nanney v. Morgan*, (1887), 37 Ch.D. 346; 57 L.J.Ch. 311; 58 L.T. 238; 40 Digest 535, 784.
- (4) *Re Williams*, [1917] 1 Ch. 1; 86 L.J.Ch. 36; 115 L.T. 689; 25 Digest 532, 221.
- (5) *Re Rose*, [1948] 2 All E.R. 971; [1949] Ch. 78; [1949] L.J.R. 208; 2nd Digest Supp.

(6) *Re Fry*, [1946] 2 All E.R. 106; [1946] Ch. 312; 115 L.J.Ch. 225; 175 L.T. 392; 2nd Digest Supp.

ADJOURNED SUMMONSES to determine the liability to estate duty of two blocks of shares in a private company gratuitously transferred by the deceased to or for the benefit of his wife and child before Apr. 10, 1943, the relevant date, having regard to the Finance Act, 1946, sched. XI, prior to which the gifts must have been made if duty were not to be levied thereon under the Finance Act, 1894, s. 2 (1) (c). The transfers were not registered until after Apr. 10, 1943, and the Inland Revenue Commissioners claimed estate duty on the footing that the gift was not complete until the transfers were registered. A

Grant, K.C., and *F. N. Bucher* for the taxpayers (the plaintiffs in each of the two summonses).

Pennyquick, K.C., and *J. H. Stamp* for the Crown. B

Cur. adv. vult.

Nov. 2. **ROXBURGH, J.**, read the following judgment: By a transfer dated Mar. 30, 1943, Eric Hamilton Rose, of Leweston Manor, Sherborne, Dorset (who died on Feb. 16, 1947), in consideration of the love and affection he had for his wife, Rosamond Mary Rose, transferred to her ten thousand shares of £1 each in the Leweston Estates Co. to hold subject to the several conditions on which he held the same at the time of the execution thereof, and she did thereby agree to accept and take the said shares subject to the conditions aforesaid. By another transfer of the same date, the deceased, in consideration of the sum of 10s. expressed to be paid by his wife and Edward Thomas Read, transferred to them another ten thousand shares of £1 each in the same company to hold subject to the same conditions, and they did thereby agree to accept them subject to such conditions. By a settlement of the same date and made between the said deceased, of the first part, his wife, of the second part, and his wife and Mr. Read, as trustees, of the third part, trusts were declared of the second block of shares under which the wife and the son of the deceased, Hugh Lancelot St. Vincent Rose, are beneficially interested. Article 33 of the company's articles of association empowered the directors in their absolute and uncontrolled discretion, and without assigning any reason, to decline to register any proposed transfer of shares. The deceased was governing director of the company and as such had very wide powers, including (art. 80) C

"full and uncontrolled authority to determine who shall be admitted from time to time to be shareholders of the company and for this purpose to determine the acceptance or rejection of all transfers [of shares]." D

The other directors were the deceased's wife and Mr. Read. Mr. Read was also secretary. The two transfers and the settlement were executed by all parties thereto between Mar. 30, 1943, and Apr. 5, 1943, and thereafter (as was conceded) Mr. Read, who had actual control of the certificates throughout, held the certificates of title to one block of shares on behalf of the wife for the purpose of registration and the certificates of title to the other block on behalf of himself and the wife for the same purpose. But the transfers were not registered by the company until June 30, 1943, and it is common ground that there will be a charge for estate duty unless before Apr. 10, 1943, there was a *bona fide* disposition of the said shares purporting to operate as an immediate gift *inter vivos* (whether by way of transfer, delivery, declaration of trust or otherwise) under which *bona fide* possession and enjoyment was assumed by the donees immediately on the gift and thenceforth retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise. Whether there was such a disposition is the question which I have to determine. In two codicils dated Mar. 30, 1943, and Apr. 3, 1943, respectively, to his will proved on July 22, 1947, the deceased referred to the said two transfers and stated that he had thereby transferred the said shares by way of gift. E

The contentions of the Crown have undergone some transformation. In a memorandum dated Mar. 8, 1949, the Estate Duty Office observed:

"The office does not dispute that the course of action taken by the deceased prior to Apr. 10, 1943, to effect these transfers would have been sufficient to constitute a perfected gift were it not for the existence of art. 80 of the company's articles of association and the fact that the deceased was the intending donor."

This, of course, was a reference to his position as governing director. But by Feb. 14, 1951, the attitude of the Crown had been reversed, because a letter from the office of the Solicitor of Inland Revenue of that date states:

"It will be noted that the words 'by reason of the fact that the deceased was governing director of the Leweston Estates Co.' which appear in the first question of each draft summons have been deleted, as the claim of the commissioners is in no way based on this fact."

Then, on Mar. 20, 1951, another letter from the same office regretted that the Crown's claim had not hitherto been fully set out and concluded:

"The case which will be presented to the court on behalf of the Revenue at the hearing of the summonses will be that the conditions of the Customs and Inland Revenue Act, 1881, s. 38 (2) (a), taken in conjunction with the Customs and Inland Revenue Act, 1889, s. 11, are not satisfied by mere delivery of a transfer and certificate of shares until at least some step is taken by the transferee to make the transfer effective."

This contention was not in fact put forward before me. At the hearing, both counsel for the Crown admitted that the circumstance that the deceased was governing director of the company and had wide powers as such was irrelevant. Leading counsel for the Crown contended that the transfers transferred no interest in the shares, legal or equitable, but that both the legal title and the whole beneficial interest passed together on the registration of the transfers by the company after the critical date. Developing this argument, he contended that, if any dividend had been declared and paid between the dates of transfer and registration, it would not only have been paid to, but would have belonged in equity to, the deceased. Counsel then proceeded to consider what would have been the position if the company had refused to register the transfers. The deceased, counsel submitted, would have retained the whole of the beneficial interest in the shares, but would have been liable to be divested at any time if the company changed its mind, and if, in the meantime, the deceased had attempted to sell his beneficial interest, the transferees under the earlier transfers (who *ex hypothesi* had no beneficial interest or legal title) would have been able to persuade a court of equity to restrain the deceased from "derogating from his grant" (which *ex hypothesi* transferred neither legal title nor beneficial interest), or to award them damages against him if the purchaser for value under a later transfer got on to the register. I must confess that this last contention seems to me to be untenable, and junior counsel for the Crown declined to commit himself in support. He contented himself with submitting that, at any rate, the beneficial interest in the aforesaid hypothetical dividend was not transferred by the transfer, without making clear to me why, if some beneficial interest in the shares passed, the whole could not pass.

Counsel for the taxpayers contended that by executing the transfers and putting them and the share certificates into the possession or power of the transferees the deceased had transferred the whole of his beneficial interest in the shares, and that a court of equity would at any time thereafter enforce the equitable rights of the transferees against the deceased as registered holder, with the result that the aforesaid dividend, if there had been any, could have been recovered by them from him and, if the company had refused registration of the transfers, he would have been treated as trustee of the shares for them.

The twin pillars of support for the arguments of the Crown are *Milroy v. Lord* (1) and *Richards v. Delbridge* (2). I must confess that but for later cases, which I am unable to reconcile with their argument, I should have regarded these two cases as turning the scales in their favour. In *Milroy v. Lord* (1), Medley, being minded to make a voluntary settlement on his niece, by a deed in the form of a deed poll, but executed by both the settlor and the proposed trustee, Lord, purported to transfer to Lord fifty shares in the Bank of Louisiana, and Lord accepted the transfer. Medley handed the relevant certificates to Lord. The shares were transferable in the books of the company by Medley or his attorney. Lord held the necessary power of attorney. It seems to have been held that no beneficial interest was transferred by these transactions, although, curiously enough, that point is nowhere expressly dealt with. KNIGHT BRUCE, L.J., twice approached the question, but did not answer it. He said (4 De G.F. & J. 272) that Medley was the legal proprietor of the shares

"and unless so far, if at all, as the beneficial title was affected by [the deed], the absolute proprietor of them beneficially likewise."

Later he said that the principal question was whether it was the duty of the court to enforce the deed specifically

"either on the ground that by it Mr. Medley constituted himself a trustee . . . or on the ground of contract, or otherwise."

But he never again refers to the question whether the instrument did pass a beneficial interest and whether on that ground it was the duty of the court to compel the legal proprietor to give effect to the equitable title. It must be inferred, however, that he would have answered "No," perhaps because the proprietor had it in his power to transfer the legal title and did not do so. TURNER, L.J., would undoubtedly have said "No." I understand him to say that, in the absence of a declaration of trust, only a transfer in the books of the company would have sufficed. If the instrument (*ibid.*, 274)

" . . . is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust . . . "

There was in that case no power in the bank to prevent the transfer of the legal title, and TURNER, L.J., was not envisaging such a case. But I do not think that he contemplated the possibility of a voluntary transfer of some beneficial interest in shares by the registered holder in advance of the transfer of the legal title. That possibility, however, has been established beyond dispute in this court by two later cases, and if the general observation of TURNER, L.J., is construed as extending to such a case, it is inconsistent with the decision of the Court of Appeal in *Nanney v. Morgan* (3). The other pillar of the Crown's argument was *Richards v. Delbridge* (2). This was not a case involving shares, and, in stating the general propositions which are to be found in his judgment, SIR GEORGE JESSEL, M.R., probably had no thought of the position under an unregistered transfer. But I agree that they would point to the conclusion (if applied to such a situation) that a voluntary transfer before registration was altogether ineffective. Such a conclusion, however, appears to me to be inconsistent with later cases.

There is no case which directly decides the point before me, and, in order to explain why I regard it as indirectly concluded in this court by three cases, I must make preliminary observations on the meaning of some words. "Gift" seems to me to involve transfer without consideration of a beneficial interest. "Gift of property" seems to me to involve transfer of the whole beneficial interest, as distinct from a gift of an interest in property. There must be an intention to give. But equity requires more than that, and if the giver has not done all that it requires, the gift is "imperfect." Now equity might have adopted the principle that, while it will perfect an equitable title acquired for value, it will never perfect an equitable title acquired without consideration. In that

case no gift unaccompanied by the legal title would be an effective gift, but, once it has to be conceded that a gift can be effective before the legal title is transferred, I can see no reason why equity should not enforce the effective gift and enforce it in its entirety.

The questions for decision, therefore, appear to me to be: (i) Was there a gift? (ii) Could it be enforced in equity against the giver? (iii) If so, what, as a matter of construction, did the gift comprise? In particular, did it comprise the whole beneficial interest of the giver from the date of transfer? Now, I regard *Re Williams* (4) as authority for the proposition that there may have been a gift, i.e., a transfer of the beneficial interest in advance of registration; *Re Rose* (5) as an authority for the proposition that there was; and *Nanney v. Morgan* (3) as authority that, if so, the beneficial title of the donees will be enforced against the legal title of the donor, and to the full extent thereof according to the true construction of the transfer. In *Re Williams* (4) the question was whether an informal document operated as a gift of a policy. Now, if there could be no gift in advance of the transfer of the legal title, the question would have been whether notice of an assignment had been given to the insurance company and this was certainly not the question in debate. In *Re Rose* (5) the testator executed a transfer of five thousand preference shares to Ernest Hook and handed him the relevant certificates. The testator died in January, 1946. Under the articles of association the directors had a discretion regarding registration of transfers. At the date of the testator's death, the directors were refusing to register the transfer, but they subsequently did so. By his will the testator bequeathed to Ernest Hook five thousand preference shares "if such preference shares have not been transferred to him previously to my death." Now the primary question was, as counsel for the Crown pointed out, whether the shares were "transferred" previously to the testator's death within the meaning of the will. But JENKINS, J., had to look beyond this question, because the transfer might have been one which transferred no beneficial interest, and in that case Hook might have lost the shares altogether, and JENKINS, J., did certainly consider and adjudicate on the effect of the transfer. He said ([1948] 2 All E.R. 978):

"It is argued . . . that the testator's transfer of the five thousand preference shares to Mr. Hook was at the time of the testator's death in the state of being an incomplete or inchoate gift . . . I was referred to *Milroy v. Lord* (1) and also to *Re Fry* (6). Those cases, as I understand them, turn on the fact that the deceased donor had not done all in his power, according to the nature of the property given, to vest the legal interest in the property in the donee. In such circumstances it is well settled that there is no equity to complete the imperfect gift. If any act remains to be done by the donor to complete the gift at the date of the donor's death, the court will not compel his personal representatives to do that act and the gift remains incomplete and fails. In *Milroy v. Lord* (1), the imperfection was due to the fact that the wrong form of transfer was used for the purpose of transferring certain bank shares. The document was not the appropriate document to pass any interest in the property at all . . . In this case, as I understand it, the testator had done everything in his power to divest himself of the shares in question in favour of Mr. Hook . . . It is true that Mr. Hook's legal title would not be perfected until the directors passed the transfer for registration, but that was not an act which the testator had to do; it was an act which depended on the discretion of the directors."

Pausing there, I understand JENKINS, J., to be saying that the testator had done everything in his power to transfer the legal title, and that, accordingly, the gift was neither incomplete nor inchoate nor imperfect. I do not understand him to visualise a complete or perfect gift under which no beneficial interest passed or a complete or perfect gift which a court of equity would not enforce against

the legal title holder. On the contrary, when he says (*ibid.*, 979), "the shares are taken by Mr. Hook under his *inter vivos* title," I do not understand him to mean that Mr. Hook had received an inchoate gift which passed no legal or equitable title until registration, but that the gift was complete and effective during the testator's lifetime and that the beneficial interest had passed before his death, although the legal title did not pass until afterwards. Accordingly, I regard *Re Rose* (5) as authority for the proposition that the gift in the present case was complete and that the beneficial interest passed from the transferor before Apr. 10, 1943. If that is so, then I treat *Nanney v. Morgan* (3) as authority for the proposition that, as from the date of the transfers, the court would have compelled the donor to make effective the beneficial interests of the donees. Stock in a railway company was registered in the names of trustees of a marriage settlement. The trustees executed a transfer in favour of Howel Morgan, who was already absolutely entitled in equity. Accordingly, this transfer could not pass any beneficial interest. Howel Morgan then executed a voluntary settlement and purported to transfer the shares to trustees on the trusts thereof. Subsequently, he became the registered proprietor and then died. His personal representatives were ordered to transfer the stock to the trustees of the voluntary settlement. That case in the Court of Appeal is certainly no authority for the proposition that a voluntary transfer by a registered holder of shares can pass a beneficial interest. That question could not arise on that appeal, because the transferors were not intending to make a gift and the beneficial title was already in the transferee. There are passages which favour the Crown on this aspect of the matter. That case, however, is clear authority for the view that the court will compel a registered holder who has previously made a voluntary equitable assignment of shares to transfer them to his assignees. Indeed, counsel for the Crown did not dispute this. It seems to me to follow that, if the company refused to register the transfers, the registered holder could be compelled to hold the shares as trustee for the assignees.

This brings me to the last question: What was the extent of the beneficial interest which the transfers transferred? I construe them as transferring the whole beneficial interest, *i.e.*, the tree and any fruit which might grow on it. And, if the transferees could force the donor to give effect to the equitable interests which he had created in the tree, why not in the fruit also? It seems to me that I could only decide in favour of the Crown by going the whole way and holding that no beneficial interest at all could pass by voluntary transfer from a registered holder in advance of registration of the transfer. But this would, in my opinion, necessarily involve holding that there could be no gift by a registered holder by transfer before registration of the transfer, but only an inchoate or imperfect gift, because an unenforceable transaction which transfers no beneficial interest is not, in my vocabulary, a gift at all. It is not open to me so to hold, having regard to the later authorities, and in particular *Re Rose* (5), in spite of the many passages in earlier authorities which seem to me to point in that direction. In conclusion, I may say that the Crown's contention would lead to a strange result. Counsel for the Crown did not, I think, dispute—he could hardly do so in the face of *Nanney v. Morgan* (3)—that, if the donor had not been the registered proprietor of the shares, but only the equitable owner, no duty would have been payable on these gifts. Why should the strength of the donor's title impair the validity of the gifts or involve the donees in estate duty?

Order accordingly.

Solicitors: *Merrimans* (for the taxpayers); *Solicitor of Inland Revenue*.

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

BURNS v. CAMPBELL.

[COURT OF APPEAL (Denning and Hodson, L.JJ.), October 29, 1951.]

Intestacy—Grant of administration—Relation back—Re-sealing of Irish grant—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 169 (1).

On Jan. 23, 1950, the plaintiff's husband, who was domiciled in Northern Ireland, died in England. On Jan. 12, 1951, the plaintiff took out letters of administration in Northern Ireland. On Jan. 19, 1951, she issued a writ in the High Court in England under the Fatal Accidents Act, 1846, claiming, as administratrix, damages for negligence from the defendant. On Mar. 20, 1951, the grant in Northern Ireland was sealed in England under s. 169 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925.

HELD: the sealing of the grant under s. 169 (1) did not result in the grant having effect in England from the date of the grant in Ireland, and, therefore, on Jan. 19, 1951, the plaintiff had not obtained a grant in England, the action had not been commenced within twelve calendar months of the death of the plaintiff's husband, as required by the Fatal Accidents Act, 1846, s. 3, and the writ must be set aside.

AS TO RE-SEALING GRANTS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 215-220, paras. 364-371; and FOR CASES, see DIGEST, Vol. 23, pp. 251-254, Nos. 3094-3115.

Cases referred to:

- (1) *Hilton v. Sutton Steam Laundry*, [1945] 2 All E.R. 425; [1946] K.B. 65; 115 L.J.K.B. 33; 174 L.T. 31; 2nd Digest Supp.
- (2) *Ingall v. Moran*, [1944] 1 All E.R. 97; [1944] K.B. 160; 113 L.J.K.B. 298; 170 L.T. 57; 2nd Digest Supp.
- (3) *In the Estate of Rankine*, [1918] P. 134; 87 L.J.P. 114; 118 L.T. 670; 23 Digest 253, 3104.

INTERLOCUTORY APPEAL by the plaintiff from an order of FINNEMORE, J., dated July 18, 1951, setting aside the writ in an action under the Fatal Accidents Act, 1846.

The plaintiff, a widow, claimed damages for negligence from the defendant, a medical practitioner, in respect of the death of her husband who, at the date of his death, was domiciled in Northern Ireland. Having obtained a grant of administration in Northern Ireland, she issued a writ in the High Court in England within twelve months of her husband's death, purporting to claim as his administratrix. She contended that the sealing in England under s. 169 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, of the Irish grant, although performed more than twelve months after the death, related back to the original grant, and, therefore, that the action was properly constituted.

Vaughan, K.C., and *Gage* for the plaintiff.
Russell, K.C., and *R. Armitage* for the defendant.

DENNING, L.J.: The plaintiff, a widow, sought to claim damages for herself and her children in respect of the death of her husband on the ground that he was negligently treated by the defendant, a medical practitioner. By the Fatal Accidents Act, 1846, the dependants of a person whose death has been caused by negligence can recover damages for the pecuniary loss they suffer, provided that the action is begun within twelve calendar months after the date of the death. The question is whether this action was validly brought within twelve months after the death.

On Jan. 23, 1950, the plaintiff's husband died in England, he being then domiciled in Northern Ireland. On Jan. 12, 1951, the plaintiff took out letters of administration in Northern Ireland. On Jan. 19, 1951, the plaintiff issued a

writ in the High Court in England in which she claimed as administratrix of the deceased for damages under the Fatal Accidents Act, 1846. The writ was, therefore, issued within twelve months from the death, but it is to be noted that at that date the plaintiff had only obtained a grant of administration in Northern Ireland. On Mar. 20, 1951, she obtained administration in England by reason of s. 169 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, under which the Northern Ireland grant was re-sealed in England. The whole question is: What is the effect of the re-sealing? Does it mean that the grant of administration in England relates back to Jan. 12, 1951, when she obtained the grant in Ireland? Or does it only speak from the date of the re-sealing on Mar. 20, 1951? That depends on the true interpretation of s. 169 (1) of the Act of 1925, which provides:

"If probate or letters of administration granted by the High Court of Justice in Northern Ireland is or are produced to the High Court and a copy thereof is deposited with the Principal Probate Registry, the grant shall, subject to the provisions of this section, be sealed with the seal of the Principal Probate Registry, and shall have the like effect in England as if it had been originally made by the High Court."

It was urged for the plaintiff that the word "originally" gave the re-sealing a retrospective effect, but I do not think that is correct. The word "originally" is only used to denote the way in which the re-sealing operates, not the date from which it operates. It means that the re-sealing has the same effect as an original grant, but it has that effect only from the date of re-sealing. That is shown by the words "shall have" which are in the future tense. Section 169 (1) means simply that the re-sealing shall thereafter have the like effect as if it had been made by the High Court. This view is confirmed by the fact that, as between England and Scotland, the re-sealing only operates *in futuro* and not retrospectively: see s. 168 (1) of the Act of 1925, which is, in effect, a re-enactment of s. 12 of the Confirmation of Executors (Scotland) Act, 1858. In the Act of 1858 the words are: "... and shall thereafter have the like force and effect ..." which shows clearly that re-sealing has no retrospective operation. It would be very strange if the effect of re-sealing were different as between England and Northern Ireland from what it is as between England and Scotland. I do not think that is the case. All these re-sealings operate as a grant only from the date of re-sealing and are not retrospective.

The result is that on Jan. 19, 1951, when the writ was issued, the plaintiff had not obtained a grant of administration to the English assets. So far as the English courts were concerned, she was not the administratrix. The action, therefore, was not properly constituted. It purported to be an action by her as administratrix, but she was not administratrix. The action was a nullity: see *Hilton v. Sutton Steam Laundry* (1). Later, the plaintiff did obtain a grant of administration to the English assets, namely, on the re-sealing on Mar. 20, 1951, but that did not revive the nullity. This means that she has lost her claim under the Fatal Accidents Act, 1846, because more than twelve months have expired from her husband's death.

If the plaintiff had issued the writ on Jan. 19, 1951, in her personal capacity as widow, there would have been a good claim for damages under the Act of 1846 without any question of administration being taken out: see the Fatal Accidents Act, 1864, s. 1. She would not have been able to claim damages under the Law Reform (Miscellaneous Provisions) Act, 1934, at that date because such a claim can only be brought by an administratrix. We cannot grant an amendment to enable her to claim merely as a widow. That is shown by the decision of this court in *Hilton v. Sutton Steam Laundry* (1). In my opinion, FINNEMORE, J., was right to set aside the writ and subsequent proceedings and this appeal should be dismissed.

HODSON, L.J.: Apart from the re-sealing of the grant, the writ in this action would, admittedly, be a nullity, *i.e.*, it would be a dead thing into which no life could be infused. That was settled by this court in *Ingall v. Moran* (2), and *Hilton v. Sutton Steam Laundry* (1), where it was decided that the title of administrator does not date back to the death of the intestate. But a different point has been taken by counsel for the plaintiff. He says that, having regard to the language of s. 169 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, the grant of administration in England dates back, not to the death, but to the date of the original grant in Ireland which was re-sealed in England. That argument is a striking one to advance, because the section itself says that, if probate or letters of administration granted by the High Court of Justice in Northern Ireland are deposited with the Principal Probate Registry, the grant shall be sealed with the seal of the Principal Probate Registry "and shall have the like effect in England as if it had been originally made by the High Court." The word "shall" indicates at once that that grant is to have effect from and after the date of the grant, and not before. Counsel has sought to argue that because the word "originally" is used before the word "made" the effect of the grant is retrospective, and he lent some colour to that argument by saying that, if the plaintiff was the administratrix in Ireland, she is the administratrix in England, and it would seem rather odd if merely because a stamp had to be put on her grant in the registry her title should not relate back. He supports his argument by reference to s. 168 (1) of the Act of 1925, which deals with the re-sealing in England of a confirmation in Scotland where the word "originally" does not appear. On the other side, it has been pointed out to us that there is an historical explanation of the absence of the word "originally" in s. 168 (1) and its presence in s. 169 (1), which appears on examination of the Probates and Letters of Administration Act (Ireland), 1857, s. 95, which deals with the re-sealing of probates granted in Ireland, and the Confirmation of Executors (Scotland) Act, 1858, s. 12, which relates to the re-sealing of Scottish confirmations of executors. The confirmation of executors is not the same thing as a grant, so that it would be inappropriate in one case to talk about the original confirmation whereas it is appropriate in the case of a grant to talk about the original grant. In support of his argument counsel for the plaintiff has relied on a decision of this court in *In the Estate of Rankine* (3) where a corporation had been appointed in the Scottish courts and they applied as executor for confirmation in the English courts. The corporation at first failed in their application for re-sealing because it was held under the English law that they could not qualify, but the Court of Appeal held that the words of the section were imperative and that the act of sealing a confirmation of the nomination of an executor by the English court was a merely ministerial act which the court had no discretion to order or refuse, that is to say, notwithstanding the fact that the executor was personally disqualified by the law of England, nevertheless the executor was entitled to a grant. In my judgment, that case does not assist on the question of construction here, which is the only matter with which we have to deal. I agree both with my Lord and FINNEMORE, J., that this action must be dismissed.

Appeal dismissed.

Solicitors: *Martyns & Gane*, agents for *Hamill Davison & Co.*, Belfast (for the plaintiff); *Bulcraig & Davis* (for the defendant).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

H.M.S. TRUCULENT. THE ADMIRALTY *v.* THE DIVINA (OWNERS) AND OTHERS.

Applied. BEAUCHAMP *v.* TURRELL.
[1952] 1 All E.R. 719.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), October 3, 4, 5, 22, 1951.]

Crown—Shipping—Limitation of liability—Collision between submarine and merchant ship—Failure of submarine to comply with rules concerning lights in the King's Regulations and Admiralty Instructions, ch. XVI, para. 660—"Actual fault or privity" of Board of Admiralty—Merchant Shipping Act, 1894 (c. 60), s. 503 (1)—Crown Proceedings Act, 1947 (c. 44), s. 5 (1).

At 7 p.m. on Jan. 12, 1950, a collision occurred in the Thames estuary between H.M.S. Truculent and a Swedish steamship, the Divina. H.M.S. Truculent sank with loss of life and the Divina was seriously injured. The navigation of both vessels was at fault, and those in charge of each vessel claimed to have been misled by the lights of the other. As the Divina was laden with an inflammable cargo, she exhibited, in addition to the usual lights, a red light at the masthead in accordance with art. 4 of the Petroleum Spirit in Harbours Order, 1939. The commander of H.M.S. Truculent, failing to recognise the red light as that of a petroleum ship, thought that the Divina was a mooring vessel lying stationary in the channel and realised the risk of collision only at a late moment. H.M.S. Truculent, being a submarine, was not able to carry lights conforming exactly with the requirements of art. 2 (a) of the Regulations for Preventing Collisions at Sea, contained in sched. I to an Order in Council dated Oct. 13, 1910, and, from the position of her lights, she gave the impression of being an extremely small vessel, with the result (a) that the pilot of the Divina made an error of navigation which contributed to the collision, and (b) there was possibly a greater loss of life among the personnel of H.M.S. Truculent than there would otherwise have been as those in charge of the Divina, failing to appreciate the probable size of the submarine's complement or that the vessel was a submarine, thought that all those who had been on board the sunken vessel had been rescued by a third ship. At the time of her construction the plans in regard to H.M.S. Truculent were submitted by the Third Sea Lord, who was in charge of such matters on behalf of the Board of Admiralty, to the full Board, and the detailed plans, showing *inter alia* the position of the ship's lights, were submitted to the Third Sea Lord who was responsible for them. On Aug. 4, 1950, liability for the collision was settled as between H.M.S. Truculent and the Divina on the basis that both vessels were to blame, H.M.S. Truculent to the extent of seventy-five per cent. and the Divina to the extent of twenty-five per cent. A number of actions by the personal representatives of civilian personnel in H.M.S. Truculent who lost their lives as a result of the collision were brought against the Admiralty, and in them the Admiralty admitted liability. The Admiralty, as the authorised government department for instituting civil proceedings on behalf of the Crown, now brought an action under the Merchant Shipping Act, 1894, s. 503 (1) and the Crown Proceedings Act, 1947, s. 5 (1), asking for a declaration of limitation of liability in respect of the claims for damages, including claims in respect of loss of life, arising out of the collision.

HELD: (i) the failure of the commanding officer of H.M.S. Truculent to recognise the red light of the Divina as the light of a vessel carrying petroleum spirit was not a sufficient reason for holding that the submarine, when entering the Thames estuary at night, should have engaged a licensed pilot, but, assuming that there was a fault in failing to take a pilot, the fault was that of the commanding officer, who had a discretion in the

matter, under the King's Regulations and Admiralty Instructions, ch. XXXIII, s. II, para. 1179, and the Admiralty could not be held privy in the matter so as to defeat His Majesty's claim for limitation of liability under s. 5 (1) of the Act of 1947.

(ii) assuming that the local commander was guilty in failing to issue a special notice that a submarine would be navigating on the surface in the Thames estuary by night, his fault would not be the fault of the Admiralty and could not defeat His Majesty's claim for limitation of liability.

(iii) although by s. 741 of the Merchant Shipping Act, 1894, His Majesty's ships were specifically exempted from the provisions of that Act, by publishing the King's Regulations and Admiralty Instructions (ch. XVI, para. 660, of which imposed on His Majesty's ships regulations in identical terms with the Regulations for Preventing Collisions at Sea, 1910), the Admiralty had accepted on behalf of His Majesty's ships the same duty to obey the collision regulations as was imposed by s. 419 (1) of the Act of 1894 on any other ship, and a breach of that duty could not be excused merely because of the practical difficulty of complying with art. 2 (a) of the regulations, and, therefore, in the absence of a notice warning other mariners that it was impossible, in the case of a submarine, to comply with art. 2 (a), the breach of that article constituted a breach of the duty which H.M.S. Truculent owed to other vessels, and there was a fault in relation to the lights exhibited by H.M.S. Truculent.

(iv) assuming that those in charge of the *Divina* made a negligent mistake and that they would not have been misled by the lights of H.M.S. Truculent but for a defective look-out on their part, nevertheless the fault of H.M.S. Truculent in exhibiting misleading lights was such as to cause the negligent mistake of the *Divina*, which she would not otherwise have made, and, therefore, that fault contributed to the loss and damage caused by the collision.

Corstar Owners v. Eurymedon Owners, The Eurymedon ([1938] 1 All E.R. 122), applied.

(v) as the fault in relation to the lights carried by H.M.S. Truculent was one of which the responsible member of the Board of Admiralty (*viz.*, the Third Sea Lord) was aware, or should be deemed to be aware, and as the Third Sea Lord was the directing mind of the Admiralty in regard to the proper equipment of His Majesty's vessels, his fault or privity was the fault or privity of someone who was not merely a servant or agent for whom the Admiralty was liable on the footing *respondeat superior*, but of someone for whom the Admiralty was liable because his action was that of the Admiralty itself, and, therefore, the loss and damage occasioned by the collision did not occur "without . . . [the] actual fault or privity" of the Admiralty within the meaning of s. 503 (1) of the Act of 1894, and, accordingly, the claim on behalf of His Majesty for limitation of liability under the Crown Proceedings Act, 1947, s. 5 (1), failed.

Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd. ([1915] A.C. 705), applied.

FOR THE CROWN PROCEEDINGS ACT, 1947, s. 5 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 6, p. 50.

FOR THE MERCHANT SHIPPING ACT, 1894, s. 503, see *ibid.*, Vol. 23, p. 656.

FOR THE REGULATIONS FOR PREVENTING COLLISIONS AT SEA, see HALSBURY, Hailsham Edn., Vol. 30, p. 676.

Cases referred to:

- (1) *Corstar Owners v. Eurymedon Owners, The Eurymedon*, [1938] 1 All E.R. 122; *sub nom. The Eurymedon*, [1938] P. 41; 107 L.J.P. 81; 158 L.T. 445; Digest Supp.

- (2) *Admiralty Comrs. v. North of Scotland & Orkney & Shetland Steam Navigation Co., Ltd.*, [1947] 2 All E.R. 350; *sub nom. Boy Andrew (Owners), Ltd. v. St. Rognvald (Owners), Ltd.*, [1948] A.C. 140; [1948] L.J.R. 768; 2nd Digest Supp.
- (3) *Workington Harbour & Dock Board v. Towerfield S.S. (Owners)*, [1950] 2 All E.R. 414; 2nd Digest Supp.
- (4) *Cassidy v. Ministry of Health*, [1951] 1 All E.R. 574; [1951] 2 K.B. 343.
- (5) *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan*, [1934] A.C. 1; 102 L.J.P.C. 123; 149 L.T. 526; 26 B.W.C.C. 463; Digest Supp.
- (6) *The Warkworth*, (1883), 9 P.D. 20; 53 L.J.P. 4; 49 L.T. 715; *affd.* C.A., (1884), 9 P.D. 145; 53 L.J.P. 65; 51 L.T. 558; 41 Digest 918, 8092.
- (7) *Standard Oil Co. of New York v. Clan Line Steamers, Ltd.*, [1924] A.C. 100; 93 L.J.P.C. 49; 130 L.T. 481; 41 Digest 428, 2691.
- (8) *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.*, [1915] A.C. 705; 84 L.J.K.B. 1281; 113 L.T. 195; 41 Digest 418, 2616,

ACTION by the Board of Admiralty, as the authorised government department for instituting civil proceedings on behalf of the Crown, asking for a declaration of limitation of liability, under the Crown Proceedings Act, 1947, s. 5 (1), in respect of claims for damages, including claims in respect of loss of life, arising out of a collision between H.M.S. Truculent and S.S. Divina on Jan. 12, 1950. On Aug. 4, 1950, the question of liability for the collision was settled as between the plaintiffs and the owners of the Divina on the basis of seventy-five per cent. of the blame being attributable to H.M.S. Truculent and twenty-five per cent. to the Divina. A number of actions were instituted against the plaintiffs by the legal personal representatives of members of the civilian personnel on board H.M.S. Truculent who lost their lives as a result of the collision, and on Aug. 11, 1950, the plaintiffs admitted liability in these actions. They admitted that the collision and the damage and losses consequent thereon were caused or contributed to by the negligent navigation of H.M.S. Truculent by their servants, but they now sought to limit their liability, under s. 5 (1) of the Act of 1947, on the ground that the collision occurred without their "actual fault or privity," within the meaning of s. 503 (1) of the Merchant Shipping Act, 1894.

Naisby, K.C., and *Porges* for the Admiralty.

H. E. G. Browning for the owners of the Divina.

Scott Cairns, K.C., and *S. Knox Cunningham* for claimants to whom liability had been admitted by the plaintiffs.

Scott Cairns, K.C., and *Bucknill*; *Bucknill*; *S. Knox Cunningham*; *A. L. J. Lincoln* and *Hene* for other claimants.

Cur. adv. vult.

Oct. 22. **WILLMER, J.**, read the following judgment. At about 7 p.m. on Jan. 12, 1950, a collision occurred in the Thames Estuary, near the South Oaze Buoy, between H.M.S. Truculent, inward bound from sea to the Medway, and the Swedish steamship Divina, outward bound from the Thames. Both vessels were damaged, and H.M.S. Truculent sank almost at once, unhappily with the loss of sixty-four lives out of her total complement of seventy-nine. As between the Admiralty and the owners of the Divina the question of liability for the collision was settled by agreement on the basis that both vessels were to blame, H.M.S. Truculent to the extent of seventy-five per cent. and the Divina to the extent of twenty-five per cent. A number of actions have been instituted against the Admiralty on behalf of the personal representatives and dependants of men who lost their lives in consequence of the collision, and in these actions liability has been admitted on behalf of the Admiralty. The present action is brought by the Admiralty, as the authorised government department for instituting civil proceedings on behalf of the Crown, for the purpose of obtaining a declaration of limitation of liability, in pursuance of the Crown

Proceedings Act, 1947, s. 5 (1), in respect of the claims for damages, including claims for loss of life, arising out of the collision. No question of *quantum* arises, it being agreed by all parties that, if the Admiralty are entitled to limit their liability, the tonnage of H.M.S. Truculent, calculated in accordance with s. 5 (5) (a) of the Act, is 416·40 tons, so that the total fund, on the basis of £15 per ton, would be £6,246. The owners of the Divina have taken no part in the proceedings before me, except to put the plaintiffs to proof of the tonnage of H.M.S. Truculent. The claim of the Admiralty to limit their liability has, however, been contested by a number of the life claimants, on the ground that the damage is not shown to have occurred without their actual fault and privity.

I have found the task of deciding this issue one of more than usual anxiety, for two reasons. In the first place, I cannot help being impressed by the very grave consequences to the various claimants, especially the life claimants, having regard to the size of the fund that would be available if the claim of the Admiralty to limit their liability succeeds. Secondly, so far as I am aware, this is the first case of its kind that has arisen since the Crown Proceedings Act, 1947, came into force, and it has been necessary to consider for the first time, without the guidance of decided authority, the scope and meaning of the phrase "actual fault or privity" of the owner in relation to a claim arising in respect of one of His Majesty's ships: [see s. 5 (1) of the Act of 1947 and the Merchant Shipping Act, 1894, s. 503 (1)].

Before stating the issues which fall to be determined it will be desirable to recite in outline the facts relating to the collision. The collision occurred at night time, and both vessels were exhibiting lights. The Divina was exhibiting masthead and side lights, and in addition, being laden with an inflammable cargo, was exhibiting a red light in accordance with art. 4 of the Petroleum Spirit in Harbours Order, 1939 (S.R. & O., 1939, No. 1180). H.M.S. Truculent was exhibiting a white steaming light, mounted on top of the periscope housing above the conning tower, and also side lights mounted on either side of the conning tower. The weather was clear but very dark, and the tide was ebb. The vessels sighted each other at a distance of two or three miles, H.M.S. Truculent having the Divina nearly ahead and the Divina having H.M.S. Truculent on her port bow. At the time of first sighting, the Divina was approaching the West Oaze Buoy, and H.M.S. Truculent was in the vicinity of the South Oaze Buoy. The vessels were on courses which intersected at a fine angle. At the West Oaze Buoy it was necessary for the Divina to make an alteration of course to port to follow the line of the channel, but owing to the presence of H.M.S. Truculent she made a smaller alteration than would ordinarily be made at that point. In the result the vessels remained on courses which intersected, but at a still finer angle. It is not necessary for me to determine whether in this situation the crossing rule [art. 19 of the Regulations for Preventing Collisions at Sea, contained in sched. I to an Order in Council, dated Oct. 13, 1910 (S.R. & O., 1910, No. 1113)] applied, or whether it was the duty of the vessels to navigate in accordance with the narrow channel rule [art. 25]. In either case it is clear that the navigation of both vessels was at fault. H.M.S. Truculent twice altered course to port, on neither occasion sounding any whistle signal, and it was only at the last, when the vessels were within about two cables of each other, that she made any attempt to take off her speed. The Divina, purporting to act under the note to art. 21 of the regulations of 1910, kept her course and speed until the vessels were very close to each other, when, at the last moment, she took violent action by altering course hard-a-starboard, without making any attempt to take off her way. The collision followed almost immediately at a broad angle, the stem and starboard bow of the Divina striking the starboard side of H.M.S. Truculent well forward of amidships.

Those in charge of each vessel claim to have been misled by the lights of the other. The commanding officer of H.M.S. Truculent failed to recognise the red

light at the masthead of the Divina as signifying that she was carrying petroleum spirit. He appears to have thought that she was some kind of mooring vessel, and he says that, until a very late moment, he was under the impression that she was lying stationary on the north side of the channel. Only at the last did he realise that the Divina was in fact under way and approaching at speed with a risk of collision. Those in charge of the Divina thought that H.M.S. Truculent was an extremely small vessel, such as a motor launch or yacht, or, perhaps, a small tug, and acted accordingly. The only lights visible, namely, the green and white, appeared very close together and both very low, giving the impression that the approaching vessel was something very small. The pilot of the Divina says that, if it had been a small vessel, such as he thought, the action which he took would have been sufficient to clear her, and he explained—as must, indeed, have been the fact—that even at the moment of collision the lights of the submarine were still well on his port bow.

After the collision H.M.S. Truculent sank almost at once, most of those on board her being, of course, trapped below. It appears, however, that many of those who were below succeeded in fact in escaping to the surface. But, most unhappily, very few were picked up. The Divina lowered a boat, and cruised in the vicinity for a matter of some hours. Valuable assistance was also rendered by a small Dutch vessel which happened to be in the neighbourhood and which succeeded in rescuing a number of men. The explanation put forward by the pilot and master of the Divina for the small number of survivors picked up is that, even after the collision, their belief that the vessel they had struck was something very small persisted for a very considerable time. Consequently, when it was seen shortly after the collision that the Dutch vessel had picked up such men as had been observed in the water, it was thought at first that the whole complement had probably been accounted for. Accordingly, when the lifeboat of the Divina returned without having picked up anybody else, it was hove on board. Later, cries for help were heard from other men still in the water. The boat was then lowered again, and succeeded in picking up several men, and a few others were rescued by means of lines thrown from the Divina. Only when these survivors came on board the Divina was it learnt that the other vessel was a submarine with a large complement on board. It is suggested that, if it had been realised on board the Divina that she was in the presence of a vessel of the size of a submarine, not only would the collision itself have been avoided, but a more sustained effort at saving life would have been made, with the probable result that much loss of life would have been avoided.

The complaints made on behalf of the defendant life claimants, from which I am invited to infer fault or privity on the part of the Admiralty, may be summarised as follows. (i) It is alleged that the lights exhibited by H.M.S. Truculent were not in accordance with art. 1 and art. 2 (a) of the Regulations for Preventing Collisions at Sea, but were so placed that they were liable to mislead, and did in fact mislead, those in charge of the Divina. (ii) No notice was ever given by the Admiralty warning mariners that His Majesty's submarines might be found navigating on the surface at night with lights which did not comply with the regulations. (iii) No notice was given by the Admiralty that on the particular date H.M.S. Truculent or any submarine would be navigating on the surface at night in the Thames estuary. (iv) Lastly, complaint is made that H.M.S. Truculent was allowed to navigate in an area of compulsory pilotage for merchant vessels without carrying a duly licensed pilot and in charge of an officer who was not sufficiently familiar with local conditions or with the local rules relating to the lights to be exhibited by petroleum ships.

The last two matters of complaint can be quickly disposed of, because, in my judgment, there is no substance in either of them. With regard to the failure to engage a pilot, it must be remembered that His Majesty's ships are not subject to compulsory pilotage. The instructions issued by the Admiralty

in relation to pilotage are contained in the King's Regulations and Admiralty Instructions for the Government of His Majesty's Naval Services, ch. XXXIII, s. II, para. 1179. From sub-para. 2 it is clear that the commanding officer of one of His Majesty's ships is not expected to take a pilot, except:

"For ports and channels which are difficult of access, or for which the charts are not themselves a sufficient guide . . ."

By sub-para. 4, in the case of a port "for which the charts and directions are a sufficient guide" a pilot is not to be taken. By sub-para. 5, an officer engaging a pilot for such a port is required to furnish an explanation of his reasons, and, if his explanation is not considered satisfactory, the expense may be charged against him. I imagine that the Thames estuary might fairly be classed as an area for which the charts and directions are a sufficient guide. The evidence shows that H.M.S. Truculent had been provided by the Hydrographic Department with a full set of the necessary charts and directions. She was commanded by a competent officer, who possessed a watch-keeping certificate and had had watch-keeping experience, as, indeed, he must have had to obtain his rank. He had had previous experience of navigating his submarine in and out of the Thames estuary by night. In these circumstances it came as a surprise to me to hear that an officer of such experience did not recognise the red light of the *Divina* as the light of a vessel carrying petroleum spirit. But if he did not know what the light signified, he had on board his vessel the necessary publication from which he could have informed himself—namely, the *North Sea Pilot*, Part III. I cannot think that the failure of this particular officer to recognise this particular light on this particular occasion is a sufficient reason why I should say that a submarine, such as H.M.S. Truculent, when entering the Thames estuary by night, ought to engage a licensed pilot. Even if I thought so, it is clear that in the last resort the decision whether or not to engage a pilot on any particular occasion is, and must be, that of the commanding officer of the vessel concerned, who, by para. 1179 of the King's Regulations and Admiralty Instructions, clearly has a discretion to do so, subject to his furnishing an explanation to his superiors. If there was a fault in failing to take a pilot in this case—and I am far from saying that there was—the fault was that of the commanding officer, and was certainly not that of any person whose fault could possibly be held to defeat His Majesty's claim for limitation of liability. Certainly I do not see how the Admiralty, having appointed a commanding officer of the necessary qualifications and experience, and having supplied him with the necessary charts and publications, could properly be held privy if that officer committed a fault in failing to take a pilot when he ought to have done.

The complaint of failure to give notice that on this particular occasion a submarine would be navigating on the surface in the Thames estuary by night seems to me to be of no greater substance. I am far from satisfied that anybody was in fact at fault for failing to give any such notice. The evidence shows that it has never been the practice to issue warning notices of that nature. If a notice ought to have been given in this case, presumably a similar notice ought to be given on every occasion when one of His Majesty's submarines puts to sea in circumstances when she is likely to be found navigating on the surface by night. I can well understand that the issue of special notices on such a scale would go far beyond anything which is practically possible. But the short answer to this complaint is that, if such a notice ought to be given, the responsibility for issuing it must rest with the local commander—who in this case, I am told, would be the Commander-in-Chief, Nore. His fault (if he was guilty of any) in failing to issue a special notice would not be the fault of the Admiralty. It has not been argued, and I do not see how it could successfully be contended, that fault or privy on the part of a local commander, however senior in rank, would be such as to defeat His Majesty's claim for limitation of liability.

It remains then to consider the complaints that the lights of H.M.S. Truculent were not in accordance with the Regulations for Preventing Collisions at Sea, and that no notice was ever issued by the Admiralty warning mariners that the lights of His Majesty's submarines were not in accordance with the regulations. These two matters of complaint are clearly inter-related, and can be considered together, for both must depend on whether there was in fact any fault in relation to the lights of H.M.S. Truculent. I agree with the submission of counsel for the Admiralty that three separate questions fall to be considered, namely: (i) Was there in fact any fault? (ii) If so, did that fault contribute to the loss and damage brought about by the collision? (iii) If there was a fault which contributed, was that a fault on the part of any person or persons whose fault or privity would defeat His Majesty's claim for limitation of liability?

In regard to the first of these questions, art. 2 (a) of the Regulations for Preventing Collisions at Sea, 1910, provide that a steam vessel under way shall carry a white light (which I shall refer to hereafter as the "steaming light"):

" . . . in the fore part of the vessel, at a height above the hull of not less than twenty feet, and if the breadth of the vessel exceeds twenty feet, then at a height above the hull not less than such breadth, so, however, that the light need not be carried at a greater height above the hull than forty feet . . . "

The steaming light carried by H.M.S. Truculent satisfied neither of these requirements. In the first place, it was carried almost exactly amidships—certainly not in a position that could fairly be described as in the fore part of the vessel. Secondly, although the breadth of H.M.S. Truculent is given as twenty-six feet 5 $\frac{7}{8}$ inches, the steaming light was only about sixteen feet above the line of the casing top and only twenty-three feet, five inches, above the water line. In the result the steaming light and the side lights were very close together, both horizontally and vertically, the vertical distance of the steaming light above the side lights being something less than nine feet, and all the lights were very low.

By the Merchant Shipping Act, 1894, s. 419 (1), all owners and masters of ships are required to obey the collision regulations. By s. 741 of the Act, however, His Majesty's ships are specifically exempted from the operation of the Act. It cannot be contended, therefore, that the lights of H.M.S. Truculent constituted any breach of statutory duty under the Merchant Shipping Act. But by the King's Regulations and Admiralty Instructions, ch. XVI, para. 660, regulations in identical terms with the collision regulations are applied to His Majesty's ships. Not only does para. 660 open with the imperative words:

"The following regulations are to be observed in order to prevent collisions at sea . . . "

but the King's Regulations and Admiralty Instructions, vol. I, includes a preamble, issued on the authority of the Lords Commissioners of the Admiralty, in the following terms:

"The regulations and instructions contained in this volume and in vol. II (which are to be designated the King's Regulations and Admiralty Instructions), for the Government of His Majesty's Naval Service, having been established by His Majesty's Order in Council, we do hereby require and direct you to observe and obey the same, and to take care that the several officers and others under your command also pay the most strict attention and obedience thereto."

On behalf of the plaintiffs it was contended that the King's Regulations and Admiralty Instructions apply to His Majesty's ships only as a matter of departmental discipline, that they are only instructions issued by the Admiralty to their own subordinates, and that they cannot be held to impose on the Admiralty any duty towards those in charge of other vessels. The maximum obligation on the Admiralty, it is urged, in relation to the fitting of lights in His Majesty's

ships, is to do what is reasonably practicable to conform as closely as possible with the regulations, having regard to the peculiarities and characteristics of the particular ship concerned. Evidence of great weight and authority was given to prove that it would be practically impossible in the case of a submarine to fit a steaming light conforming exactly with the requirements of art. 2 (a) of the regulations without impairing the safety and operational efficiency of the vessel. I need not describe in detail what the practical difficulties would be, for I fully accept the evidence that was given, and I am prepared to assume that the difficulties of complying strictly with the regulations would be great, if not insuperable. I was informed, and I am prepared to accept, that the positioning of the lights is similar in others of His Majesty's submarines, and, indeed, in those of other navies.

In my judgment, these considerations afford no answer to the charge that the steaming light of H.M.S. Truculent constituted a breach of the regulations. Nor can I accept the argument that breach of the regulations on the part of one of His Majesty's ships is only a matter of departmental discipline. In my judgment, such a breach is a breach of the duty owed by His Majesty's ships to other mariners. The King's Regulations and Admiralty Instructions are not only issued to the officers of His Majesty's ships, but they are also published to the world at large. A copy of the volume may be purchased at His Majesty's Stationery Office, and it is a matter of common knowledge among seafarers that His Majesty's ships are required to obey the collision regulations. By publishing the King's Regulations and Admiralty Instructions it seems to me that the Admiralty have accepted on behalf of His Majesty's ships the same duty to obey the collision regulations as is imposed on other vessels, and I do not see how a breach of that duty is to be excused merely because it is difficult in practice to comply with this or that requirement. If the argument on behalf of the plaintiffs is well founded, it would be possible for the Admiralty to evade any liability, even for the most flagrant breach of the steering and sailing rules (art. 17-art. 27 of the regulations) on the part of the officer in charge of one of His Majesty's ships, for it would always be open to them to say that the breach was a mere matter of departmental discipline and constituted no breach of duty to the world at large.

If it really is impossible, in the case of a submarine, to fit a steaming light that will comply with art. 2 (a) of the regulations, it seems to me that at the least a duty arises to issue a notice warning other mariners of this fact. It is conceded that up to the time of this collision no such notice was issued by the Admiralty. A notice to mariners was issued, and repeated annually, giving warning of the possibility of meeting submarines submerged, and describing the signals used to denote their presence. But no notice was issued relating to submarines navigating on the surface by night. After the date of this collision a notice to mariners, No. 869 of May 5, 1950, in the following terms, was issued:

"Warning to mariners. Submarines—navigation lights. Submarines may be met on the surface by night, particularly in the vicinity of the following ports: Thames estuary, Portsmouth, Portland, Plymouth, Barrow, Liverpool, Londonderry and Clyde areas. By virtue of the construction of a submarine the only position from which navigation lights can be exhibited is the conning tower of the vessel and this is approximately in the centre of her length. For the same reasons of construction it is impracticable for a submarine to show the second white steaming light prescribed in art. 2 (b) of the Regulations for Preventing Collisions at Sea, although submarines may vary in length from 215 feet to 280 feet. The single steaming light and bow lights are necessarily low down and closely spaced and give no indication of the submarine's length nor of her exact course or change of course. They may be mistaken for the lights of a very much smaller vessel of the coastal type. Authority—Admiralty."

I am informed that a notice combining a warning in substantially similar terms with that contained in the previous notice just referred to has been issued during 1951. It is unnecessary for me to decide—and I purposely refrain from deciding—whether the issue by the Admiralty of these more recent notices is sufficient to cure the non-compliance by most, if not all, of His Majesty's submarines with art. 2 (a) of the collision regulations, relating to the position of the white steaming light. What I do decide is that, in the absence of any such notice up to the date of this collision, the breach of that article by H.M.S. Truculent, constituted a breach of the duty which she owed to other vessels such as the *Divina*. Accordingly, I conclude that in this case there was a "fault" in relation to the lights exhibited by H.M.S. Truculent.

Did that fault, then, contribute to the loss and damage brought about by the collision? Those in charge of the *Divina* claim that they were in fact misled into thinking that the lights of H.M.S. Truculent were those of a very small vessel, and they say that, but for this mistake, they would have taken other measures, which would, or would probably, have avoided the collision, and which might at the worst have resulted in considerably less loss of life. The notice to mariners, No. 869 of 1950, contains an admission on behalf of the Admiralty that the lights of a submarine may be mistaken for those of a very much smaller vessel of the coastal type. I should be the last person to hold anybody bound by such an admission made in such circumstances. But the same admission was made in evidence by Vice-Admiral Sir Michael Denny, the Third Sea Lord and Controller of the Navy, and also by Lt.-Commander Bowers, the officer in command of H.M.S. Truculent. For what my own opinion is worth, I should, without assistance, have arrived at the same conclusion myself. But I have thought it right to consult the Elder Brethren on this point, and they also have expressed the opinion that lights such as those carried by H.M.S. Truculent would, indeed, be liable to be mistaken for those of a very small vessel. Having seen the pilot of the *Divina* and heard him cross-examined, I have no hesitation in accepting his evidence that he was in fact misled. To my mind, the behaviour of the *Divina* after the collision is only consistent with the hypothesis that, as stated by the pilot and the master, those in charge of her remained even then in ignorance of the fact that they had collided with a vessel of the size of a submarine. I am forced, therefore, to the conclusion that the lights carried by H.M.S. Truculent were not only liable to mislead, but did in fact mislead those in charge of the *Divina*. I see no reason to reject the evidence of the pilot of the *Divina* that, but for his belief that he was meeting a very small vessel, his action would have been different. Had he realised that he was in the presence of a large vessel, he could have taken earlier, and, perhaps, different, action. Had he done so, the collision might well have been avoided altogether. In any case a different collision would have resulted, and the disastrous consequences of this collision might quite probably have been avoided.

It may be said, however, that notwithstanding the faulty lights of H.M.S. Truculent those in charge of the *Divina* ought not to have been misled, and would not have been misled but for their own negligence and faulty look-out, so that the faulty lights of the submarine cannot in law be said to have contributed to the loss and damage. Such a proposition would, in my judgment, be inconsistent with authority by which I am bound. A somewhat similar situation arose in *Corstar Owners v. Eurymedon Owners, The Eurymedon* (1) where a vessel at anchor in the River Thames was negligently allowed to lie athwart the main fairway in such a position that her anchor lights were liable to confuse and mislead vessels passing up and down the fairway. The *Eurymedon*, navigating up-river, was in fact misled, and a collision resulted. BUCKNILL, J., and the Court of Appeal decided that the *Eurymedon* was keeping a defective look-out, but for which she would not have been misled by the lights of the vessel at anchor, but notwithstanding this came to the conclusion that

the negligence of the vessel at anchor contributed to the collision and pronounced both vessels to blame. In the Court of Appeal GREER, L.J., in the course of a judgment which has twice been cited with approval in the House of Lords [in *Admiralty Comrs. v. North of Scotland & Orkney & Shetland Steam Navigation Co., Ltd.* (2) and *Workington Harbour & Dock Board v. Towerfield S.S. (Owners)* (3)], stated the law of contributory negligence applicable to such a state of facts in five propositions, the fifth of which was as follows ([1938] 1 All E.R. 126):

"If the negligent act of one party is such as to cause the other party to make a negligent mistake that he would not otherwise have made, then both are equally to blame."

This proposition appears to me to apply exactly to the facts of the present case. Let it be assumed, without deciding, that those in charge of the *Divina* made a negligent mistake, and that they would not have been misled by the lights of H.M.S. *Truculent* but for a defective look-out on their own part. Nevertheless it remains true to say that the fault of H.M.S. *Truculent* in exhibiting misleading lights was such as to cause the negligent mistake of the *Divina* which she would not otherwise have made. I do not see how it is possible, therefore, to avoid the conclusion that this fault on the part of H.M.S. *Truculent* contributed to the loss and damage here complained of.

I come, therefore, to the third and most difficult question, namely, whether the fault of H.M.S. *Truculent* in exhibiting misleading lights was a fault on the part of any person or persons whose fault or privity would defeat His Majesty's claim for limitation of liability. On behalf of the defendants an attractive argument was presented to me, which, if I accepted it, would relieve me from the necessity of deciding this difficult question. Reliance was placed on the doctrine that, where the law imposes an absolute duty of care on some person, that person cannot escape his responsibility by delegating the performance of that duty to someone else: see the observations of DENNING, L.J. ([1951] 1 All E.R. 585) in *Cassidy v. Ministry of Health* (4). The argument ran somewhat as follows. By the Merchant Shipping Act, 1894, s. 419 (1), a statutory duty to obey the collision regulations is imposed on both owners and masters of ships. In so far as the regulations relate to the equipment of the ship, for instance, to proper lights and sound-signalling apparatus, they impose an absolute duty on the owner, who cannot evade his responsibility by delegating its performance. So, when by Order in Council the collision regulations were applied to His Majesty's ships, not only was a duty imposed on the officers in charge of His Majesty's ships to obey the steering and sailing rules (art. 17-art. 27), but the Admiralty, on behalf of His Majesty, must be taken to have accepted an absolute obligation in the matter of equipping His Majesty's ships, for instance, with proper lights. Responsibility for the performance of that obligation cannot, it is said, be evaded by delegation. Consequently, it is not necessary, in the case of one of His Majesty's ships, to do more than prove that the lights were not in accordance with the regulations, in order to show that the Admiralty were in breach of an absolute duty accepted by them on behalf of His Majesty. In such a case, therefore, it is impossible to establish absence of actual fault or privity so as to entitle His Majesty to a decree of limitation. I was invited to say that, just as in *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* (5) the breach by colliery owners of their statutory duty under the Coal Mines Act, 1911, was held to amount to "personal negligence or wilful act" on their part for the purposes of the Workmen's Compensation Act, 1925, s. 29 (1), so also in this case the breach by the Admiralty of their obligation to obey the collision regulations, so far as these relate to the fitting of lights, should be held to amount to "actual fault or privity," within s. 503 (1) of the Merchant Shipping Act, 1894.

In my judgment, this argument fails because the conclusion contended for does not follow from the premise. Let it be assumed that in the matter of the

provision of lights the Merchant Shipping Act, 1894, s. 419 (1), imposes on ship-owners an absolute obligation, responsibility for the performance of which they cannot evade by delegation. Let it further be assumed that by publishing the King's Regulations and Admiralty Instructions the Admiralty have accepted, on behalf of His Majesty, a similar absolute obligation. It may well be true that in an action for damage caused by defective lights neither the owners of a merchant ship nor the Admiralty could successfully evade liability on the footing that they had delegated their duty to provide lights in accordance with the regulations to some competent person. But this goes only to liability, which is not in issue in the present case. The question of limitation only arises after liability has been determined, and it by no means follows that because liability cannot be evaded the right of limitation is lost. If the proposition contended for by the defendants were well founded, it would never be possible for shipowners to limit their liability where loss or damage has been caused, or contributed to, by defective lights or other defective equipment in their ships. Yet many cases are to be found in the reports in which, in such circumstances, shipowners have been able to satisfy the court of absence of fault or privity on their part and have been held entitled to limit their liability: see, e.g., *The Warkworth* (6), a decision of the Court of Appeal. I do not think, therefore, that it is possible to contend that the mere proof of defective lights on board H.M.S. *Truculent* is sufficient of itself to prevent the Admiralty, on behalf of His Majesty, from establishing absence of fault or privity. I do not see that this conclusion is inconsistent with anything that was said in *Standard Oil Co. of New York v. Clan Line Steamers, Ltd.* (7) to which I was referred by the defendants. In that case, the facts of which were very special, shipowners allowed their ship to put to sea without informing the master of certain peculiarities of the ship in relation to the filling of her tanks. The owners knew of these peculiarities, but the master did not. The master's lack of knowledge rendered the ship unseaworthy, and a loss occurred. In these circumstances it was held that the owners were not entitled to limit their liability, because they could not discharge the burden of showing that the loss occurred without their actual fault or privity. The fact that they had informed their engineer superintendent of the ship's peculiarities did not help the owners. They had not informed the master, and it was the master's ignorance that was the cause of the ship's unseaworthiness. I do not read this decision as any authority for the proposition that, where shipowners delegate the performance of a duty imposed on themselves, they can in no case limit their liability.

It seems to me that, to decide this case, it is necessary to examine with care, in the light of the provisions of the statute conferring the right of limitations, the actual facts which have been proved in evidence. The wording of s. 5 (1) of the Crown Proceedings Act, 1947, is:

"The provisions of the Merchant Shipping Acts, 1894 to 1940, which limit the amount of the liability of the owners of ships shall, with any necessary modifications, apply for the purpose of limiting the liability of His Majesty in respect of His Majesty's ships . . ."

By the Merchant Shipping Act, 1894, s. 503 (1):

"The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say,) (a) Where any loss of life or personal injury is caused to any person being carried in the ship; (b) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship; (c) Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship; (d) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship; be liable to damages beyond

the following amounts; (that is to say,) (i) In respect of loss of life or personal injury, either alone or together with loss of or damage to vessels, goods, merchandise, or other things, an aggregate amount not exceeding £15 for each ton of their ship's tonnage; and (ii) In respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding £8 for each ton of their ship's tonnage."

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Section 503 (1) of the Merchant Shipping Act, 1894, must, therefore, now be read as providing that His Majesty may limit his liability where the loss takes place without His Majesty's actual fault or privity. It is obvious that in this context the expression "His Majesty" is not used in any personal sense, for otherwise it would be impossible to conceive of any case in which the right to

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limitation of liability could possibly be disputed. Clearly the expression is used in a corporate sense, and this is recognised in the statement of claim when it alleges that His Majesty sues in the name of the plaintiffs, the Admiralty, as the authorised government department for instituting civil proceedings by the Crown in relation to one of His Majesty's ships. The question must, therefore, be approached on the footing that the Admiralty are in the position of owners

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of H.M.S. Truculent, and the claim in this action must succeed or fail according as the Admiralty does or does not satisfy the court that the loss occurred without their actual fault or privity. To determine what is meant by actual fault or privity on the part of the Admiralty, it is necessary, I think, to examine the constitution of the Admiralty. As I understand the position, the control of the department is vested in the Board of Admiralty, presided over by His

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Majesty's Minister, the First Lord of the Admiralty, and including amongst its members, amongst others, the several Sea Lords. Members of the Board, in addition to their collective responsibility for the decisions of the Board as a whole, have within their own respective provinces what I may describe as certain functional responsibilities, in the sense that they are empowered to act and issue orders in the name of the Board. The member of the Board with whom

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we are chiefly concerned in this case is the Third Sea Lord and Controller of the Navy. I received some very helpful and informative evidence from Vice-Admiral Sir Michael Denny, the present holder of that office, who explained that the functional responsibilities of the Third Sea Lord include the following: Design, construction, repair and maintenance of His Majesty's ships and aircraft, provision of warlike stores, supervision of establishments, and research in the Navy. He accepted that a matter such as the provision of proper lights in one of His Majesty's vessels would be one that came within his province.

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It appears to me that there is an analogy between the constitution and functions of the Board of Admiralty and those of the board of directors of a limited company. Just as a limited company acts and transacts its business through its board of directors, so His Majesty, in relation to His Majesty's ships, acts through the Board of Admiralty. Again, just as in the case of some companies an individual member of the board may be authorised to act in the name of the board, so that his act is in law the act of the company, so also in the case of the Admiralty an individual member of the Board may act in the name of the Board as a whole. The question of fault or privity in relation to a limited company was exhaustively considered by the House of Lords in

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Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd. (8). That was a case of loss by fire, and the decision related to s. 502 of the Merchant Shipping Act, 1894. But the considerations affecting fault or privity would have been no different had the claim been for limitation of liability under s. 503. The action arose out of a loss through the unseaworthiness of a ship belonging to a limited company, and the evidence indicated that the unseaworthiness was known, or ought to have been known, to the managing director of the company. The managing director was not called as a witness, and in the circumstances it

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was held that the company had not discharged the burden of proving that the loss occurred without their actual fault or privity. I think it will be helpful to quote *in extenso* a passage from the speech of VISCOUNT HALDANE, L.C., who laid down in the clearest possible terms the principles applicable in such a case. He said ([1915] A.C. 713):

"My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company."

VISCOUNT HALDANE, L.C., then dealt with the position of the managing director of the particular company, Mr. Lennard, on the facts of the particular case, and proceeded (*ibid.*):

"... if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of s. 502. It has not been contended at the Bar, and it could not have been successfully contended, that s. 502 is so worded as to exempt a corporation altogether which happens to be the owner of a ship, merely because it happens to be a corporation. It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing *respondet superior*, but somebody for whom the company is liable because his action is the very action of the company itself. It is not enough that the fault should be the fault of a servant in order to exonerate the owner; the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy . . ."

It appears to me that the present case is to be determined by applying as nearly as possible the principles there enunciated to the facts that have been proved in evidence. Vice-Admiral Sir Michael Denny gave evidence to the effect that at the time of the construction of H.M.S. *Truculent* the builders' plans prepared by the Director of Naval Construction would have been submitted by the then Third Sea Lord to the full Board of Admiralty and approved by them. The detailed plans, showing in detail the actual position of the ship's lights, would not ordinarily go before the full Board, but (as I understand it) these would be submitted to the Third Sea Lord for approval—or at least he would have access to them and would be responsible for them. H.M.S. *Truculent* was, of course, constructed before the present Third Sea Lord assumed office as such, and Vice-Admiral Sir Michael Denny does not claim to have himself studied in detail the plans of a submarine of the class of H.M.S. *Truculent*. But he has told me that he is familiar with ships of that class, and was aware that, as in the case of other classes of submarines, the lights carried by them did not fully comply with the Regulations for Preventing Collisions at Sea. In particular, he was aware that the steaming light of a submarine of the class of H.M.S. *Truculent* was not in accordance with art. 2 (a), and, indeed, it was clear from his evidence that he has given active consideration to the practicability of overcoming that defect. I have no doubt that what is within his knowledge must have been, and must certainly be deemed to have been, within that of his predecessors in office. The position, therefore, is that H.M.S. *Truculent*,

in common with other submarines, was allowed to navigate on the surface by night equipped with a steaming light which, to the knowledge of the responsible member of the Board of Admiralty, if not to the actual knowledge of the Board as a whole, did not comply with art. 2 (a), and was liable to be misleading to other vessels.

If, therefore, there was a fault in relation to the lights exhibited by H.M.S. Truculent, as I have found that there was, that fault was one of which the responsible member of the Board of Admiralty was aware, or must be deemed to have been aware, that is, one to which he was privy. If it was necessary to publish a notice to mariners dealing with the lights carried by submarines, it was within the province of the Third Sea Lord, as I understand it, to publish such a notice on the authority of the Board as a whole. In relation to such a matter as the proper equipment of His Majesty's vessels the Third Sea Lord was, and is, in my judgment, the "directing mind" of the Admiralty, to use VISCOUNT HALDANE'S phrase in *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.* (8). It follows that his fault or privy is the fault or privy of somebody who is not merely a servant or agent for whom the Admiralty is liable on the footing *respondeat superior*, but somebody for whom the Admiralty is liable because his action is the very action of the Admiralty itself. For these reasons I am not satisfied that the loss and damage in question in this case occurred without the actual fault or privy of the Admiralty, and, in my judgment, therefore, the claim on behalf of His Majesty for limitation of liability fails and must be dismissed.

As this judgment is, I suppose, liable to attract a certain measure of publicity, it is, I think, right that I should add the following observations which I hope will receive the same publicity. There is nothing in what I have said to warrant the inference that highly placed officers in the service of His Majesty have been guilty of any grave dereliction of duty or seriously lacking in professional skill. The questions that have been debated in this case have been of a highly technical character. These questions have manifestly engaged the serious consideration of responsible officers at the Admiralty. Those officers have apparently taken the view that, having done everything reasonably practicable to comply as nearly as possible with the regulations governing the exhibition of lights, they had sufficiently discharged the duty that lay on them. I have taken a different view. No doubt, the views I have expressed will be accorded the consideration that they deserve by the responsible authorities. In the meantime, however, I wish to stress that there is nothing in this judgment to disturb public confidence in those responsible for conducting the affairs of His Majesty's Navy.

Action dismissed.

Solicitors: *Treasury Solicitor* (for the Admiralty); *Hill, Dickinson & Co.* (for the owners of the *Divina*); *Rowley, Ashworth & Co.* (for claimants to whom liability had been admitted); *W. H. Thompson*; *Haslewood, Hare & Co.*, agents for *Basset & Boucher*, Gillingham, Kent, and *Sutton, Cheshire & Thompson*, Newcastle-upon-Tyne; *Pattinson & Brewer*; *Greenwood & Son*; and *Faithfull, Owen & Fraser*, agents for *Winch, Greenstead & Winch*, Rainham, Kent (for other claimants).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

TRUCKS & SPARES, LTD. v. MARITIME AGENCIES
(SOUTHAMPTON), LTD.

[COURT OF APPEAL (Denning and Hodson, L.J.J., and Lloyd-Jacob, J.),
November 5, 1951.]

Detinue—Interim order for delivery up—Proof of title—Retention by shippers of bills of lading against general balance of consignor's account—Claim by purchaser for delivery of goods from shippers—Need to produce bills of lading.

One H. shipped goods from Southampton to Montreal, and, by arrangement with H., the carriers retained the bills of lading against payment of the general balance of an account owing to them by H. On arrival of the goods at Montreal, delivery was claimed by the plaintiffs who filed an affidavit by the managing clerk to their solicitors in which he stated that the plaintiffs were the purchasers of the goods. The plaintiffs, having brought an action against the carriers for the detinue of the goods, applied for an interim mandatory order directing the carriers to deliver the goods to them.

HELD (HODSON, L.J., *dissentiente*): before an interim order could be made the court would require proof by the plaintiffs of their title to the goods; production of the bills of lading was the proper proof at the present stage of the action; and that proof should be given before a mandatory order was made.

AS TO WHEN AN INTERLOCUTORY INJUNCTION WILL BE GRANTED, see HALSBURY, Hailsham Edn., Vol. 18, pp. 27-30, paras. 41-45.

APPEAL by the defendants from an interim mandatory order of DEVLIN, J., dated Oct. 30, 1951, directing the defendants to deliver to the plaintiffs goods which they had carried from Southampton to Montreal and were holding, together with the bills of lading, pending payment by the consignor of a sum on account of his general balance of indebtedness to them.

Molony for the defendants (the carriers).

P. H. R. Bristow for the plaintiffs.

DENNING, L.J.: In this case a Mr. Hamilton shipped six Hamilton trucks and other automobile parts by a ship called the Linda Dan from Southampton to Montreal, the carriers being the defendants, Maritime Agencies (Southampton), Ltd. The bills of lading were drawn up and signed by the master of the ship, but they were not issued by the carriers to Hamilton. He was only sent copies of them. The carriers kept the original bills of lading themselves because Hamilton owed them a lot of money, and they sent the bills to their agents at Montreal with instructions to hold them until they sanctioned their release. Hamilton knew that that was what they were doing because they had done the same thing before. The freight on this particular consignment was payable in advance, and in due course Hamilton paid it, but he did not pay any of his outstanding account. When the goods arrived at Montreal the plaintiffs, Trucks & Spares, Ltd., demanded delivery, claiming that they were the purchasers of the goods. They did not produce the bills of lading because, of course, Hamilton had not been able to endorse the bills to them. Delivery having been refused, the plaintiffs brought this action, claiming a mandatory order directing the carriers to deliver up the goods or their value and damages for their detention. They made an interim application to DEVLIN, J., who made an order directing the carriers to deliver the goods to the plaintiffs. From that order the carriers appeal to this court. They say that they do not know the plaintiffs in this matter. The plaintiffs were not the shippers. They have not got the bills of lading, and, therefore, no order should be made, at all events at this stage, in their favour. It is to be noticed that Hamilton

is not a party to the action, and the question is whether the plaintiffs have a sufficient title at this stage to get an order for delivery from this court.

The only evidence of title which the plaintiffs adduced before the court is this statement in an affidavit by a solicitors' managing clerk:

"I am informed by the plaintiffs, who are a company incorporated in the dominion of Canada, with their registered office at 6001 Cote de Liesse, Montreal, and verily believe that the plaintiffs are the purchasers of the said trucks and spare parts from one Hamilton."

The question is whether that assertion is sufficient evidence of title so that this court can make a mandatory order for delivery. In my opinion, it is not. In cases of this kind the bill of lading is the evidence of title which should be produced. That is well known throughout the commercial world, and it must have been well known to Hamilton and to the plaintiffs. I do not know whether the plaintiffs have paid anything for these goods. I should doubt whether they have. If they are wise and follow the ordinary commercial practice, they will not pay except against the bills of lading, and, if they have not paid, it is unlikely that the property has passed to them. There may be an agreement for sale, but no passing of the property. But, whether the property has passed or not, in my opinion, they ought to produce the bills of lading duly endorsed in order to make a good title at this stage. It is said: How can the plaintiffs be expected to produce the bills of lading having regard to the fact that the carriers are withholding them, and withholding them wrongly because they are holding them for a lien over Hamilton's general account, which they have no right to do? That seems to me to be a matter to be decided at the trial. On the facts set out in the carriers' affidavit it might be said that, owing to the course of business between Hamilton and the carriers, it was an understood thing that the carriers should have a lien against general account. If there was an agreement for a lien on general account then, of course, the purchasers from Hamilton would not be in a better position than Hamilton himself and could only take subject to the lien. I appreciate that there may be nothing in this point, but, even so, I think we cannot allow strangers to the contract of carriage to claim the goods at this stage without the production of the bills of lading. The carriers may be found at the trial to be wrong, but that is a matter which can be dealt with by damages. For my own part, I do not think it would be right at this stage to make a mandatory order, which would, in effect, be deciding finally the issues between the parties here and now, whereas they ought to be decided at the trial of the action. I would allow the appeal.

HODSON, L.J.: This is an appeal from **DEVLIN, J.**, who made an order on Oct. 30, 1951, directing the carriers to deliver to the plaintiffs six trucks, eighty cases, and 199 loose pieces of automobile parts shipped on board the *Linda Dan* to Montreal. The plaintiffs are a company incorporated in Canada and claim to be the purchasers of the goods. On Sept. 29, 1951, bills of lading were prepared and the goods were shipped. The freight was paid by cheque which has been collected by the carriers' bankers. The position set out in the affidavit of Mr. Humphreys, managing clerk to the plaintiffs' solicitors, is that the carriers instructed their agents in Montreal not to deliver the goods to the plaintiffs because, the carriers said, one Hamilton owed them money in respect of previous shipments. The affidavit goes on to say that the plaintiffs had contracted to deliver the goods to purchasers from them on Oct. 30, and, if they could not do so, they would lose a large profit and incur penalties for breach of contract. The carriers say it is true that the goods were shipped through them, but no bills of lading were ever issued in respect of the shipment because the original bills were sent by air mail to the carriers' agents in Montreal with instructions not to part with them until express instructions were received from the carriers' managing director. This procedure was adopted because Hamilton owed the carriers £4,000 and upwards for shipping charges incurred in respect

of previous shipments, and in his affidavit Mr. Hammerstein, the carriers' managing director, says frankly that it was his intention not to authorise the agents at Montreal to release the bills until Hamilton had made a substantial payment on account.

In my view, in the circumstances the plaintiffs can demand the goods from the carriers. In my judgment, it is no answer to the latter to say: "You have no title to the goods because you have not the bills of lading," if it is the carriers' own action which has prevented the plaintiffs from having the bills of lading. The carriers admit that they refused to issue the bills of lading which would enable the plaintiffs to obtain a title to the goods, and, in my view, they cannot be heard to say that the plaintiffs have not a title which they themselves are wrongly preventing them making. There is no claim that the carriers have a general lien on the goods. I have the misfortune to differ from my Lord. I would dismiss the appeal.

LLOYD-JACOB, J.: It is with regret that I find myself constrained to differ from **DEVLIN, J.** In my view, before an injunction at this stage of these proceedings could be granted the court must require proof of an indefeasible title. The evidence discloses that there are documents of title, the bills of lading, duly executed and held by the Montreal agents of the shippers conditionally on Hamilton's account, and a decision affirming title at this stage may create grave injustice to some person or persons acquiring a title through the bills of lading in ignorance of the circumstances with which this action is concerned. Moreover, I am not satisfied that any such irreparable damage would be caused to the plaintiffs as would justify the granting of an injunction of this kind at this stage. The damage alleged is an anticipated loss of profit and the possibility of penalties for breach of contract. I can see no reason why the plaintiffs could not adequately be safeguarded hereafter by an appropriate award of damages if and when their contentions are supported by evidence at the trial. I would allow this appeal.

Appeal allowed.

Solicitors: *White & Leonard*, agents for *Streat & Daunt*, Southampton (for the defendants); *Granville Jones & Co.*, Barnet (for the plaintiffs).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

Re ART REPRODUCTION CO., LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), November 5, 1951.]

Company—Winding-up—Voluntary liquidation—Proof—Statute-barred debts—Admissibility—Companies Act, 1948 (c. 38), s. 257 (1), s. 302.

On Oct. 11, 1950, a limited company went into voluntary liquidation. The applicant claimed that the company was indebted to him, but the liquidator rejected his proof on the ground that his claim was statute-barred. The applicant sought an order that proof of his debt be allowed, notwithstanding that it was statute-barred.

HELD: the court had no jurisdiction to order the admission to proof of a statute-barred debt in a compulsory liquidation, and, as it was impossible to place an interpretation on the word "liabilities" in the Companies Act, 1948, s. 302 (which dealt with voluntary winding-up) different from that to be placed on the same word in s. 257 (1) of that Act (which dealt with compulsory winding-up), the court had no such jurisdiction in a voluntary liquidation.

Re River Steamer Co., Mitchell's Claim (1871) (6 Ch. App. 822) and *Re General Rolling Stock Co., Joint Stock Discount Co.'s Claim* (1872) (7 Ch. App. 646), applied.

Re Fleetwood & District Electric Light & Power Syndicate ([1915] 1 Ch. 486), considered.

AS TO DEBTS PROVABLE, see HALSBURY, 1949 Edn., Vol. 5, pp. 739-744, paras. 1200-1214; and FOR CASES, see DIGEST, Vol. 10, pp. 924-933, Nos. 6339-6399.

FOR THE COMPANIES ACT, 1948, s. 302, see HALSBURY'S STATUTES, Second Edn., Vol. 3, p. 690.

Cases referred to:

- (1) *Re Fleetwood & District Electric Light & Power Syndicate*, [1915] 1 Ch. 486; 84 L.J.Ch. 374; 112 L.T. 1127; 10 Digest 1002, 6959.
- (2) *Re General Rolling Stock Co. Joint Stock Discount Co.'s Claim*, (1872), 7 Ch. App. 646; 41 L.J.Ch. 732; 27 L.T. 88; 10 Digest 933, 6399.
- (3) *Re River Steamer Co., Mitchell's Claim*, (1871), 6 Ch. App. 822; 25 L.T. 319; 22 Digest 376, 3844.

MOTION by a creditor in the winding-up of the Art Reproduction Co., Ltd. for an order that a registrar's order, dated Oct. 9, 1951, be varied or discharged, and that the proof of the applicant's debt should be admitted. The proof had been rejected on the ground that the debt was statute-barred.

F. B. Alcock for the applicant.

P. J. Sykes for the liquidator.

WYNN-PARRY, J.: This is an application by a Mr. Upperton, who was the managing director of the Art Reproduction Co., Ltd., for an order that the order of the registrar dated Oct. 9, 1951, be varied or discharged, and that the proof of debt of the applicant for £594 17s. 9d. be allowed. The applicant proved in the liquidation of the company, and to the extent of that sum the liquidator rejected his proof of debt. That rejection was upheld by the learned registrar.

The applicant claims on the basis of an agreement dated Feb. 11, 1930, by which he was appointed as managing director of the company for the term of ten years, commencing on Jan. 1, 1930, on terms as to remuneration and otherwise to which I need not refer except to say that cl. 9 provided, in effect, for damages in the event of the company's going into liquidation during the currency of the agreement, such damages being limited to one year's remuneration, or, in the event of there being less than one year to run, to the unexpired portion of the agreement. At a meeting of directors on Dec. 12, 1939, it was resolved:

"That owing to the present precarious state of trade due to the war, the directors continue their present agreements and defer entering into new agreements until conditions of trade warrant it."

On Aug. 31, 1940, a receiver and manager was appointed, and on Dec. 10, 1940, he terminated the applicant's employment by the company. On Oct. 11, 1950, the company went into voluntary liquidation.

The applicant's claim, so far as it has been rejected, falls into two parts—(i) the balance of remuneration due to him as managing director from Jan. 1, 1940, to Sept. 5, 1940, in respect of which he claims £278 10s., and (ii) a sum which is, in effect, damages for breach of the service agreement over the period from Sept. 5, 1940, to Dec. 31, 1940, at £19 3s. 6d. per week, a total of £316 7s. 9d. As regards this part of the claim, the liquidator required the applicant to put in a proof. In due course he rejected the proof on the ground that it was statute-barred as to both parts of the claim. At the hearing before me it was not disputed on behalf of the applicant that the second part of the claim—that for damages for breach of the agreement—must clearly be regarded as statute-barred, but it was sought to argue that the first part, the balance of remuneration over the period from Jan. 1, 1940, to Sept. 5, 1940, was not statute-barred. That contention was rested on the submission that the effect of the resolution of the directors that the "present agreements" be continued was that the terms of the applicant's service agreement, which was a document under seal, was prolonged

for all purposes. I am unable to accept that contention. The resolution of the directors appears to me to do no more than to evidence the terms on which the company and the applicant agreed that he should go on serving the company, and whereas up to the expiration of the service agreement, *viz.*, Dec. 31, 1939, the parties were governed by the agreement under seal, thereafter their contractual relations depended on an agreement either under hand or oral, it matters not which. Therefore, in relation to sums due under that second agreement, the Limitation Act, 1939, s. 2 (1), clearly applies, and that part also of the claim is, in my judgment, statute-barred.

It was then contended on behalf of the applicant that even on the footing that both parts of the claim were statute-barred, nevertheless there is jurisdiction in the court to authorise the liquidator to pay the claims, and that, in the circumstances of this case, the court ought to exercise that jurisdiction. The liquidator, it is clear, had considerable sympathy for the applicant, and so did the learned registrar, and I do not differ from either of them, but, the point being a question of jurisdiction, the matter has to be considered strictly. Counsel for the applicant said in the course of his argument that one of the difficulties which had faced both the registrar and those who had had to deal with the matter was *Re Fleetwood & District Electric Light & Power Syndicate* (1), a decision of ASTBURY, J. That was a case concerning a voluntary liquidation in which the liquidator, having surplus assets available for distribution, issued a summons to determine whether he was at liberty to pay statute-barred creditors, thus directly raising on the face of the summons the question which is raised before me today. At the hearing of the summons the statute-barred creditors contended that the liquidator was entitled to pay them, but the shareholders contended that he was not. The court declined to answer the question specifically, but directed the liquidator to apply the assets in due course of administration. In order to have the matter finally determined, the liquidator paid £50 to the defendants to the summons who represented the statute-barred creditors, and on that a friendly summons was issued to determine whether or not that was a proper payment, and, if not, that directions for repayment should be given. At the outset of his judgment, ASTBURY, J., says ([1915] 1 Ch. 490):

"It seems a startling proposition to suggest that in a due course of administration in a voluntary winding-up the liquidator is entitled to pay statute-barred debts."

With that statement I am, with all respect, in complete agreement. ASTBURY, J., continues (*ibid.*):

"I am told there is no direct decision on the point and I must therefore decide it in accordance with the decisions on analogous courses of administration."

With that direction to himself in mind, ASTBURY, J., considered a number of authorities and appeared to be inclined to apply by way of analogy the rules governing the administration in the Court of Chancery, but at the end of his judgment he pointed out that in the case before him there was already an order of the court directing the liquidator to apply the balance in his hands in due course of administration, and observed that the meaning of that order was that, the shareholders having in that proceeding formally objected to the payment of the statute-barred creditors, the liquidator, who was a party and heard the objection taken, could not, on the basis of applying the assets in due course of administration, pay the statute-barred debts. The result, therefore, is that the question before me is entirely left open.

As I have said, ASTBURY, J., proceeded on the basis that, as there was no direct decision on the point, he must decide it in accordance with the decisions on analogous courses of administration. With the greatest respect to the learned judge, I cannot feel that that is the correct approach to the problem. In my

view, it is first necessary to look at the relevant Companies Act (in this case the Companies Act, 1948) and see whether or not, within the language of that statute, there is guidance as to the course which the court in a case like this should follow. I, therefore, turn to the Act.

The first section to which it is relevant to refer is s. 257 (1) which provides:

- A “As soon as may be after making a winding-up order, the court shall settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected, and applied in discharge of its liabilities”

Section 302, which applies in every voluntary winding-up, provides:

- B “Subject to the provisions of this Act as to preferential payments, the property of a company shall, on its winding-up, be applied in satisfaction of its liabilities *pari passu*, and, subject to such application, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.”

- C Section 316, which appears under the fasciculus: “Provisions applicable to every mode of winding-up,” provides:

- D “In every winding-up (subject, in the case of insolvent companies, to the application in accordance with the provisions of this Act of the law of bankruptcy) all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value.”

Finally, s. 317 provides:

- E “In the winding-up of an insolvent company registered in England the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy in England”

- F It was urged on me on behalf of the applicant that a comparison of s. 316 and s. 317 showed that s. 316 enunciated the general rule, and that s. 317 was designed to provide an exception, and that the rules in bankruptcy would only apply in the case of a company which was insolvent. So be it, but that does not seem to me to be in any way decisive of the problem before me.

- G I turn back to s. 257, which provides that the court is to cause the assets of the company to be collected and applied in discharge of its liabilities, and compare that with the language of s. 302, which provides, in the case of a voluntary winding-up, that

“ . . . the property of a company shall, on its winding-up, be applied in satisfaction of its liabilities *pari passu*”

- H There appears to me no context which would justify placing on the word “liabilities” in s. 302 any different interpretation or meaning from that which is to be attributed to that word in s. 257, but, further, in the case of the section in the Act of 1862 corresponding to s. 257 there has been judicial pronouncement. In *Re General Rolling Stock Co., Joint Stock Discount Co.’s Claim* (2) JAMES, L.J., in the course of his judgment, quoted s. 98 of the Companies Act, 1862, and proceeded (7 Ch. App. 648):

“A duty and a trust are thus imposed upon the court, to take care that the assets of the company shall be applied in discharge of its liabilities. What liabilities? All the liabilities of the company existing at the time when the

winding-up order was made which gives the right. It appears to me that it would be most unjust if any other construction were put upon the section."

In the course of his judgment, MELLISH, L.J., said (*ibid.*, 649):

"It appears to me to be the clear meaning of that section, that the assets should be applied in satisfaction of all the liabilities which existed at the time of the winding-up order."

In BUCKLEY ON THE COMPANIES ACTS, 12th ed., p. 634, it is said in the notes to s. 316:

"But, of course, a debt barred at the date of the order cannot be proved . . ."

and for that proposition there is cited *Re River Steamer Co., Mitchell's Claim* (3), which, in my judgment, bears that proposition out, for in that case it appears that the proposition to the contrary was not even argued. The note goes on:

"and, *semble*, cannot even in a solvent voluntary liquidation properly be paid against the wishes of the contributories."

Counsel for the liquidator contended that that statement in its present form was, if anything, too cautious, and ought to read: "and, *semble*, cannot even in a solvent voluntary liquidation properly be paid unless the contributories consent." In my judgment, that would be a correct statement of the law.

That being the case as regards proofs in a compulsory liquidation and having regard to the view which I take on a comparison of s. 257 and s. 302, the force of the statements of the lords justices in *Re General Rolling Stock Co.* (2) must apply, and, in my judgment, do apply in the case of a voluntary winding-up. If this were not the case, I can see nothing but confusion resulting. There are, as was pointed out by counsel for the liquidator, many cases in which the court makes a compulsory order to wind-up a company which is not insolvent. There are other cases in which a company goes into voluntary liquidation and it may be either solvent or insolvent. It appears to me to be quite illogical that there should be one rule in the case of a compulsory liquidation and another rule in the case of a voluntary liquidation. The only safe rule and the only course consonant with common sense is to have one rule which can be applied both in the case of compulsory liquidations and in the case of voluntary liquidations. On that review of the enactments and the authorities, I find it unnecessary to go outside the language of the Act to find the answer to the question which I have to determine, and I find, therefore, no need to draw to any extent on the analogy of the administration of estates in the Chancery Division of the court. The result will be that, with some reluctance, I must dismiss this application.

Application dismissed.

Solicitors: *Doyle, Devonshire & Co.* (for the applicant); *E. F. Turner & Sons* (for the liquidator).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re ULLSWATER (deceased). BARCLAYS BANK, LTD. v.
LOWTHER AND ANOTHER.

[CHANCERY DIVISION (Roxburgh, J.), November 6, 7, 1951.]

Administration of Estates—Fund for payment of legacies and testamentary expenses—Respective liability of capital and income—Exclusion of rule in Allhusen v. Whittell.

A By his will, dated Oct. 22, 1942, a testator devised and bequeathed his estate to his executor, a bank, on trust for sale and conversion with power to postpone sale, and directed "that the income of such of the same premises as for the time being shall remain unsold shall as well during the first year after my death as afterwards be applied as if the same were income arising from investments hereinafter directed to be made of the proceeds of sale thereof and that no reversionary or other property not actually producing income shall be treated as producing income for the purposes of this my will and I direct that the bank shall out of the moneys to arise from the sale calling in and conversion of or forming part of my said real and personal property and out of my ready moneys pay my funeral and testamentary expenses (including all estate duty leviable at my death in respect of my residuary estate but not including [certain properties]) and debts and shall also pay or provide for the pecuniary legacies and annuities given by this my will or any codicil hereto and the duty on all legacies and annuities hereby or by any codicil hereto bequeathed free of duty but so that all legacies and annuities and the duty on all legacies and annuities bequeathed free of duty shall be paid primarily out of my personal estate and shall invest the residue of the said moneys in the name of the bank in or upon any of the investments for the time being authorised by law for the investment of trust funds." On the question how, as between capital and income, the debts and funeral and testamentary expenses and pecuniary legacies ought to be borne and paid:

E HELD: the words directing "that the income of such of the same premises as for the time being shall remain unsold shall as well during the first year . . . as afterwards be applied as . . . income" did not exclude the rule in *Allhusen v. Whittell* (1867) (L.R. 4 Eq. 295), and that rule, not being otherwise excluded, must be applied, with the result that the executor ought to be taken to have paid the said outgoings and interest thereon out of such portion of the capital of the residuary estate as, with the income thereof computed down to the respective actual dates of such payments, was sufficient for the purpose.

F AS TO THE RULE IN *ALLHUSEN v. WHITTELL*, see *HALSBURY*, Hailsham Edn., Vol. 14, p. 368, para. 689; and FOR CASES, see *DIGEST*, Vol. 23, pp. 464-468, Nos. 5358-5374.

G Cases referred to:

- (1) *Allhusen v. Whittell*, (1867), L.R. 4 Eq. 295; 36 L.J.Ch. 929; 16 L.T. 695; 23 Digest 464, 5358.
- (2) *Howe v. Dartmouth (Earl)*. *Howe v. Aylesbury (Countess)*, (1802), 7 Ves. 137; 32 E.R. 56; 23 Digest 467, 5373.

H ADJOURNED SUMMONS to determine, *inter alia*, whether, on the true construction of the will of the Rt. Hon. James William Viscount Ullswater, deceased, the executor and trustee ought to be taken to have paid the debts and funeral and testamentary expenses payable out of the testator's estate and the pecuniary legacies bequeathed by his said will and the codicils thereto (collectively referred to as "the outgoings") and the interest thereon out of such portion of the capital of the residuary estate as, with the income thereof computed down to the respective actual dates of such payments, would amount to the outgoings

and the interest thereon, or on some other and what principle. The income of the residuary estate during the relevant period was low. The remainderman argued that the principle referred to was excluded by the will.

B. S. Tatham for the plaintiff, the executor and trustee.

Denys B. Buckley for the first defendant, the tenant for life.

M. J. Albery for the second defendant, the remainderman.

ROXBURGH, J.: The question which arises in this case is whether the testator's will excludes the rule in *Allhusen v. Whittell* (1). I think it is conceded that, unless it does, that rule is applicable. The point is one of general importance, because the clause which is said to exclude the rule is very commonly to be found in wills. The testator devises and bequeaths all his real and personal estate to the bank which is the trustee under the will on trust for sale and conversion, with power to postpone sale, and he gives the following direction:

"I direct that the income of such of the same premises as for the time being shall remain unsold shall as well during the first year after my death as afterwards be applied as if the same were income arising from investments hereinafter directed to be made of the proceeds of sale thereof and that no reversionary or other property not actually producing income shall be treated as producing income for the purposes of this my will and I direct that the bank shall out of the moneys to arise from the sale calling in and conversion of or forming part of my said real and personal property and out of my ready moneys pay my funeral and testamentary expenses (including all estate duty leviable at my death in respect of my residuary estate but not including [certain properties]) and debts and shall also pay or provide for the pecuniary legacies and annuities given by this my will or any codicil hereto and the duty on all legacies and annuities hereby or by any codicil hereto bequeathed free of duty but so that all legacies and annuities and the duty on all legacies and annuities bequeathed free of duty shall be paid primarily out of my personal estate and shall invest the residue of the said moneys in the name of the bank in or upon any of the investments for the time being authorised by law for the investment of trust funds."

The words which counsel for the remainderman submits exclude the rule in *Allhusen v. Whittell* (1) are the well-known words:

"I direct that the income of such of the same premises as for the time being shall remain unsold shall as well during the first year after my death as afterwards be applied as if the same were income arising from investments hereinafter directed to be made of the proceeds of sale thereof."

Those words are primarily designed to exclude the rule in *Howe v. Earl of Dartmouth*. *Howe v. Countess of Aylesbury* (2), and, undoubtedly, they are effective for that purpose, but it does not follow that they could not have a construction bearing on a problem with which they were not primarily designed to deal. I must confess that, for a long time, the argument of counsel for the remainderman seemed to me most convincing. He said: "You cannot have an investment out of the proceeds of sale until all the debts have been paid, because that is what the will says," and, read literally, that is what it says. Therefore, said he, *ex hypothesi* the debts must be deemed to have been paid from some other fund, and this income, *i.e.*, the income of the property for the time being remaining unsold, must be payable to the tenant for life or other person beneficially interested without regard to the existence of debts which *ex hypothesi* have been discharged. As I say, if the will be read literally, that, I think, is a fair grammatical construction, but it appears to me that it is open to such extraordinary consequences that I ought not to allow words written *also intuitu* to bear on this other problem by mere grammatical construction.

The main argument of counsel for the tenant for life is that the debt might

A be a future debt. These are words very commonly found in wills, and I am not going to try to introduce some hair-splitting distinctions with the result that they might mean one thing in one will and something different in another will. There might have been here a future debt in the form of a covenanted annuity payable during somebody's lifetime and future instalments might arise for many years. According to the strict construction of the will, in such a case no proceeds of sale could be invested in the meantime because the direction to invest is only to invest the residue of the moneys after payment of the debts, and as *ex hypothesi* there were future debts, the debts had not or could not all have been paid, and, therefore, the direction to invest the residue could not yet be operating and, I suppose, it would remain in the bank on current or possibly deposit account. I think that is the literal construction of these words, but it would be a ludicrous result and one which I am sure no court has ever contemplated. The truth of the matter is that, though these operations are stated in chronological sequence, they are not to be regarded as a mandatory direction to the trustees to adhere to the strict order of time. In other words, it would obviously be proper for the trustees to invest some proceeds of sale, not immediately required for the purposes of administration, in some authorised investment notwithstanding that debts were still outstanding. That is the first ground which seems to me to make it necessary to reject the submission of counsel for the remainderman.

B
C
D Secondly, if this direction is to be applied on the footing that all debts are notionally extinguished, it must follow that all interest on debts is notionally extinguished, too, because there could not be any interest on a debt if there were no debt. Therefore, I should have to hold that this direction contemplated, not only that the debts had been discharged, but also that all interest on debts had been discharged, and, if I construe this as a direction to apply the income as though all interest on debts were discharged, then how could any interest on any debt be deducted from this income? The result would be that both the capital of a debt and the interest on the debt would have to be paid exclusively out of capital. That, of course, is a preposterous idea.

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H Counsel for the remainderman sought to escape from this point by submitting that the phrase: "I direct that the income of such of the same premises as for the time being shall remain unsold" meant the net income of the gross estate, but it is not the gross estate. It is a part of the gross estate that is being referred to, *viz.*, such as for the time being shall remain unsold. The phrase "net income," in relation to that, would mean what remains after subtracting from the income of that portion of the estate the outgoings of that portion of the estate, but it could not possibly have any relation to the net income of the whole estate. It seems to me that this is an impossible argument. If, as counsel submits, and as I am disposed to agree, "the same premises" means a portion of the gross estate, the word "income" must either mean the gross income or the net income of that portion of the estate. It cannot possibly refer to the net income of the whole estate. Therefore, in my judgment, counsel's argument does not meet the difficulty, and it seems to me that my only proper course is to say that these words, undoubtedly inserted *alio intuitu*, are not to be construed so as to have any bearing on a problem with which nobody would expect them to be concerned, *viz.*, the rule in *Allhusen v. Whittell* (1). In my judgment, they have no bearing on that rule. They do not exclude it, and there is nothing else in the will which is put before me as excluding the rule.

Order accordingly.

Solicitors: *Foyer, White & Prescott* (for the plaintiff); *Ellis & Ellis* (for the first defendant); *Preston, Lane-Claypon & O'Kelly*, agents for *Herbert & Gowers & Co.*, Oxford (for the second defendant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

T. O. SUPPLIES (LONDON), LTD. v. JERRY CREIGHTON, LTD.

[KING'S BENCH DIVISION (Devlin, J.), November 8, 1951.]

Company—Service of document on company—Service “by post”—Validity of service by registered post—Companies Act, 1948 (c. 38), s. 437 (1).

Postal service of a document on a company under the Companies Act, 1948, s. 437 (1), may be effected by either ordinary or registered letter.

AS TO SERVICE OF DOCUMENTS ON A COMPANY, see HALSBURY, 1949 Edn., Vol. 5, p. 491, para. 781; and FOR CASES, see DIGEST, Vol. 9, pp. 676, 677, Nos. 4505-4510.

FOR THE COMPANIES ACT, 1948, s. 437 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 3, p. 780; and FOR THE INTERPRETATION ACT, 1889, s. 26, see *ibid.*, Vol. 24, p. 224.

APPEAL against an order of Master BURNAND setting aside a judgment obtained by the plaintiffs on the ground that there had been an irregularity in the service of the writ. The defendants, a limited company, contended that the service was irregular in that the writ had been served on them under the Companies Act, 1948, s. 437 (1), by registered post instead of by ordinary post.

Pearl for the plaintiffs.

Faulks for the defendants.

DEVLIN, J.: This is an appeal from an order of Master BURNAND by which, on the ground that there was an irregularity in the service of the writ, he set aside a judgment obtained by the plaintiffs on Aug. 15, 1951. The plaintiffs are a limited company called T.O. Supplies (London), Ltd., and the defendants are also a limited company called Jerry Creighton, Ltd. A dispute between the two parties caused the plaintiffs through their solicitors to issue a writ on July 27, 1951, for the sum of £33 2s. 6d., as being the price of goods sold and delivered by the plaintiffs to the defendants at their request. No letter before action appears to have preceded the service of the writ, the plaintiffs having decided to serve the writ on the defendants in accordance with the procedure provided in the Companies Act, 1948, s. 437 (1), without any communication through solicitors.

Section 437 (1) is as follows:

“A document may be served on a company by leaving it at or sending it by post to the registered office of the company.”

The registered office of the defendants is the office of their accountants at Stratford Mansions, 34, South Molton Street, London, W.1. After being issued, the writ was sent by registered post to the defendants at that address. The defendants do not carry on their business there, but in the city of London at 122, City Road. They have an arrangement with their accountants whereby the accountants re-direct all letters addressed to the registered office to the city office. That course was taken in this case so that when the document arrived at the registered office of the defendants it was re-directed. When, however, it arrived at 122, City Road, the offices there were closed for staff holidays from July 28 to Aug. 13, 1951. The offices were in charge of a saleswoman who refused to accept the registered letter because, she says, she thought the contents of a registered letter must be so important that she would be unable to deal with it. On Aug. 15, no appearance having been entered, the plaintiffs signed judgment in default of appearance and issued execution. On Aug. 22 the plaintiffs' solicitor received the registered letter back from the “dead letter” office, and he then became aware that it had not been delivered. Notwithstanding that, execution was allowed to proceed, and on Aug. 27 the sheriff's officer entered the defendants' premises to levy execution. Then the defendants learned for the first time what had happened. They entered an appearance and in due course took out a summons which came before Master BURNAND to have the judgment set aside.

The master set aside the judgment on the ground, which I am told is in accordance with the practice which has existed since 1883, that the service on the company was bad in that the writ had been served by registered post and not by ordinary post. There appears to be no authority on the matter and the decision of a very experienced master, given in accordance with a practice which has existed for so long, is one to which great weight should be given. But

A in the end the matter must be determined on the construction of the statute. There may be reasons of convenience and they may tend both ways. I am told that the object of the practice is to meet the possibility that a registered letter will not for some reason be taken in. On the other hand, by registering a letter one may make it less likely that it will be lost in the course of post and the fact that a receipt is obtained for it makes its arrival more easy to prove. While there

B is, undoubtedly, the difficulty of a registered letter not being taken in, sooner or later the sender will be made aware of that by means of its return from the "dead letter" office and the court would certainly know how to deal, whether by costs or otherwise, with any plaintiff who, knowing that a writ had in fact not been delivered at the company's place of business, nevertheless sought to obtain judgment on it.

C In the Rules of the Supreme Court both registered and ordinary post are employed in the procedure prescribed for various purposes. R.S.C., Ord. 67, r. 2, provides:

"All writs, notices, pleadings, orders, summonses, warrants and other documents, proceedings and written communications in respect of which personal service is not requisite shall be sufficiently served if left within the prescribed hours, at the address for service of the person to be served as defined by Ord. 4 and Ord. 12, with any person resident at or belonging to such place, or if posted in a prepaid registered envelope addressed to the person to be served at such address for service as aforesaid; provided that where service under this rule is made by registered post, the time at which the document so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof."

E For those purposes those responsible for regulating these matters thought that registered post was desirable. On the other hand, for the purpose of an interpleader summons, the position seems to be otherwise. R.S.C., Ord. 57, r. 17 (1), provides "for service either by personal service upon the claimant or by prepaid ordinary post."

F I do not feel that these rules help one way or the other except in so far as they show that, where the legislature through the rules intends to insist on one method in preference to the other, it prescribes specifically what that method is to be.

I am concerned only to interpret the statute in this case, which does not limit the word "post" either by saying it is to be registered post or by saying it is to be ordinary prepaid post. The only qualification or limitation which can properly be put on the enactment is that contained in the Interpretation Act, 1889, s. 26, which provides:

"Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve,' or the expression 'give' or 'send,' or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post."

H In my view, the word "post," construed in its ordinary and natural meaning, is wide enough to cover both registered post and ordinary post. I do not think that as a matter of construction it is possible to limit it to one or the other. There may or may not be desirable reasons for doing so. There are considerations

on both sides, and the considerations on one side rather than on the other appear to have been thought more weighty at the time this practice was evolved. But it is not the business of the courts to decide what is convenient in these matters. Unless the Act of Parliament is doubtful or ambiguous, there is no room for considering matters of convenience. It is for the legislature, if it thinks registered post is not a convenient way of effecting service, to say so. I think it is clear that the words which the legislature has used in earlier Acts and repeated in 1948, refer to "post" in the ordinary sense of the term and are not limited either to registered post or to ordinary prepaid post. That view is supported to some extent by the provisions in the Post Office Act, 1908, s. 12 and s. 13, which touch on registration. They do not create any real difference of genus between ordinary post and registered post. I think the word "ordinary" in the Interpretation Act, 1889, s. 26, does not qualify the word "post" but qualifies "course of post." In my judgment, s. 26 does not draw any distinction between categories of post; it is dealing simply with time as measured by "the ordinary course of post." Accordingly, I think that the plaintiffs are right in their contention.

Appeal allowed. Judgment set aside and leave to defend.

Solicitors: *S. C. Field* (for the plaintiffs); *J. N. Nabarro & Sons* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

HENRY HEAD & CO., LTD. v. ROPNER HOLDINGS, LTD.

[CHANCERY DIVISION (Harman, J.), November 9, 1951.]

Company—Share premium account—Premium—Shares issued for cash "or otherwise"—Company formed to acquire shares of two associated companies and to effect amalgamation—One £1 share of new company issued for each £1 share in associated companies—Excess of true value of assets over issued shares a premium—Companies Act, 1948 (c. 38), s. 56 (1).

R.H., Ltd., which was incorporated as a holding company, had for its main object the acquisition, for the purpose of amalgamation, of the whole of the issued share capital of two shipping companies which, although carrying on business separately, were under the same management. A valuation of the assets of the two shipping companies was procured, and, in order to equalise the assets of each, the company the assets of which were greater paid a capital profit dividend equal to the excess. R.H., Ltd., then issued the whole of its authorised capital of £1,759,606 (being the sum of the issued nominal capitals of the two shipping companies) to the shareholders in the shipping companies on the basis of one £1 share for each £1 of the nominal value of the shares of the shipping companies. The aggregate value of the assets of the shipping companies at the date of the acquisition of their shares by R.H., Ltd., was £6,830,972. The excess over £1,759,606 was shown, less £4,860 formation expenses, in the annual balance sheet of R.H., Ltd., as "Capital Reserve, share premium account" in conformity with the Companies Act, 1948, s. 56 (1). On the question whether R.H., Ltd., was obliged to include the said excess in the share premium account,

HELD: R. H., Ltd., had, within the terms of s. 56 (1), issued its shares at a premium, and, therefore, was bound to transfer to the share premium account a sum equal to the aggregate amount or value of the premiums, i.e., the difference between £1,759,606 and the true value of the assets of the two shipping companies.

AS TO THE COMPANIES ACT, 1948, s. 56, see HALSBURY, 1949 Edn., Vol. 5, p. 163, para. 289; and see HALSBURY'S STATUTES, Second Edn., Vol. 3, p. 508.

Case referred to:

(1) *Drown v. Gaumont-British Picture Corpn., Ltd.*, [1937] 2 All E.R. 609; [1937] Ch. 402; 106 L.J.Ch. 241; 157 L.T. 543; Digest Supp.

A MOTION for an injunction to restrain the defendant company from retaining £5,066,506 standing to the credit of "Capital Reserve, share premium account" in the books and accounts of the defendant company as a sum credited therein to share premium account or treating the same (in the said books or accounts or otherwise) as representing the aggregate amount or value of premiums on shares to which the Companies Act, 1948, s. 56 (1), applied, or from treating the said sum otherwise than as constituting a general reserve of the defendant company. The motion was treated by consent as the trial of the action.

B The defendant company was incorporated with an authorised capital of £1,759,606 divided into 1,759,606 shares of £1 each, being the sum of the issued nominal capitals of the Pool Shipping Co., Ltd., and of the Ropner Shipping Co., Ltd., two companies for the purpose of the acquisition of the share capital of which the defendant company was formed. The object of the acquisition was merely to effect an amalgamation of the Pool Shipping Co., Ltd., and the Ropner Shipping Co., Ltd., to strengthen the two concerns, and to obtain the benefit of a quotation on the London Stock Exchange. In the first balance sheet of the defendant company (as at Mar. 31, 1949) £5,066,506 was credited to a share premium account within the meaning of the Companies Act, 1948, s. 56 (1).
D That sum was composed of the excess of the combined valuations of the shares of the Pool Shipping Co., Ltd., and the Ropner Shipping Co., Ltd., as at Dec. 8, 1948, over the nominal value of the issued capital of the defendant company after deduction of £4,860 in respect of formation expenses.

E *Russell, K.C.*, and *C. W. Turner* for the plaintiff, a company holding shares in the defendant company.

Cross, K.C., and *Ian Campbell* for the defendant, the holding company.

HARMAN, J.: The defendant company is what is popularly known as a holding company and was incorporated at the end of 1948, having as its first and paramount object the acquisition for amalgamation purposes of two shipping companies, formerly carried on separately under the same management. The
F amalgamation was of the simplest kind. The shareholders in the two companies (all of whom, apparently, concurred) were willing to sell their shares in the two companies in exchange for shares in the holding company. At that point there arose the question of the rate of capitalisation, as it is sometimes called. Sometimes this figure is a merely nominal figure, and at other times it is designed to reflect the true position having regard to the assets being acquired. In the
G present case a valuation of the assets of the two companies was procured from a firm of accountants. No doubt, those calculations were based on information given by persons having a knowledge of shipping, and the accountants merely valued the physical assets of the two companies, leaving out questions of profit-earning capacity, goodwill, and so forth. They arrived at a value of the assets of each of the constituent companies, and advised that the one having slightly
H larger assets than the other should distribute by way of capital profit dividend a sufficient sum to its shareholders to reduce the value of its assets to an equality with the other company. At that point the advice was given that a pound for pound capitalisation, *i.e.*, £1 of the new company's shares for a pound's worth nominal of the constituent companies' shares, was a fair method of performing the amalgamation. Accordingly, there was issued in the aggregate to the shareholders in the two companies the entire authorised capital of the defendant company, which was £1,759,606. That, however, merely represented the

aggregate of the nominal value of the shares at par. The real value of the shares was, if the valuation was right, £5,066,506 in excess of that sum. The defendant company has, therefore, acquired for 1,759,606 of its £1 shares, assets worth between £6,000,000 and £7,000,000. When the balance sheet of the defendant company appeared for the year ended Mar. 31, 1949, the issued capital was set out on the left-hand side and below that, under the words "Capital Reserve, share premium account (less formation expenses)" the figure of £5,066,506. On the other side one finds the value of the shares in the subsidiary companies valued in the way I have stated at rather under £7,000,000. The consolidated balance sheet contains a rather more express statement: "Share premium account, being the excess of the value of the net assets of subsidiary companies at the date of acquisition over the book value of the investments (less formation expenses)." That is what this £5,066,506 is stated to represent. The directors have been advised that they are bound to show their accounts in that way, and, not only they, but also the plaintiff, who is a large shareholder, regards that as very undesirable, because it imposes rigidity on the structure of the company having regard to the fact that a payment out of an account kept under that name, *viz.*, the share premium account, can only be effected by means of a transaction analogous to a reduction of capital. It is, in effect, as if the company had originally been capitalised at nearly £7,000,000 instead of £1,759,606.

The question I have to determine is whether the defendants were obliged to keep their accounts in that way. That depends on the Companies Act, 1948, s. 56, which is a new departure in legislation, and, it is said, was intended to make compulsory that which had long seemed to be desirable, *viz.*, the practice of putting aside as a reserve, and treating in the ordinary way as capital, cash premiums received on the issue of shares at a premium. I think, perhaps, the attention of the public and the legislature was particularly drawn to this by the case of *Drown v. Gaumont-British Picture Corpn., Ltd.* (1), where the defendant corporation, notwithstanding that it was making very large trading losses, paid out by way of dividend a large sum, principally drawn from a share premium account.

Section 56 (1) set out to remedy that omission, and provides:

"Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account, to be called 'the share premium account,' and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the share premium account were paid up share capital of the company."

Consequently, the share premium account can only be distributed in the same restricted way and with the same leave of the court as if share capital were being returned to the shareholders. Counsel for the plaintiff asks who in the world would suppose that a transaction of the kind with which we are concerned here, a common type of transaction, was the issue of shares at a premium? Nobody, he says, in the commercial world would dream of so describing it, and at first sight it is with a sense of shock that one hears it said that this transaction was the issue of shares at a premium. Everybody, I suppose, who hears those words thinks of a company which, being in a strong trading position, wants further capital and puts forward its shares for subscription by the public at such a price as the market in those shares justifies. The amount of the price above the nominal value of a share is, no doubt, a premium. That is what is ordinarily meant by the issue of shares at a premium, but the section goes further, for it relates to a situation in which a company issues shares at a premium "whether for cash or otherwise."

What "otherwise" can there be? It must be a consideration other than cash. The section continues with the words "a sum equal to the aggregate amount or value of the premiums." Apparently, if shares are issued for a consideration other than cash and the value of the assets so acquired is more than the nominal value of the shares issued, shares have been issued at a premium. I think that counsel for the plaintiff was constrained to admit that in the ordinary case that was so, but he says you must draw the line somewhere and avoid absurdity. It cannot apply, he says, where the issuing company has no assets at all other than those it will acquire as the price of the issue of the shares. "Premium", he submits, means some premium resulting from the excess value of its already existing assets over the nominal value of its shares. I am much attracted by that. I have every desire to reduce the effect of this section to what I cannot help thinking would be more reasonable limits, but I do not see my way to limiting the section in that way. It does not say that this is a section which only applies after the company has been in existence a year, or after the company has acquired assets, or when the company is a going concern, or that it does not apply on the occasion of a holding company acquiring shares on an amalgamation. Whether that is an oversight on the part of the legislature or whether it was intended to produce the effect it seems to have produced, is not for me to speculate. All I can say is that this transaction seems to me to come within the words of the section, and I do not see my way to holding as a matter of fact of construction that it is outside it.

Action dismissed.

Solicitors: *Sinclair, Roche & Temperley*, agents for *Temperley, Tilly & Hayward*, West Hartlepool (for all parties).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

In the Estate of BOTTING. BOTTING v. BOTTING.
(SPICER AND COX cited).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Havers, J.), October 15, 18, 19, 1951.]

Will—Revocation—Dependent relative revocation—Need of evidence of physical destruction of will.

Where the presumption of the destruction of a will *animo revocandi* arises, it may be rebutted by the doctrine of dependent relative revocation even though there be no direct evidence of the physical destruction of the will.

Homerton v. Hewett (1872) (25 L.T. 854), explained.

AS TO DEPENDENT RELATIVE REVOCATION, see HALSBURY, Hailsham Edn., Vol. 34, p. 89, para. 127; and FOR CASES, see DIGEST, Vol. 44, pp. 361-365, Nos. 1944-1978.

Cases referred to:

- (1) *Powell v. Powell*, (1866), L.R. 1 P. & D. 209; 35 L.J.P. & M. 100; 14 L.T. 800; 44 Digest 361, 1944.
- (2) *Dancer v. Crabb*, (1873), L.R. 3 P. & D. 98; 42 L.J.P. & M. 53; 28 L.T. 914; 37 J.P. 663; 44 Digest 361, 1949.
- (3) *Dixon v. Treasury Solicitor*, [1905] P. 42; 74 L.J.P. 33; 92 L.T. 427; 44 Digest 363, 1963.
- (4) *In the Estate of Southerden. Adams v. Southerden*, [1925] P. 177; 95 L.J.P. 1; 133 L.T. 505; 44 Digest 365, 1978.
- (5) *Re Faris, Goddard v. Overend* (No. 2), [1911] 1 I.R. 469; 44 Digest 321, 1537 (n).
- (6) *Homerton v. Hewett*, (1872), 25 L.T. 854; 36 J.P. 216; 44 Digest 317, 1508.
- (7) *In the Goods of Weston*, (1869), L.R. 1 P. & D. 633; 38 L.J.P. & M. 53; 20 L.T. 330; 33 J.P. 312; 44 Digest 362, 1951.

(8) *Re Bunn, Durber v. Bunn*, (1926), 134 L.T. 669; 44 Digest 364, 1972.

ACTION by the plaintiff as executor to have established a will dated Feb. 14, 1947, as the last will of the testator, Harrie Ewart Botting. The defendant and the parties cited pleaded that the will had been destroyed *animo revocandi*. In reply, the plaintiff denied that the will was so destroyed, and said that it was only destroyed with a view to the execution of a further valid will and that the document executed with that intention was not a valid will.

Temple, K.C., for the plaintiff.

A. R. Ellis for the defendant.

H. H. Harris for parties cited.

HAVERS, J.: The plaintiff, Mr. William George Botting, is propounding a will of Feb. 14, 1947, which he alleges is the true last will of the testator, Harrie Ewart Botting, and he asks me to say that another document purporting to be a will dated June 11, 1949, was not a valid will, in that it was not attested and executed in accordance with the formalities of the Wills Act, 1837. Defending the action is Mr. Hugh Botting, and there are also two parties cited, who are daughters of a sister of the testator, and they both adopt the same defence. They invoke the presumption of law that the alleged will was destroyed *animo revocandi*.

It is abundantly clear that the testator did make a will dated Feb. 14, 1947, and that it was duly executed and attested in accordance with the formalities of the Wills Act. I am satisfied that the completed draft which is before me is an accurate draft showing the contents of the will. It is common ground that that will was in the custody of the testator, and I think it is common ground that, as that will was not forthcoming on his death, the presumption arises that it was revoked by him *animo revocandi*. That *prima facie* presumption is capable of rebuttal. The plaintiff says that on the evidence which has been adduced before me I ought to find that when that will was destroyed by the testator he had not an absolute intention to destroy it, but that the intention was only contingent—namely, that he destroyed it to make way for another testamentary instrument, the document of June 11, 1949, which plainly is not a valid will because it has not been duly executed and attested in accordance with the formalities of the Wills Act. In law, the plaintiff relies on the doctrine of dependent relative revocation and says that the destruction of the will of 1947 was not, by reason of the circumstances, *animo revocandi*. That raises a straight issue, but a serious difficulty arose when counsel for the defendant drew my attention to a decision, to which I shall refer later, of LORD PENZANCE, under which counsel for the defendant contended that the doctrine of dependent relative revocation has no application unless there is evidence of the physical destruction of the will. His contention is that there is no such evidence in this case, and, therefore, that the doctrine of dependent relative revocation does not arise and has no application.

I have to decide the question: With what intent was the will of 1947 destroyed by the testator? Did he have an absolute intention to destroy that document once and for all, no matter what the result or whether he made any future testamentary document or not, or was its destruction dependent on the making of a further testamentary instrument and exclusively and solely referable to that? I have come to the conclusion on the evidence that the document of June 11, 1949, was executed by the testator in the belief that it was a will and intending that it should be a will. My attention was called to the law relating to the doctrine of dependent relative revocation. A passage was cited from MORTIMER ON PROBATE LAW & PRACTICE, 2nd ed., where is set out in general the doctrine of dependent relative revocation. The author says (p. 164):

“Cases have also arisen in which the act of destruction was referable wholly and solely to the intention of setting up some other testamentary

paper in the place of the one destroyed. The result of these decisions has been to establish the doctrine of 'dependent relative revocation,' according to which an act of destruction, wholly and solely referable to the intention of setting up some other testamentary paper, is or is not a revocation, according as the relative act is efficacious or invalid. 'The doctrine of dependent relative revocation,' said SIR J. P. WILDE in *Powell v. Powell* (1), 'is based on the principle that all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is therefore necessary in each case to study the act done by the light of the circumstances under which it occurred, and the declarations of the testator with which it may have been accompanied. For unless it be done *animus revocandi* it is no revocation. What then if the act of destruction be done with the sole intention of setting up and establishing some other testamentary paper, for which the destruction of the paper in question was only designed to make way?'

That passage is very appropriate to the facts of this case. The author goes on, still citing *Powell v. Powell* (1):

"It is clear that in such case the *animus revocandi* has only a conditional existence, the condition being the validity of the paper intended to be substituted. The act is referable, not to an abstract intention to revoke, but to an intention to validate the other paper; and if the sole condition upon which revocation was intended is not fulfilled, the *animus revocandi* is not present. In the above observations it has been assumed that the act of destruction was referable, wholly and solely, to the intention of setting up some other testamentary paper. Cases may and probably will arise in which the intention is either mixed or ambiguous, and such are for future consideration'."

The first authority cited was *Dancer v. Crabb* (2). The headnote says:

"The testatrix, having her will in her hand, dictated the alterations she desired to be made in the first part of it to a friend, who wrote them down. Testatrix, feeling unwell, desired her friend to stop there, and then tore off and burnt so much of her will as had been covered by the memorandum written at her dictation. This memorandum, together with the rest of the will, which contained the residuary clause and the signatures of the testatrix and witnesses and the attestation clause intact, was placed in a desk by the testatrix and locked up, and she believed when she did so that these papers constituted a new will, and were not merely instructions for such a will: — HELD, that it was a case of dependent relative revocation, a revocation dependent on the papers locked up constituting a new will, and probate was granted of the original will as contained in the portion which remained and the draft of the part which was destroyed."

SIR JAMES HANNEN, after dealing with a number of authorities, said about these cases (L.R. 3 P. & D. 104):

"They enforce under varying circumstances the principle that although the testator does an act which unexplained would be one of revocation, yet if it appears that he did it only as a part of the means of setting up another will, if that end be not accomplished the former will is not revoked. Or, to state the proposition in different language, if the testator's act can be interpreted thus: 'Whatever else I may do, I intend to cancel this as my will from this time forth,' the will is revoked: but if his meaning is, 'As I have made a fresh will my old one may now be destroyed,' the old will is not revoked if the new one be not in fact made."

That sets out the principle very neatly.

In *Dixon v. Treasury Solicitor* (3) the headnote is:

"The doctrine of dependent relative revocation may apply to a case where the document intended to be substituted for that which was destroyed is non-existent and has never existed as a valid testamentary paper. (So held by GORELL BARNES, J.). Upon a finding of fact that the testator destroyed his will with the intention that it should be revoked conditionally on his executing a fresh will:—*Held* (by GORELL BARNES, J.), that, as he did not execute a fresh will, the will destroyed was entitled to probate."

In summing up to the jury GORELL BARNES, J., said ([1905] P. 46):

"The questions I leave to you are—(1) Whether the testator cut his signature off the will with the intention of revoking the will; or—(2) Whether the testator cut his signature off the will with the intention that the will should be revoked conditionally on his executing a fresh will."

In the headnote to *In the Estate of Southerden, Adams v. Southerden* (4) it is stated:

"A revocation of a will grounded on an assumption of fact which is false takes effect unless, as a matter of construction, the truth of the fact is the condition of the revocation, so that the revocation is contingent upon the fact being true. Statement in THEOBALD ON WILLS, 7th ed., p. 750, adopted by MEREDITH, M.R., in *Re Faris, Goddard v. Overend* (5) ([1911] 1 I.R. 469, 472), approved and followed. A testator under the mistaken belief that in the event of his dying intestate his widow would be entitled to the whole of his property revoked a will which he had made by burning it:—HELD, that the revocation of the will being dependent on a condition which was not fulfilled was inoperative, and the contents of the will so destroyed were admitted to probate."

There is a passage in the judgment of ATKIN, L.J., which seems to me to put the matter very concisely. ATKIN, L.J., said ([1925] P. 185):

"The true answer to the question in the present case is that there was in fact no intention to revoke the will at all. There has been brought into existence in recent years a doctrine which has been described as 'dependent relative revocation.' The question in each case is, had the testator the intention of revoking his will? The intention may be conditional, and if the revocation is subject to a condition which is not fulfilled, the revocation does not take effect. Cases of dependent relative revocation are mostly cases where the testator has supposed that if he destroyed his will his property would pass under some other document. But the condition is not necessarily limited to the existence of some other document. The revocation may be conditional on the existence or future existence of some fact."

Those were the authorities cited by counsel for the plaintiff and, subject to the authorities cited by counsel for the defendant, I should have had no hesitation in holding in this case that on these authorities it is plain from the evidence that this testator, when he destroyed the will, had not got any intention of destroying it unconditionally, but that its destruction was conditional on another will being made and taking its place. An authority, however, has been brought to my notice by counsel for the defendant which creates a difficulty—the decision of LORD PENZANCE in *Homerton v. Hewett* (6). The headnote says:

"A testator executed his will at his solicitor's office, and took it away with him. It was never seen afterwards, and could not be found after his death in his repositories. He had made declarations inconsistent with his testamentary depositions shortly before his death, but the court held that,

he being the last custodian of the will, and it not being forthcoming, the presumption of revocation arose and was not rebutted. The court will not apply the principle of dependent relative revocation except there is proof of the actual destruction of the instrument."

LORD PENZANCE, in his judgment, having stated the facts and referred to *Powell v. Powell* (1) and *In the Goods of Weston* (7), said (25 L.T. 855):

A "Is there any single fact which the court can lay hold of to destroy the legal effect of that presumption? But then it is said that if this will has been destroyed it was for the purpose of setting up the codicil, and the case therefore comes within the principle of dependent relative revocation. But
B the force of that is destroyed by this remark, that the court has never been in the habit of applying that doctrine to any case in which there was not proof of the destruction of the document. Here there is no proof of the fact of destruction. It is merely a surmise of law, and we do not know when the testator destroyed it, or what he said or did when he destroyed it. It would be a dangerous thing to surmise a transaction, and build upon it some theory by which the effect of revocation could practically be destroyed. In
C both the cases cited there was evidence of destruction, and in all cases before it applies the principle of dependent relative revocation the court must have some such evidence. The court therefore is bound to pronounce against the will, but there will be no order as to costs."

At first sight that case seems to be a formidable authority in favour of the defendant. *Re Bunn, Durber v. Bunn* (8) was also cited, but I have examined
D the judgment of LORD MERRIVALE, P., in that case and I cannot find anything which shows that his attention was directed to *Homerton v. Hewett* (6).

The argument of counsel for the defendant is that the court should presume that where a will was last known to be in the possession of the testator and is not to be found at his death it is presumed to have been destroyed *animo revocandi*. On that principle I am asked to pronounce against the will of 1947.
E It was also argued that, in considering the question whether the doctrine of dependent relative revocation applies, I am not entitled to presume the fact of destruction or to draw the inference from the evidence that the testator did destroy the will. It seems to me that in the circumstances of this case I am bound to make that *prima facie* presumption, and then it is open to the plaintiff to bring before me, if he can, evidence to rebut it and to show what the intention
F of the testator was in destroying the will. If I am satisfied on the whole of the evidence that the destruction was conditional on another will being made, then the doctrine of dependent relative revocation applies, and, if it turns out that this later instrument is invalid because it has not been properly attested and executed by the testator, the result is that the will of 1947 has not been revoked by that destruction because the testator did not have any *animus revocandi*.
G The passage in the judgment of LORD PENZANCE in *Homerton v. Hewett* (6) created great difficulties in my mind on the question whether, on the facts of this case, I should apply the doctrine of dependent relative revocation, but I do not think that LORD PENZANCE meant that it was necessary to call some witness who could say: "I saw the testator burn, or otherwise destroy, the document." There are various ways in which the fact of destruction or the time
H of destruction can be proved. The evidence before me is such that I feel that the proper inference to draw from it is that the will was destroyed by the testator conditionally and that I am able to put an approximate time and date when its destruction took place. If so, it seems to me that that would be consistent with the decision of LORD PENZANCE. I think there is sufficient evidence to satisfy me that the will was destroyed by the testator shortly before June 11, 1949, when he made this new document, which, I find, he thought and intended to be a new will. In those circumstances I do not think the decision of LORD

PENZANCE in *Homerton v. Hewett* (6) precludes me from applying the doctrine of dependent relative revocation, and I hold that it does apply. I shall, therefore, pronounce for the will of Feb. 14, 1947, and I am satisfied that the completed draft contains the terms of that will.

Grant of probate of completed draft.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Bunker & Co.*, Hove (for the plaintiff); *Hyman Isaacs, Lewis & Mills*, agents for *Burt Brill & Edwards*, Brighton (for the defendant); *Stephens & Sons* (for the parties cited).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

Re BEIT'S WILL TRUSTS. BEIT AND OTHERS v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.JJ.), October 17, 18, 19, November 9, 1951.]

Estate Duty—Determination of life interest—Annuity given by will—Agreement by annuitant to release of residuary estate and substitution of covenanted annuity as security—Finance Act, 1940 (c. 29), s. 43 (1).

Under the will of a testatrix an annuitant was entitled for her life to an annuity which was to be secured by setting aside an annuity fund out of residue. Subject thereto and subject to the payment of certain deferred legacies, the residue, including the annuity fund, was given equally among the testatrix' three children. The estate proved insufficient to provide the annuity fund, and the annuitant entered into an agreement with the executors whereby the executors should purchase from the residuary legatees an annuity, secured by their personal covenant, equal to the annuitant's annuity and should hold the annuity so purchased as sole security for the payment of the annuitant's annuity and should distribute the remainder of the testatrix' estate free from any claims by the annuitant. The executors applied part of the residuary estate in purchasing an annuity accordingly, and proceeded to distribute the remainder of the estate. The annuitant died on Nov. 18, 1947. The Crown claimed estate duty under s. 43 (1) of the Finance Act, 1940, on the "slice" of capital of the residuary estate which would have been required to produce the annuity, on the footing that the annuity had "determined" within the meaning of s. 43 (1) of that Act.

Held: the legal effect of the agreement between the annuitant and the executors was that, with the annuitant's consent, part of the residuary estate was appropriated as sole security for the payment of the annuitant's annuity; that no contractual relationship was created between the annuitant and the residuary legatees; that the annuitant's rights continued to be those of an annuitant under the will of the testatrix against the executors and trustees of that will, modified only to the extent that an asset of the residuary estate, in the shape of the covenanted annuity, had been appropriated to the payment of the annuity under the will in exoneration of the remainder of the estate; and, therefore, the annuity given by the will had not determined within the meaning of s. 43 (1) of the Finance Act, 1940, and estate duty was not leviable under that section.

EDITORIAL NOTE. In the case of deaths occurring after Apr. 18, 1950, s. 43 of the Finance Act, 1940, has been amended by the Finance Act, 1950, s. 43 (1), sched. VII.

AS TO PROPERTY IN WHICH AN INTEREST WAS LIMITED TO CEASE ON THE DECEASED'S DEATH, see HALSBURY, Hailsham Edn., Vol. 13, p. 236, para. 226; and FOR CASES, see DIGEST, Vol. 21, pp. 9, 10, Nos. 34-42.

FOR THE FINANCE ACT, 1940, s. 43 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 470.

Cases referred to:

- (1) *Inland Revenue Comrs. v. Westminster (Duke)*, [1936] A.C. 1; 104 L.J.K.B. 383; 153 L.T. 223; *sub nom. Westminster (Duke) v. Inland Revenue Comrs.*, 19 Tax Cas. 490; Digest Supp.
- A (2) *St. Aubyn (L.M.) v. A.-G.* (No. 2), [1951] 2 All E.R. 473.

APPEAL by the Crown from an order of VAISEY, J., dated June 6, 1951, dismissing the Crown's claim for estate duty under s. 43 (1) of the Finance Act, 1940. The Crown claimed that an annuity given to the deceased by the will of a testatrix had been disposed of or had determined, within the meaning of that sub-section, by an agreement made by the deceased with the executors of the testatrix' will to accept a substituted covenanted annuity in place of the annuity given to her by the will. VAISEY, J., held, on the interpretation of the said agreement, that the deceased's annuity under the will had not determined, but had continued up to the date of her death.

The following statement of the facts is taken from the judgment of JENKINS, L.J.:—This appeal concerns a claim for estate duty on the death of Mrs. Estelle Newton Carter, who died on Nov. 18, 1947, in respect of an annuity given to her by the will, dated Dec. 21, 1945, and proved on Feb. 26, 1947, of Dame Lilian Beit ("the testatrix"), who died on Nov. 7, 1946. The claim is founded on the contention that in the circumstances stated below Mrs. Carter's annuity was an interest limited to cease on her death which had been disposed of or had determined within the meaning of s. 43 (1) of the Finance Act, 1940, with the result that, as Mrs. Carter failed to survive the date of such disposition or determination by the minimum period prescribed as a condition of exemption from the operation of that section, estate duty became payable by the joint effect of s. 2 (1) (b) of the Finance Act, 1894, and s. 43 (1) of the Finance Act, 1940, on the "slice" of the testatrix' residuary estate required to produce the annuity, ascertained in accordance with the provisions of s. 7 (7) of the former Act. In proceedings brought by originating summons by the testatrix' executors and residuary legatees as plaintiffs against the Commissioners of Inland Revenue as defendants, VAISEY, J., by his judgment dated June 6, 1951, rejected the claim, and the commissioners now appeal from that decision.

By her will the testatrix (so far as is material for the present purpose) appointed her son, Sir Alfred Beit, Philip Rose Johnston, and Louis Edward Pendryrs Tylor (three of the five plaintiffs in the proceedings), to be executors and trustees thereof, and, after giving (by cl. 4 and cl. 5) a number of specific and pecuniary legacies all free of duty, gave (by cl. 6) to each of twenty-five named persons annuities (free of duty) of such annual amounts as after deduction of income tax in the manner thereafter stated should leave the respective amounts mentioned opposite their respective names, the list of names and annual amounts including in particular "the said Estelle Newton Carter £52 12s.", this being the annuity to which the present proceedings relate. By cl. 7 and cl. 8 the testatrix gave all her real and personal estate not otherwise disposed of to her trustees on usual trusts for sale, calling in, and conversion, and payment out of the moneys arising therefrom or forming part thereof of her funeral and testamentary expenses, estate duty, and debts, and the legacies given by the preceding provisions of her will or by any codicil thereto and all death duties and other moneys payable out of her general personal estate by virtue of any direction or bequest free of duty contained in her will or any codicil thereto. By cl. 9 of her will the testatrix provided as follows:

"Out of the residue of such moneys (hereinafter called 'the residuary fund') my trustees shall invest in any manner hereby authorised and appropriate so much thereof as shall be requisite for providing a fund

(hereinafter called 'the annuity fund') which shall be sufficient by its income at the date of appropriation to provide the annuities hereinbefore given together with any like annuities payable under any codicil hereto on the assumption that the standard rate of tax is the standard rate at the date on which the annuity fund is appropriated and my trustees shall hold the annuity fund upon the trusts hereinafter declared concerning the same."

By cl. 10 the testatrix provided that the setting aside of the annuity fund should fully exonerate all the remainder of her residuary estate from the payment of the said annuities, and, accordingly, that, when such fund should have been set aside in full, her trustees should apply the balance remaining of the residuary fund in paying a number of deferred legacies all free of duty, and subject thereto should divide the residue of such moneys equally between her three children the said Sir Alfred Beit, Alice Angela Bull and Lilian Muriel Munro (the two last-named being the remaining plaintiffs in the present proceedings). Clause 11 contained a number of directions concerning the annuity fund which was (by sub-cl. (a)) to be held on trust to pay the annuities out of the income thereof, and, in the event of the income being insufficient, out of the capital thereof, and subject thereto on the same trusts as were declared by the last preceding clause concerning the balance of the residuary fund, with discretionary powers for the trustees (by sub-cl. (c) and (d)) to release surplus income and capital so as to make them available for the purposes of the last preceding clause, and with a further power for the trustees (by sub-cl. (e)) to apply any moneys comprised in the annuity fund in purchasing from the government or any insurance company an annuity for the life of an annuitant of such amount as should appear convenient so as to exonerate the remainder of the annuity fund from payment of that annuity to the extent of the amount so purchased. Clause 12 contained provisions as to the payment of the deferred legacies which were declared only to be payable out of any surplus remaining after the setting aside of the annuity fund or out of surplus income or capital released from the annuity fund.

The estate of the testatrix, after payment of debts and funeral and testamentary expenses and duties and providing for the legacies given by cl. 4 and cl. 5 of her will, proved insufficient to constitute an annuity fund which would by its income provide for the annuities in accordance with the testatrix' directions. In these circumstances the executors made arrangements to provide for the annuities given by the will by purchasing corresponding annuities from the residuary legatees. The nature of the arrangements so made appears from the following documents. By a letter dated Apr. 23, 1947, the executors' solicitors wrote to Mrs. Carter as follows (letters in the same terms *mutatis mutandis* being sent at or about the same time to all the other annuitants):

"April 23, 1947. Dear Madam, Lilian Lady Beit, deceased. 1. The Lilian Lady Beit Pension Trust from which you received a pension of £4 19s. 4d. net per month payable by monthly instalments terminated upon the death of Lilian Lady Beit on Nov. 7, 1946. Lilian Lady Beit, however, by her will dated Dec. 21, 1945, has given you, free of death duties, a legacy of £50 and an annuity payable by monthly instalments of such a sum as after deduction of income tax at the standard rate up to a maximum of 10s. in the pound will amount to £52 12s. per annum. At the present rate of income tax, namely, 9s., and so long as the rate does not rise above 10s. in the pound, the annuity will be payable by monthly instalments of £4 7s. 8d. net. 2. No difficulty is anticipated in paying your legacy in full, but although it is anticipated that the estate will be sufficient to pay your annuity in full there will not (as explained below) be sufficient funds to secure it in the way in which the will directs and other arrangements to provide for it are necessary. 3. The object of this letter is to inform you of the benefits given to you by Lilian Lady Beit's will and to inquire whether,

having regard to the circumstances mentioned below, you would be prepared to agree to an arrangement under which Lilian Lady Beit's executors should purchase from her children an annuity equal in amount to that which the will gives you, and should hold it as the only security for the annuity given to you by the will, the remainder of the estate then being distributed free from your claim.

A There is then set out a summary of the effect of the will as regards pecuniary legacies and annuities, and the letter goes on:

B "Most of the annuitants were recipients of pensions from the Lilian Lady Beit Pension Trust and the will provided that in the case of each such person the first monthly instalment of his or her annuity is to be payable one month from the date of the payment of the last instalment of his or her pension."

In para. 5 is set out a summary of the provisions about the annuity fund. Then the letter refers to the gift of deferred legacies after the provision of the annuity fund and proceeds:

C " (6) The executors have now obtained a grant of probate and for that purpose have had the assets of the estate valued. On the basis of that valuation it seems reasonably certain that (after paying estate duty at the prescribed rate, namely, fifty-five per cent.) the estate will be sufficient to pay the legacies and annuities in full and that in course of time there will be a surplus sufficient to pay the deferred legacies and to leave an ultimate balance for the residuary legatees. But the estate will not be sufficient to provide for the annuities in precisely the way that the will directs, namely, by setting up an annuity fund sufficient to pay them out of income; capital will have to be drawn on to pay them. In brief, though the annuities can be paid, the provisions of the will for securing them by means of an annuity fund cannot be carried out. 7. In these circumstances it will be necessary to make other provisions for securing the annuities and the executors are advised that unless sufficient of the annuitants are willing to agree to the arrangement suggested in para. 3 of this letter, an application will probably have to be made to the court for directions as to what other provisions they should make. The most convenient method of providing the annuities is for the executors to purchase annuities equal to those which they have to pay under the will, and Lilian Lady Beit's children are prepared to sell them such annuities, the security for payment being the personal covenant of Lilian Lady Beit's children. When that has been done, the executors will use the annuities so purchased to pay the annuities given by the will. The remaining funds in the estate will then be distributed and will no longer be available to the annuitants. Such an arrangement can only be carried out if sufficient annuitants agree. If agreed, this method would enable the deferred legacies to be paid at once (which could not otherwise be done) and would permit Lilian Lady Beit's children, as residuary legatees, to receive immediately the funds remaining after payment of death duties, debts and legacies. This method would also avoid the necessity of applying to the court and generally speed up the administration of the estate. It would, therefore, have great advantages from the point of view of the estate. 8. From their point of view the annuitants, of whom you are one, would be accepting the personal covenant of Lilian Lady Beit's three children, with the executors, as providing sufficient security for their annuities in place of their right to have provision made out of the whole assets of the estate. The annuitants would benefit incidentally by having provision made for their annuities more speedily than could otherwise be arranged. 9. Actually, so far as Lilian Lady Beit's children are concerned, the position would be exactly as if the Lilian Lady Beit

Pension Trust had continued in operation because, although Lilian Lady Beit, during her life, controlled the operation of the Pension Trust, the moneys necessary to keep that Pension Trust in operation were provided by the children under an agreement reached between them and their mother. You will appreciate you have, in fact, since the death of Lilian Lady Beit, received monthly payments equivalent to the monthly payments which you received under the Pension Trust. These monthly payments have been provided voluntarily by Lilian Lady Beit's children because they did not wish you to suffer any hardship or inconvenience by reason of the difficulties that have arisen in connection with the will. If you are willing to agree to the arrangement proposed in this letter will you kindly sign and return to us as early as possible the enclosed letter addressed to the executors of Lilian Lady Beit, signifying your agreement. Your signature should be witnessed as indicated thereon. 10. Quite apart from the position under the will Lilian Lady Beit's children propose to augment the annuity given to you by the will so as to ensure that you actually receive the same amount as you did from the Lilian Lady Beit Pension Trust, namely, £4 19s. 4d. net each month."

That is signed by the solicitors to the executors. The letter enclosed for Mrs. Carter's signature was duly signed and returned by her under date Apr. 30, 1947, and was in these terms:

"April 30, 1947. To the executors of Lilian Lady Beit. Dear Sirs, I agree to the arrangement proposed in Messrs. Coward, Chance & Co.'s letter of Apr. 23, 1947, under which the executors will purchase from Lilian Lady Beit's children an annuity secured by the children's personal covenant corresponding to the annuity given to me by her will. I agree that the executors shall hold the annuity purchased as sole security for the payment of my annuity and distribute the remainder of the estate free from any claims by me."

Similar letters assenting to the proposal were duly signed and returned by all the other annuitants with the exception of a Mrs. Annie C. Hooff, from whom no reply was received, and a Mr. A. E. Key, who disclaimed his annuity.

Effect was given to the arrangements thus proposed by the executors and agreed to by the twenty-three assenting annuitants by means of a deed of covenant dated July 26, 1947, and made between the executors, of the one part, and the three residuary legatees (therein called "the covenantors"), of the other part. By this deed, after recitals of the death of Lady Beit and the relevant provisions of her will (the names of the annuitants and the amounts of their respective annuities being set out in a schedule to the deed) and recitals that the executors were desirous of purchasing annuities of similar amounts to those payable to the annuitants under the will to the intent that they might hold the annuities so purchased as assets of the testatrix' estate for the purpose of paying the annuities given by the will, that the covenantors were willing to sell to the executors such annuities secured by such personal covenant of the covenantors as thereafter appeared for a sum of £60,904 18s. 4d. and that the executors had agreed to buy the same from the covenantors, that the executors had paid this sum to the covenantors in cash and investments as therein mentioned, that the covenantors had out of their own moneys made to certain of the annuitants payments in anticipation of their annuities under the will on the footing that such payments should when the estate of the testatrix was sufficiently administered to commence paying the annuities under the will be treated as payments on account of such annuities, and that Mr. Key had disclaimed his annuity for which reason his name was omitted from the annuitants specified in the schedule thereto, the covenantors jointly and severally covenanted (by cl. 1) as follows:

"that as regards each of the annuitants they and their personal representatives will during the life of the annuitant pay to the executors an annuity of such annual amount as after deduction of income tax in the manner hereinafter stated shall leave the annual amount specified opposite the name of that annuitant in the schedule hereto."

A Clause 2 contained somewhat complicated provisions as to the deduction of tax corresponding to those contained in the will in relation to the annuities payable thereunder. By cl. 3 the annuities covenanted to be paid were made payable by equal calendar monthly payments. By cl. 4 each of the said annuities was to commence as from the date on which the corresponding annuity under the will was payable, but any sums which the covenantors might have paid direct to the annuitants in anticipation of the annuities payable under the will should

B be treated as a payment under the deed. Clause 5 contained a provision, apparently redundant in view of the form of the covenant, to the effect that the deed was to operate as a joint and separate undertaking by all and each of the covenantors. The schedule to the deed set out the names of all the annuitants other than Mr. Key and the net amounts of the annuities payable to them respectively under the will, Mrs. Hooff's name being included in the list notwithstanding that she had not in fact assented to and accordingly was not bound by the scheme in pursuance of which the deed was entered into. The sum of £60,904 18s. 4d. was fixed on actuarial advice as a proper price for the executors to pay for annuities on the lives and for the amounts in question. After paying this sum and paying or providing for the deferred legacies the executors had in hand an undistributed residue of £23,000.

C

D By a deed of indemnity of even date with the deed of covenant the three residuary legatees covenanted to indemnify the two independent executors and the testatrix' two daughters covenanted to indemnify Sir Alfred as the other executor from liability in respect of any death duties which might be payable on the death of any of the annuitants and from any costs and expenses which might be incurred in connection with collecting the annuities payable by the

E residuary legatees under the deed of covenant and applying the same in payment of the annuities payable under the will. As from the date of the deed of covenant the executors duly paid the annuities payable under the will (including Mrs. Carter's annuity down to the date of her death) out of the respective corresponding annuities payable and duly paid by the residuary legatees to the executors under the deed of covenant.

F *Upjohn, K.C.*, and *J. H. Stamp* for the Crown.

Heyworth Talbot, K.C., and *Brunyate* for the taxpayers, the executors and residuary legatees under the will.

Cur. adv. vult.

Nov. 9. The following judgments were read.

G **SIR RAYMOND EVERSHERD, M.R.:** I have had the advantage of reading the judgment prepared by *JENKINS, L.J.*, and as he has set out fully the material facts, I shall not state them in this judgment. The facts being as stated by *JENKINS, L.J.*, the question depends on the true legal effect of the arrangement made by Mrs. Carter with the executor-trustees in the year 1947, according to the proper interpretation of the relevant documents and in the

H light of other material and admissible circumstances.

We were properly reminded of the principle applicable in such cases and enunciated in *Inland Revenue Comrs. v. Duke of Westminster* (1), namely, that the court is not entitled to turn aside from the legal result in fact achieved because it seems complex and peculiar, or because, in its practical effect, it is in substance similar to some other and simpler arrangement which might equally have been made. On the other hand, it is no less true that the court, in arriving at its conclusion on the effect in law of what was in fact done, is not to be misled by,

or to place undue emphasis on, the particular words used in the transaction, for words which are inappropriate may obscure or even disguise the true nature of that which is, in truth, achieved. Bearing these principles in mind, I ask myself what was the true effect of what Mrs. Carter was invited to do by the letter of Apr. 23, 1947, and what she did by her signature on Apr. 30 to the form of reply sent with the letter? And, first, it was suggested that, if an annuitant, having such an interest as Mrs. Carter had under Lady Beit's will, enters into an arrangement involving the release of all the annuitant's rights in respect of every part of residue so that the residue can be, and is, immediately distributed, then the annuitant's interest under the will must necessarily altogether determine and cease to exist. All characteristics identifying the annuity by reference to the will which gave it have disappeared. That which survives the arrangement is essentially different from that which before existed. I am unable to accept this extreme view. True, a principal attribute of an annuity conferred by will (in the absence of some special limitation in the will) is that the annuitant has the right of recourse against every item of the residue. But an annuitant under a will, as it seems to me, may release every part of the residue and agree that some other property or right vested, or to be vested, in the trustees of the will should constitute the sole subject-matter to which recourse could thereafter be had without in other respects affecting the annuity's continuing identity. No doubt, if an annuitant agreed not only to release the whole of the property to which the annuitant could look for securing payment, but also to release the executors and trustees as such from all further liability, accepting in exchange the personal obligation of some individual or individuals either to the annuitant direct or to some third party on the annuitant's behalf, then the annuity, the subject-matter given by the will, would appear to have determined and ceased to exist and to have been replaced by something other and distinct. But, in my judgment, such is not the inevitable conclusion from the fact that the residue has been released.

A test may well be found by reference to the nature of the annuitant's rights, after the arrangement made, in case of default. Counsel for the Crown contended that in the present case Mrs. Carter could sue the covenantors (Lady Beit's children) direct, joining the trustees as co-plaintiffs with her or as defendants. And if Mrs. Carter's annuity given to her by the will has in truth determined and been replaced by the children's covenant made with the executor-trustees as bare trustees for Mrs. Carter, this result will presumably follow. But I do not think that the result is the necessary consequence of what was done, and to assume it is, I think, to beg the question. There seems to me to be nothing contrary to principle and good sense in saying that the annuitant's remedy remained always exclusively that of calling on the executor-trustees, in an action entitled in the trusts of the will, properly to administer their trusts, that is, to take the necessary steps to enforce the covenants in their favour. And such a conclusion postulates that Mrs. Carter's rights remain rights, in essentials, conferred by the will. Whether, in the latter event, any claim might be made for duty under s. 2 of the Act of 1894 apart from s. 43 of the Act of 1940 is a matter we are not called on to decide. For the purposes of the present case the claim of the Crown proceeds on the basis that the original annuity has determined so as to give rise to a claim under the joint effect of the Act of 1940 and the Act of 1894.

If, then, an arrangement which preserves the identity of the will annuity, but substitutes for the "security" provided by the testatrix' estate some other subject-matter, is one that is possible and legitimate, the question remains whether it has been achieved. Certainly the language of the relevant letters seems clearly and deliberately on the face of them directed to that end. In para. 3 of the letter of Apr. 23 Mrs. Carter is invited to agree to an arrangement under which the executors should purchase a certain annuity to hold it as the only security "for the annuity given to you by the will," language in terms postulating

the continuance of that annuity and not its replacement by something else. Again, in para. 7, the language follows the same intent:

“The most convenient method of providing the annuities” [that is, the annuities given by the will] “is for the executors to purchase annuities . . . the security for payment” [that is, of the annuities given by the will] “being the personal covenant . . . The executors will use the annuities so purchased to pay the annuities given by the will.”

Paragraph 8 is again to the same effect. In no part of the letter does the language used, according to its ordinary plain meaning, state or suggest that the annuities given by the will as such determine or are replaced. The form of reply has been no less carefully drafted. “I agree” says Mrs. Carter “that the executors shall hold the annuity purchased as sole security for the payment of my annuity and distribute the remainder of the estate free from any claims by me.”

Counsel for the Crown argued that the deed in fact entered into with the children was, in strictness, not admissible, but he said also that the Crown did not desire that the court should not see it in case any assistance could be derived from its terms. As regards its admissibility, I should have thought that the court was entitled to pay regard to it as part of the transaction in fact entered into, and, therefore, as throwing light on the true nature of the arrangement which Mrs. Carter was asked to make or approve. The two letters constituting the “bargain” (whether enforceable or not) between Mrs. Carter and the executor-trustees did not specify exactly the arrangement to be made—Mrs. Carter’s acceptance merely authorising “an arrangement” of a character designed to achieve a particular end. If, then, on reference to the deed, it had appeared that the “arrangement” in fact entered into necessarily had the effect of putting an end to Mrs. Carter’s annuity, it would (I should have thought) have properly been referred to by the Crown as casting light on the true nature of what was contemplated, notwithstanding the actual words used in the letters—and whether, in such event, Mrs. Carter could have said that the deed went beyond her authority, is a point which need not be considered. In fact, however, and I think beyond a doubt, the deed by its language strictly conformed to the interpretation which I have placed on the terms of the letters which forecast the nature of the transaction into which the executor-trustees proposed to enter. Without placing undue emphasis on the recitals, it is sufficient to say that the terms of the deed support and confirm the contention of the taxpayers that the arrangement into which she was invited to enter, and which was, in fact, made, was one deliberately designed and properly expressed so as to achieve the perpetuation of the annuity given by the will.

During the course of the argument I was somewhat troubled by the language used in para. 7 of the letter where it is stated that “Lady Beit’s children are prepared to sell them such annuities.” If I may borrow the language of LORD SIMONDS, used in a very different context in his speech in the House of Lords in *St. Aubyn (L.M.) v. A.-G.* (No. 2) (2) ([1951] 2 All E.R. 485):

“No one, lawyer, business man, or man in the street, was ever heard to use such language to describe such an act . . .”

And the phrase and the notion behind it was still, to my mind, more startling when the so-called purchase price consisted of sums of residue to which the alleged sellers were in any case entitled subject to the annuities. I was tempted to wonder whether the language used in this respect indicated a degree of artificiality great enough to throw doubt on the genuineness of the whole transaction. But I have resisted the temptation. Counsel for the taxpayers said that the language was not so strange in truth as I had myself thought, and, in any case, the import of the particular words is not essential to the achievement of the main purpose of the arrangement.

I have, therefore, come to the same conclusion as that reached by VAISEY, J. In the course of his judgment the learned judge used this language:

"Indeed it may well be, and I think it is, the case that the situation is irresolvably ambiguous in character. These are some of the questions which were suggested, or have occurred to me. Was Mrs. Carter, immediately prior to her death, receiving from the trustees of the will of the testatrix the annuity bequeathed to her by such will, or was she in receipt from the executors, parties to the deed of 1947, of a substituted annuity of the same amount held by them for her not as trustees of the will, but as bare trustees under the terms of the arrangement? Ought the purchase by the executors of the annuities from the children to be considered as an investment (unauthorised but agreed to) of a portion of the testatrix' estate, to be held by them thereafter as trustees of the will? Or ought the arrangement to be regarded as the setting up of a new series of trusts superseding the original trusts of the will? It is to be observed that the deed of 1947 makes no mention at all of the trusts of the will or of the continuing obligations of the parties of the former part (defined as 'the executors') in their capacity of trustees of the will, which raises this further question, whether the appointment of new trustees of the will with a vesting declaration in common form would give to the appointees the right to sue the children under the deed of 1947? Or would it be necessary, and not merely a wise precaution, to extend the appointment and declaration so as to cover expressly the deed of 1947?"

I have found the point in the case difficult and narrow, as did the learned judge. On the other hand, there is no ambiguity in the language of the statute. The ambiguity, that is, the doubt and difficulty, arises from the nature of the transaction in question and the language used in the material letters. That being so, it seems to me that the court is bound, to the best of its ability, to resolve the difficulty and to reach a decision on what was in truth the effect of the arrangement made, and then to say whether the Crown is entitled to bring the case within the terms of s. 43 of the Act of 1940. And this task I have attempted to perform. In the two first alternative questions posed by the learned judge in the passage I have quoted lies the kernel of the matter. Those are the questions which I think the court is bound to answer, and my answer is in accordance with the first of the two alternatives. Similarly, I would answer the judge's third question affirmatively and his fourth negatively. As regards the antinomy contained in the last two questions posed by the judge, I am not for myself entirely satisfied that the premise on which the questions are based is well founded, nor am I satisfied that for the purposes in hand it is necessary to answer the two questions posed one way or the other. And since the particular questions may arise in fact hereafter in reference to other annuities, I prefer not to attempt any answer to either question now, but to allow them to await the time when they may actually arise for decision. In my judgment, the appeal should be dismissed.

JENKINS, L.J., stated the facts as set out above and continued: The question for decision is whether the mode of providing Mrs. Carter's annuity proposed by the letter of Apr. 23, 1947, agreed to by her by the letter of Apr. 30, 1947, and implemented by the deed of covenant, involved a disposition or determination of the annuity payable to her under the will within the meaning of s. 43 (1) of the Finance Act, 1940. If it did, then, by virtue of that sub-section in conjunction with s. 2 (1) (b) of the Finance Act, 1894, this transaction must be wholly ignored and duty must be paid on the appropriate "slice" of residue, ascertained in accordance with s. 7 (7) of the latter Act, as if the letters of Apr. 23 and 30 had never been written and the deed of covenant had never been executed. This result would involve considerable, though, probably, not insuperable, difficulties of calculation under s. 7 (7) in view of the extent to which the residuary

estate has in fact been expended or distributed. If, on the other hand, s. 43 (1) has no application, it is admitted on the part of the commissioners that duty cannot be exigible by the unaided operation of s. 2 (1) (b), inasmuch as the annuity payable to Mrs. Carter under the will (hereinafter referred to as "the will annuity"), which on this view of the matter continued on foot down to the date of her death, was at the date of her death an interest subsisting only and exclusively in property consisting of the corresponding annuity payable to the executors under the deed of covenant (hereinafter referred to as "the covenanted annuity") which ceased contemporaneously with the will annuity, so that no benefit, or no benefit capable of valuation under the provisions of s. 7 (7), accrued or arose by the cesser of the will annuity.

A It is clear that the answer to this question must depend primarily on the true construction and legal effect of the scheme embodied in the letters of Apr. 23 and 30, 1947. The deed of covenant is material and relevant only in so far as it shows that the scheme agreed to by Mrs. Carter was in fact carried out, for she was no party to it, and, therefore, could not have been bound by any of its provisions which might not precisely accord with the terms of the scheme to which she had agreed. Counsel for the Crown assented (as in view of *Inland Revenue Comrs. v. Duke of Westminster* (1) he was bound to do) to the proposition that any liability to duty in the present case must be established by reference to the true legal effect of the transaction in the form it actually took, and not by a process of equating the transaction as actually carried out to some other transaction of different legal effect by means of which a substantially similar result would for all practical purposes have been achieved, and which, if it had been the transaction actually carried out in the present case, would have attracted duty as claimed. He submitted, however, that the transaction as actually carried out and judged according to its true legal effect was indeed such as to entitle the Crown to succeed. If I might briefly summarise his argument, he claimed the true legal effect of the letters of Apr. 23 and 30, 1947, to be that Mrs. Carter gave up the whole of her interest in the residuary estate in exchange for an annuity payable by the residuary legatees to the executors as bare trustees for her and not in their capacity as executors or trustees of the will. He pointed out that it was a matter of indifference to Mrs. Carter what, if anything, the executors might pay out of residue in order to obtain the covenant. All that mattered to her was that the covenant should be obtained. He also relied on the fact that the terms of the arrangement were such that Mrs. Carter was to look exclusively to the corresponding covenanted annuity for payment of her will annuity and that neither she nor any of the other annuitants had any interest in any of the covenanted annuities other than the one corresponding to his or her will annuity. From this he adduced that Mrs. Carter could at any time after the execution of the deed of covenant have called on the executors to assign to her absolutely the covenanted annuity corresponding to her will annuity, when she would have been left with nothing but a purely contractual annuity payable direct to her by the residuary legatees, her will annuity and the interest in residue which it originally conferred being completely gone. He argued further that, if the executors had made default in paying Mrs. Carter's will annuity through some failure on the part of the residuary legatees to pay the corresponding covenanted annuity, her proper remedy would have been to sue the residuary legatees in the name of the executors, or, failing that, to sue the residuary legatees joining the executors as defendants. He relied on the fact that the executors could have no right to deduct from the annuity paid to Mrs. Carter under the scheme anything in respect of costs, charges and expenses as supporting his submission that there was here no true retention of residue to meet Mrs. Carter's will annuity, but rather a substitution for the will annuity of a new and wholly contractual interest in the shape of the covenanted annuity.

Counsel for the Crown, therefore, invited us to hold that the actual transaction, judged according to its true legal effect, did involve a disposition or determination

of Mrs. Carter's will annuity. But, with all respect to his clear and persuasive argument, it appears to me on examination to stand convicted of the error reprobated in the *Duke of Westminster's* case (1). Turning again to the letters of Apr. 23 and 30, 1947, I find the proposal actually made and accepted to be, not that Mrs. Carter's will annuity should be surrendered in exchange for a contractual annuity payable by the residuary legatees, but that Mrs. Carter's will annuity should be provided for out of the residuary estate in a particular way, that is to say, by the purchase by the executors out of the residuary estate of an annuity of corresponding amount from the residuary legatees, such annuity to be secured by the personal covenant of the residuary legatees with the executors and to be used by the executors to pay Mrs. Carter's will annuity, Mrs. Carter on her part agreeing that the executors should hold the annuity so purchased as sole security for her will annuity and should distribute the remainder of the estate free from any claims by her. It seems to me reasonably plain that, if the arrangement thus summarised was capable of taking legal effect according to its terms its legal effect was: (i) that Mrs. Carter's will annuity was not disposed of or determined, but remained on foot; (ii) that, with Mrs. Carter's consent, a part of the residuary estate invested in a particular way, that is, in the purchase by the executors from the residuary legatees of the corresponding covenanted annuity, was appropriated as the sole security for payment of her will annuity in exoneration of the remainder of the estate; (iii) that no contractual relationship whatever was set up between Mrs. Carter and the residuary legatees, the obligation undertaken by the latter being exclusively an obligation to the executors to pay them the several covenanted annuities; and (iv) that Mrs. Carter's rights in respect of her annuity continued to be those of an annuitant under Lady Beit's will against the executors and trustees of that will, modified only to the extent that a particular asset of the residuary estate, in the shape of the corresponding covenanted annuity, had, with her consent, been appropriated, in exoneration of the remainder of the estate, to the payment of her will annuity.

I see no reason for holding that the true legal effect of the arrangement was not exactly as above described. No doubt, for all practical purposes a substantially similar result might have been achieved more simply and directly if Mrs. Carter had surrendered her will annuity in exchange for a covenant with her by the residuary legatees for the payment to her of an annuity of like amount, and, if the transaction had taken that form, duty would, presumably, have been attracted on her death under s. 43 (1) of the Finance Act, 1940. But the transaction did not take that form, and there is, in my view, no justification for treating it for duty purposes as if it had. The circumstance that the particular asset appropriated to meet Mrs. Carter's will annuity consisted solely of a contractual annuity of like amount and duration purchased by the executors out of the residuary estate for this express purpose, does, no doubt, lend to the scheme a certain air of artificiality, which is increased by the further circumstance that the vendors of the contractual annuity to the executors were themselves the residuary legatees. But these circumstances afford no justification for disregarding the true legal effect of the transaction. They are relevant only in so far as they can properly be regarded as determining or qualifying its true legal effect. I cannot see that they can be properly so regarded. If the transaction as formulated and carried out had been in all respects precisely the same save that the covenanted annuity was purchased from an insurance company instead of being purchased from the residuary legatees, would it have had a different legal effect in relation to the question whether Mrs. Carter's will annuity had been disposed of or had determined within the meaning of s. 43 (1) of the Finance Act, 1940? In my view, its legal effect would in all essentials have been the same. The position would still have been that the executors, with the consent of Mrs. Carter, would have appropriated a particular asset (namely, a contractual annuity of like amount and duration purchased out of the residuary estate)

to answer Mrs. Carter's will annuity in exoneration of the remainder of the residuary estate. How could it then have been contended with any colour of justification that Mrs. Carter's will annuity had been disposed of or had determined? So to contend would, so far as I can see, have been a flat contradiction both of the facts (it being assumed that Mrs. Carter's will annuity had been duly paid in full down to the date of her death) and of the true legal position.

A What bearing can the circumstance that the persons by whose covenant the contractual annuity was secured were themselves the residuary legatees have on the result? In my view, none. It can do no more than aid the obnoxious argument, based on the so-called "substance" of the transaction, to the effect that in substance the transaction was a release of the entire residue to the residuary legatees discharged from Mrs. Carter's annuity in consideration of their personal covenant to pay her a like annuity in lieu thereof. But in law how

B did the matter actually stand? The residue was unadministered. The residuary legatees could not claim a penny in their capacity as beneficiaries until the annuities had been fully provided for, the deferred legacies paid or provided for, and the ultimate residue thus cleared for distribution. There is, therefore, so far as I can see, no justification for holding that as a matter of law the payment

C made to them out of the unadministered residuary estate as the purchase price of the covenanted annuities did not bear the character it purported to bear according to the terms of the transaction as actually carried out, but must be treated as a payment to them on account of their beneficial interests in the ultimate residue. Accordingly, I cannot regard the circumstance that the residuary legatees were themselves the vendors to the executors of the covenanted annuities as having any true bearing on the result.

D As to the character of the asset appropriated to answer Mrs. Carter's will annuity, if in fact it was an investment of part of the residuary estate (as, in my view, it clearly was) I fail to see how the legal result of the transaction is affected by the circumstance that the asset so appropriated consisted of a contractual annuity of like amount and duration. If, instead of purchasing such

E an annuity, the executors had acted as their own insurers and, with Mrs. Carter's consent, had appropriated to answer her will annuity a part of the residuary estate calculated to be sufficient by expenditure of both capital and income to pay her will annuity in full down to the date of her death, and in the event their calculation had turned out to be exact so that the appropriated fund had been exhausted by the payment of the final instalment, I apprehend it could not be

F maintained that Mrs. Carter's will annuity had been disposed of or had determined in her lifetime. The relevant question seems to me to be whether the executors provided for the payment of Mrs. Carter's annuity by means of an investment made out of residue. The answer to that question being "Yes," it seems to me immaterial that the investment they chose to make for this purpose (admittedly in breach of trust, but with the consent of the interested parties) consisted of a contractual annuity of like amount and duration.

G The submission of counsel for the Crown as to the form any action by Mrs. Carter would properly have taken in the event of default by the executors or by the residuary legatees as covenantors and as to Mrs. Carter's right to call for an assignment of the covenanted annuity do not, I think, carry the matter any further. The question must still be whether Mrs. Carter's rights under the scheme were those of a beneficiary entitled to an annuity under the will with

H whose concurrence an appropriation of a particular asset representing part of the estate had pursuant to the scheme been made to answer that same annuity, or were those of a former annuitant under the will who had given up that annuity in exchange for a new and distinct annuity payable to her by virtue of the scheme. The first of these alternatives represents what appears to me to be the correct view, and, if it does, I do not see how discussion of the appropriate procedure for the enforcement of her rights under the will, in view of the character of the particular asset appropriated, can be of any real assistance.

As to Mrs. Carter's alleged right to call for an assignment of the covenanted annuity, while I am quite prepared for the sake of argument to accept its existence, I cannot see that it amounts to any more than a corollary to the appropriation of a particular asset for the exclusive purpose of answering her will annuity, or that it in any way advances the contention that her will annuity had been disposed of or had determined within the meaning of s. 43 (1) of the Finance Act, 1940. She never did call for or obtain any such assignment, and I see no merit in speculating as to what the position might have been had she in fact done so. As to the freedom of the fund represented by the covenanted annuity from any claim on the part of the executors for costs, charges and expenses, I do not see how this advances the argument that the provision made by it for the payment of Mrs. Carter's will annuity was in truth a provision for the payment to her of a different annuity otherwise than out of the residuary estate.

A subsidiary argument advanced by the Crown was to the effect that inasmuch as s. 43 (1) of the Finance Act, 1940, is concerned with interests in property and an annuity given by will is an interest in the residuary estate and every part of it, therefore, where an annuitant consents to the appropriation of a particular part of residue to answer the annuity in exoneration of the remainder the annuity is disposed of or determined within the meaning of the section *quoad* the part of the residuary estate so released. I cannot follow this argument. An annuitant is entitled to receive no more and no less than the prescribed annual sum. So long as it continues to be payable, and is paid in full, out of some part of the residuary estate sufficing for the purpose, it has not, according to any ordinary use of language, been disposed of or determined merely because the annuitant has agreed to look exclusively to that part of the estate as adequately securing the due payment to him of the full annual amount to which he is entitled. For the reasons I have endeavoured to state, although I am far from regarding the case as free from difficulty, I have reached, perhaps, rather more positively, the same conclusion as the learned judge, and am accordingly of opinion that this appeal fails and should be dismissed.

MORRIS, L.J.: In my judgment, the problem that is presented in this case is one calling for the construction of the two letters of Apr. 23 and 30, 1947. Before she received the former letter Mrs. Carter had all the rights to which as an annuitant under the will she was entitled. When she had dispatched her letter of Apr. 30, were her former rights modified, and, if so, in what way and to what extent, or were they replaced by or exchanged for some other rights? In my judgment, these are the issues which arise. I can see no reason for endowing the words of the two letters with any meanings or implications other than the ordinary and natural ones. There is no suggestion that there was any other communication of any kind sent to Mrs. Carter than the letter of Apr. 23. When she sent her written reply, it is to be read and judged according to normal rules of interpretation. I do not understand the Crown to contend otherwise. Indeed, counsel for the Crown repudiated any quest for the "substance" of the matter, but invited examination of it "in truth and in fact."

Mrs. Carter agreed to the proposals contained in the letter of Apr. 23. She agreed that the annuity to be purchased by the executors should be held by them as the sole security for the payment of her annuity. She further agreed that the executors could distribute the remainder of the estate free from any claims by her. Different proposals might have been made to Mrs. Carter. She might have been invited to accept the direct obligation of Lady Beit's children as covenantors to her. She was not so invited and she did not so agree. She agreed (i) that the executors should expend money in purchasing a covenant from Lady Beit's children that they would pay to the executors the annual sum of £52 10s. during her own life, and (ii) that the executors would hold such purchased annuity

"as sole security for the payment" of her annuity. Mrs. Carter did not give up her right to receive her annuity under the will. She expressly referred to it in manner consistent only with retention of it. Her words "sole security for the payment of my annuity" clearly refer to her annuity under the will. Her words in the first sentence of her letter confirm this—that is, the words "the annuity given to me by her will."

A She agreed to a change in the security which was the buttress supporting the obligation of the executors to pay to her her annuity under the will. We were invited by the Crown to treat the matter as though, in place of the phrase "as sole security," some alternative phrase were found. I can see no reason at all for yielding to an invitation to say that Mrs. Carter used one phrase but meant another. The word "security" seems to me to be part of the core of the matter. B She had been invited in the letter of Apr. 23 to consider the "security" aspect. In para. 6 of that letter she was told:

"In brief, though the annuities can be paid, the provisions of the will for securing them by means of an annuity fund cannot be carried out."

In para. 8 of the letter she was told:

C "From their point of view the annuitants, of whom you are one, would be accepting the personal covenant of Lilian Lady Beit's three children, with the executors, as providing sufficient security for their annuities in place of their right to have provision made out of the whole assets of the estate."

It is in the light of these passages that the word "security" in Mrs. Carter's reply of Apr. 30 must be regarded. She agreed to an alteration in the character D of the support on the basis of which the executors could discharge their obligation to pay to her her annuity under the will. She did not use any words which varied or modified her right to her annuity save that she agreed that the executors might so deal with the estate that it would be denuded of assets but there would be a future in-flow to the executors which would put them in a position to discharge their obligation under the will of paying her annuity to her. Being E satisfied that the source of the in-flow to the executors would be constant and dependable, she was satisfied that there was security for the payments due to her. In saying to the executors: "You may take an annuity so that you may pay me my annuity" she was not merging the two annuities. She was not ending her right to her annuity under the will, but in expressly referring to it she was facilitating certain arrangements by which its payment to her by the executors F would be ensured.

The executors entered into the deed of covenant with the covenantors on July 26, 1947. The Crown, who maintained that after that date the executors were bare trustees for Mrs. Carter of the right given by the deed to receive an annuity during Mrs. Carter's life, also maintained that in strictness the court was not entitled to look at the deed because Mrs. Carter was neither party nor G privy to it. The Crown did not, however, press an objection to the perusal by the court of the deed, but submitted that, if the deed were looked at, it would be found to contain a mis-recital. In my judgment, the court is entitled to look at the deed. Its existence forms one of the events which the court is invited to survey. It is, I consider, further useful to look at the deed in order to see whether it embodied the transaction which was to be expected if other H annuitants decided similarly to Mrs. Carter. A perusal of the deed shows it to be in the form which, after reading the two letters of Apr. 23 and 30, I would have expected to find. In particular, I consider that it was accurate to have recited in the following terms:

"And whereas the executors are desirous of purchasing annuities of similar amounts to those payable to the annuitants under the will to the intent that they may hold the annuities so purchased as assets of the testatrix' estate for the purpose of paying the annuities given by the will,"

In the result, I have come to the conclusion that Mrs. Carter's right to receive an annuity under the will was one that continued until her death, that she did not dispose of that right or acquire any new or substituted right, and that her right was not determined. Accordingly, s. 43 (1) of the Finance Act, 1940, did not come into operation and I would answer the question raised in the originating summons in the negative. I am, therefore, of opinion that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Coward, Chance & Co.* (for the taxpayers).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

Re LOVE. *Ex parte* OFFICIAL RECEIVER (TRUSTEE) *v.*
KINGSTON-UPON-THAMES COUNTY COURT REGISTRAR.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.JJ.),
November 7, 8, 1951.]

Bankruptcy—Execution—Relation back of trustee's title—Execution completed after act of bankruptcy, but before date of receiving order, and before notice of presentation of bankruptcy petition or of act of bankruptcy—Bankruptcy Act, 1914 (c. 59), s. 37 (1), s. 40 (1).

On Sept. 8, 1949, the bankrupt committed an act of bankruptcy by failing to comply with the requirements of a bankruptcy notice. On Oct. 4 a county court ordered the bankrupt to pay a sum of £10 as fines imposed on him for contempt of court. On Nov. 4 the registrar of the county court, as high bailiff, seized the bankrupt's household furniture, pursuant to warrants of execution dated Oct. 17. On Nov. 11 a bankruptcy petition was presented against the bankrupt in the High Court. On Nov. 15 the registrar sold the furniture for £101 15s. out of which, under the County Courts Act, 1934, s. 170, he retained the amount of the fines of £10, no notice of the presentation of the bankruptcy petition or of an act of bankruptcy having then been received by him. On Dec. 14 a receiving order was made against the bankrupt, and on Jan. 5, 1950, he was adjudged bankrupt. The official receiver, as trustee of the property of the bankrupt, now claimed the repayment of the sum of £10 from the registrar on the ground that, as, under the Bankruptcy Act, 1914, s. 37 (1), his title related back to Sept. 8, 1949, when the act of bankruptcy was committed, the goods seized were vested in him and not in the bankrupt at the date of the seizure.

HELD: where a creditor had issued execution against the goods of a debtor and had completed the execution, within the meaning of s. 40 (2) of the Act of 1914, before the date of the receiving order and before notice of the presentation of a bankruptcy petition by or against the debtor or of the commission of an act of bankruptcy by the debtor, the conditions of s. 40 (1) were satisfied and the creditor was entitled to retain the benefit of the execution and was not affected by the provisions of s. 37 (1) despite the provision in s. 37 (1) that his bankruptcy should be deemed to relate back to and to commence at the time of the act of bankruptcy, even though an act of bankruptcy had been committed before the execution was issued, and, therefore, the official receiver was not entitled to demand payment of the £10 received by the registrar.

Wild v. Southwood ([1897] 1 Q.B. 317), distinguished.

Quaere, whether, in view of s. 151 of the Bankruptcy Act, 1914, the provisions of s. 40 (1), in so far as they might operate to defeat the recovery of the fines, was binding on the Crown.

Decision of DANCKWERTS, J. (*ante*, p. 321), affirmed.

AS TO RIGHTS OF CREDITOR UNDER EXECUTION, see HALSBURY, Hailsham Edn., Vol. 2, pp. 355-357, paras. 479, 480; and FOR CASES, see DIGEST, Vol. 5, pp. 808-813, Nos. 6902-6923.

Cases referred to:

- (1) *Wild v. Southwood*, [1897] 1 Q.B. 317; 66 L.J.Q.B. 166; 75 L.T. 388; 5 Digest 914, 7479.
A (2) *Re O'Shea's Settlement*, [1895] 1 Ch. 325; 64 L.J.Ch. 263; 71 L.T. 827; 5 Digest 914, 7478.
(3) *Re Wright, Ex p. Arnold*, (1876), 3 Ch.D. 70; 45 L.J.Bcy. 130; 35 L.T. 21; 5 Digest 924, 7559.

B APPEAL by the official receiver from a judgment of DANCKWERTS, J., dated June 18, 1951, and reported *ante*, p. 321, on a motion for (a) a declaration that on Nov. 4, 1949, the date of an execution levied by the registrar of Kingston-upon-Thames County Court, the goods on which execution was levied were vested in the official receiver as trustee of the property of the debtor, and (b) an order for payment of the sum of £10 retained by the registrar from the sale of the goods as the amount of fines imposed on the debtor by the county court, on Oct. 4, 1949, for contempt of court.

C It was contended by the official receiver that, as his title as trustee related back to an act of bankruptcy committed by the bankrupt on Sept. 8, 1949, the goods seized were vested in him and not in the bankrupt at the date of seizure. DANCKWERTS, J., held that, as the registrar had completed the execution, within the meaning of the Bankruptcy Act, 1914, s. 40 (1) and s. 40 (2), before notice of the presentation of a bankruptcy petition or of an act of bankruptcy, D he was entitled to retain the money which he had received and was not affected by the provisions of s. 37 and s. 38 of the Act.

Muir Hunter for the official receiver.

Denys B. Buckley for the registrar.

E SIR RAYMOND EVERSLED, M.R.: I will ask JENKINS, L.J., to deliver the first judgment.

JENKINS, L.J.: This is an appeal from a judgment of DANCKWERTS, J., dated June 18, 1951, whereby he rejected a claim by the official receiver, as trustee of the property of the bankrupt, to the effect that a sum of £10, received by the registrar of the Kingston-upon-Thames County Court, formed part of the assets of the estate of the bankrupt and was recoverable by the official F receiver accordingly.

The circumstances of the case are briefly these. On Sept. 8, 1949, the bankrupt committed an act of bankruptcy by failing to comply with a bankruptcy notice. A petition was presented on Nov. 11, 1949, a receiving order was made on Dec. 14, 1949, and on Jan. 5, 1950, he was adjudged bankrupt. These were proceedings in the High Court. There were also these proceedings in G the Kingston-upon-Thames County Court. On Oct. 10, 1949, judgment was entered in that court in favour of the Minister of National Insurance against the bankrupt for the sum of £60 7s. 3d., arrears of contributions due from him under the relevant Acts, and the Minister was granted a warrant of execution in respect of that judgment. There was an additional sum for costs, making a total sum of £61 13s. 3d. On Oct. 4, 1949, the bankrupt was ordered H to pay a sum of £10, being the amount of certain fines imposed on him for contempt of court. The registrar of the Kingston-upon-Thames County Court, being also the high bailiff, is the officer in charge of executions. Pursuant to warrants of execution dated Oct. 17, 1949, the registrar, on Nov. 4, 1949, seized the bankrupt's household furniture, and on Nov. 15 he sold the furniture for £101 15s. Out of this sum the amount of the judgment debt was paid to the judgment creditor, the Minister, and £10, being the amount of the fines, was retained by the registrar by virtue of the County Courts Act, 1934, s. 170. The

official receiver demanded repayment from the Minister of the sum of £61 13s. 3d., and the Minister acceded to that demand. The registrar, however, adopted a different attitude and refused to repay the sum of £10.

The question is whether the execution effected in those circumstances was a valid execution as against the official receiver, or was invalid so that its proceeds should be considered as part of the estate of the bankrupt. The question turns primarily on the true construction of the Bankruptcy Act, 1914, s. 40, which reads:

"(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. (2) For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver. (3) An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall, in all cases, acquire a good title to them against the trustee in bankruptcy."

There is no doubt that the execution in this case was completed before the date of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor or of the commission of any available act of bankruptcy by the debtor. *Prima facie*, therefore, the circumstances in which this execution was levied and completed were such as to comply with the provisions of s. 40 (1). The sub-section is stated in a negative form—that is to say, that the creditor shall not be entitled to retain the benefit of the execution unless certain conditions are fulfilled, but, in my view, it is plain by necessary implication that *prima facie* the sub-section provides conversely that, if the conditions are fulfilled, the creditor shall be entitled to retain the benefit of the execution. The learned judge delivered a considered judgment in which he discussed the question involved fully and carefully, and he came to the conclusion that there was nothing in the arguments addressed to him on the part of the official receiver to justify a departure from what he considered to be the plain meaning of s. 40 (1). Accordingly, he dismissed the official receiver's application. I have come to the same conclusion.

The argument of counsel for the official receiver is on these lines. He says that the fundamental principle of the bankruptcy law, as demonstrated by s. 37 and s. 38 of the Act, is that the commencement of a bankruptcy relates back to the date of the act of bankruptcy on which the petition is founded and the vesting provisions of the Act operate accordingly. Section 38 provides that the property of the bankrupt divisible among his creditors shall not comprise certain things (which are immaterial for the present case), but shall comprise:

"(a) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge."

Section 37 (1) provides:

"The bankruptcy of a debtor . . . shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of

bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition . . . ”

- The effect of that sub-section (says counsel for the official receiver) is that the bankruptcy of this bankrupt related back to, and was deemed to take effect from, Sept. 8, 1949, so that, when he was adjudged bankrupt, the whole of his property vested, as from Sept. 8, 1949, in the official receiver. It follows, so proceeds the argument, that at the date when the first step in the execution was taken—that is to say, in effect, on Oct. 17, 1949, when the warrants of execution were issued—there was nothing on which the execution could operate, inasmuch as, by the doctrine of relation back, the property of the bankrupt must be deemed already at that date to have vested in the trustee in bankruptcy.
- Counsel for the official receiver says that, if the provisions of s. 40 (1) are construed as I have construed them, the sub-section will involve a departure from these fundamental principles. He contends, therefore, that s. 40 (1) should be read subject to an implied qualification that, irrespective altogether of the question of notice, no execution can be valid unless it is put in motion before the commission of the relevant act of bankruptcy.
- I find it extremely difficult to accept that argument, and I feel constrained to reject it on the short ground that it does not accord, as it seems to me, with the natural reading of s. 40 (1). If I might adopt an argument addressed to us by counsel for the registrar, it seems to me that the natural meaning of s. 40 (1) is this. It views the position at the point of time at which the adjudication takes place and the trustee embarks on his administration of the bankrupt's estate. The question then arises: Has any creditor issued execution against the goods or lands of this debtor (or of this bankrupt, as by then he would be) on any date prior to this point of time? If the answer to that question is “Yes,” the next question which arises is: Did he complete the execution or attachment before the date of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor or of the commission of any available act of bankruptcy by the debtor? If that question also falls to be answered in the affirmative, then, as it seems to me, the conditions of s. 40 (1) are satisfied. To introduce a new requirement to the effect that the execution should have been issued before the commission of any act of bankruptcy would appear to involve an arbitrary remodelling of the sub-section. It is perfectly true that, once a bankruptcy ensues, “relation back” operates, so that the property of the bankrupt is deemed to have been vested in the trustee as from the date of the act of bankruptcy, but, in my view, it does not follow from this that the property of a debtor not yet adjudicated bankrupt is to be treated for all purposes as if it was already vested in the trustee. Here, at the date when execution was issued, there is no doubt that the property was the property of the debtor. True it is that, owing to the act of bankruptcy that had taken place unknown to the creditor, the property was subject to the risk or contingency that, in the event of adjudication ensuing, it would vest in the trustee, and, when so vested, would be deemed to have so vested from the date of the act of bankruptcy, but I think it is a very different thing to say that, therefore, when the position is considered as at the date of adjudication for the purposes of s. 40 (1), it must be considered as if the trustee had in fact already had the property vested in him at the date when the creditor issued his execution.

The argument of counsel for the official receiver derives its main support from the judgment of VAUGHAN WILLIAMS, J., in *Wild v. Southwood* (1). The headnote in that case is:

“A charging order under s. 23 of the Partnership Act, 1890, upon a judgment debtor's interest in a partnership, being a proceeding *in invitum*, is not a ‘transaction’ protected by s. 49 of the Bankruptcy Act, 1883. *Re O'Shea's Settlement* (2) followed. When in such a case the partners by direc-

tion of the court pay into court a sum of money in redemption or purchase of the interest charged, the transaction is not a 'completed execution' within the meaning of s. 45 of the Bankruptcy Act, 1883. *Semble*, if the money had been paid out to the execution creditor or the partners had paid him the money direct, he would have got a good title."

Section 45 of the Bankruptcy Act, 1883, corresponds to s. 40 of the Act of 1914 and s. 49 of the Act of 1883 corresponds to s. 45 of the Act of 1914. After stating the facts briefly VAUGHAN WILLIAMS, J., said ([1897] 1 Q.B. 319):

"Now, what are the rights of the plaintiff, who is the execution creditor? I will first deal with his rights, irrespective of s. 49, which is the protective section, or s. 45, which I think is a restrictive section. What is the right of the execution creditor? His right is to seize the goods or property of the bankrupt, and to levy execution thereon. He has no right to seize or levy execution on the property of any one else. Now, at the date when the first step towards getting execution, or anything in the nature of execution, was taken, was the interest of the bankrupt in the partnership property his property or not? If it was his property, the execution creditor had a right to go against it; if it was not, the creditor had no such right. The first step towards obtaining the charging order was the taking out of the summons on Apr. 20, 1896, and at that time the bankrupt's interest in the partnership had ceased to be his interest. It had vested in the official receiver, and became the property of the trustee in bankruptcy in the events which happened. This law of relation back, which makes the title of the trustee vest as from a date antecedent to the transaction or event which took place without any petition in bankruptcy having occurred or a receiving order having been made, operates no doubt very hardly in many cases, and therefore various Acts of Parliament have contained protective sections to relieve those persons who would be injured by the stringency of that law."

Thus, down to that point, VAUGHAN WILLIAMS, J., was, I think, undoubtedly expressing a view that, save in so far as particular sections might produce some different result, the effect of the doctrine of relation back would be as contended by counsel for the official receiver in the present case. So far the learned judge had dealt with the matter on the general principles of the bankruptcy legislation without considering the particular effect of any section, whether of the class termed by him as "restrictive" or of the class termed by him as "protective." He continued (*ibid.*, 320):

"Apart from those protective sections, it is plain that this execution cannot hold good against the trustee in bankruptcy whose title relates back to a period anterior to it. Then is this execution within the protective section? That is s. 49 of the [Bankruptcy Act, 1883]."

Section 45 of the Act of 1914, which corresponds to s. 49 of the Act of 1883, is:

"Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements, assignments and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy—(a) Any payment by the bankrupt to any of his creditors; (b) Any payment or delivery to the bankrupt; (c) Any conveyance or assignment by the bankrupt for valuable consideration; (d) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration . . ."

Then there are certain provisos which limit this validation to cases of transactions done before the date of the receiving order and without notice of any available act of bankruptcy. Section 49 of the Act of 1883 was in substantially similar terms. VAUGHAN WILLIAMS, J., went on to say (*ibid.*):

"In my judgment this execution creditor cannot rely on that section, because, as I understand the case of *Re O'Shea's Settlement* (2), it is a distinct

decision that the obtaining of a charging order under s. 14 of the Judgments Act, 1838, is not a 'transaction' within the meaning of s. 49. But then it is said that decision does not apply to a charging order obtained under s. 23 of the Partnership Act, 1890. I do not accede to that argument at all. It seems to me that whether the charging order is obtained under the Judgments Act, 1838, or under the Partnership Act, 1890, it is a proceeding *in invitum*, and cannot be called a 'transaction' within the meaning of s. 49. In effect, *Re O'Shea's Settlement* (2) decides that the transactions protected by s. 49 are voluntary transactions between the bankrupt and those with whom he is dealing. I think, therefore, that s. 49 does not apply."

Having thus disposed of what he termed "the protective section," the learned judge turned to s. 45 of the Act of 1883 (corresponding to s. 40 of the Act of 1914). He said (*ibid.*):

"Then it is said that s. 45 assists this execution creditor. All I say is that, if it is a protective section, then the decision in *Re O'Shea's Settlement* (2) deprives him of the benefit of it. But if it is a restrictive section the question does not arise, because the restrictive section can clearly give him no larger rights than he would have under s. 49. I have therefore disposed of that part of the case. It remains for me to deal with the argument that this money paid into court ought to be paid out because it is not and never has been part of the bankrupt's estate. I do not agree with that at all. The Partnership Act, 1890, in effect gives to the continuing partner the right to buy out the execution; and in such a case the money might be paid direct to the execution creditor. I do not say what would have been the effect if the money had been paid out of court to the execution creditor. But having regard to the omissions from s. 49 of that which formed part of protected transactions in s. 133 of the Bankruptcy Act, 1849, I am disposed to think that the execution creditor would probably have got a good title. But I have not to decide that point."

VAUGHAN WILLIAMS, J., went on to say, in effect, that the money paid into court represented part of the proceeds of the bankrupt's interest in the partnership just as much as if it had been actually sold. Being part of the bankrupt's estate divisible among his creditors, it had to be paid out to the trustee.

That judgment, particularly in view of the fact that it was the judgment of a learned judge who was, as is well known, exceptionally well versed in bankruptcy matters, is one to be treated with the greatest respect, and the more so because it appears to have stood without comment since 1896, but it does not seem to me that it really amounts to a decision in favour of the official receiver on the point now at issue. I think that, in the end, VAUGHAN WILLIAMS, J., left that point open when he said (*ibid.*, 320):

"I do not say what would have been the effect if the money had been paid out of court to the execution creditor. But having regard to the omissions from s. 49 of that which formed part of protected transactions in s. 133 of the Bankruptcy Act, 1849, I am disposed to think that the execution creditor would probably have got a good title."

The precursors of s. 49 of the Act of 1883 were s. 95 of the Bankruptcy Act, 1869, and s. 133 of the Bankrupt Law Consolidation Act, 1849. They were what

VAUGHAN WILLIAMS, J., in *Wild v. Southwood* (1), described as protective sections. Both of those sections afforded express protection to executions completed after, but without notice of, an act of bankruptcy and before the date of the *fiat* or the filing of the petition (under s. 133 of the Act of 1849) or before the date of the order of adjudication (under s. 95 of the Act of 1869). There is no doubt that under either of those sections, as I understand it, the execution in the present case would have been valid. So, when the learned judge in *Wild v. Southwood* (1) says "having regard to the omissions from s. 49 . . .

of protected transactions in s. 133 of the Bankruptcy Act, 1849," he seems to me to be saying: "These are transactions which would formerly have been protected under s. 133 of the Act of 1849. They are now omitted from the corresponding s. 49 of the Act of 1883, so that, in construing s. 45 of the Act of 1883, I am disposed to think that, if an execution creditor completes his execution without notice of an act of bankruptcy, he probably gets a good title under s. 45, even as the provisions now stand." The learned judge left the point in suspense by saying he thought that that was probable, but he had not got to decide it. Accordingly, the matter being one which is open in this court, whatever the proper construction of the learned judge's decision in *Wild v. Southwood* (1) may be, I do not think that this is a case where the court should feel any embarrassment in arriving at its own conclusion notwithstanding *Wild v. Southwood* (1), because the question at issue here seems to me to have been left in suspense in that case.

The point decided in *Re O'Shea's Settlement* (2) was that a charging order under s. 14 of the Judgments Act, 1838, was not a "transaction" protected by s. 49 of the Bankruptcy Act, 1883, and such an order had not for all purposes the same effect as if it had been voluntarily given by the judgment debtor. That was the decision relied on by VAUGHAN WILLIAMS, J., in holding that the charging order in *Wild v. Southwood* (1) was not a "transaction."

In *Re O'Shea's Settlement* (2) LORD HALSBURY said ([1895] 1 Ch. 329):

"I think we are all agreed that Mr. Mackenzie's construction of s. 49 is correct, and that this charging order is not a 'transaction' protected by that section. The order is really more in the nature of an execution. But that will not help the respondent. It is impossible, to my mind, to give any other interpretation to the word 'transaction.' I agree with what MELLISH, L.J., said in *Re Wright. Ex p. Arnold* (3). It seems to me that a 'transaction' is very much the same thing as a 'dealing'."

LINDLEY, L.J., said (*ibid.*, 330):

"I am of the same opinion. The substantial question is whether a charging order, obtained upon the fund in court, under the Judgments Act, 1838, s. 14, falls within either s. 45 or s. 49 of the Bankruptcy Act, 1883, and is valid as against the trustee in bankruptcy of the judgment debtor, whose title relates back to a time anterior to the charging order. Unless the charging order is protected under one or other of those sections, it is not protected at all as against the trustee's title relating to a time anterior to it. Therefore the question we have to consider is, whether the charging order is either a protected 'execution' within s. 45, or a protected 'transaction' within s. 49. It is clearly impossible to hold that the charging order is a protected execution within s. 45, and Mr. Hall has very properly declined to argue that it is."

The learned lord justice went on to consider the question whether it was a "transaction." That passage in the judgment of LINDLEY, L.J., is, in my view, significant, in that he regarded both s. 45 and s. 49 of the Act of 1883 as protective sections. He did not recognise the distinction drawn by VAUGHAN WILLIAMS, J., between s. 45 as restrictive and s. 49 as protective. Accordingly, notwithstanding the argument of counsel for the official receiver and notwithstanding what was said by VAUGHAN WILLIAMS, J., in *Wild v. Southwood* (1), in my judgment, there is no sufficient ground for construing s. 40 (1) of the Act of 1914 otherwise than in accordance with the plain meaning of the language of the sub-section read by itself. When it is so read, I agree entirely with the conclusion of DANCKWERTS, J., as to its true construction. I agree with him, too, that it would be surprising if the re-arrangement of the Act which took place in 1883, when completed executions were put in a category by themselves in what was then s. 45 of the Act and removed from what had formerly been s. 133 of the Act of 1849 and s. 95 of the

Act of 1869, should have had the drastic result of depriving execution creditors of a protection which they had hitherto enjoyed, based on the reasonable criterion of notice.

A That disposes of the main question in the appeal, which I have said I might well have disposed of much more rapidly by merely adopting the reasoning of DANCKWERTS, J., with which I entirely agree. A point was raised on the part of the registrar of the Kingston-upon-Thames County Court which, having regard to the view I have taken on the main question argued in the appeal, is not now necessary to be decided. The point is this. It is claimed that the provisions of s. 40 (1) of the Bankruptcy Act, 1914, in so far as they might otherwise operate to defeat the recovery of the £10 fines, are not binding on the Crown, and, therefore, cannot be relied on against the registrar of the county court inasmuch as, in collecting these fines, he was acting on behalf of the Crown.

B That being a question which it is not necessary to decide to determine the result of the appeal, I am not to be regarded as expressing any concluded view on it, except to say that so far I have not been satisfied that s. 151 of the Act of 1914 does not have the effect of making this particular provision binding on the Crown. For these reasons, in my judgment, this appeal fails and should be dismissed.

C **SIR RAYMOND EVERSHERD, M.R.:** I am of the same opinion. The judgment of DANCKWERTS, J., was a reserved judgment, and JENKINS, L.J., has already fully stated the reasons, which commend themselves to me, for his own conclusion, but, since the matter is of some significance, I wish to add a few observations on two points. The short question is whether the language of s. 40 (1) of the Bankruptcy Act, 1914, entitles the registrar to retain the £10 against the trustee in bankruptcy.

D

Section 40 (1) is expressed negatively:

E "Where a creditor has issued execution against the goods or lands of a debtor . . . he shall not be entitled to retain the benefit of the execution . . . against the trustee in bankruptcy of the debtor, unless he has completed the execution . . . before the date of the receiving order . . ."

As a matter of ordinary construction of what is relatively simple language, I should have no doubt that the affirmative was implicit in the negative, *i.e.*, that, if the creditor had completed the execution before the date referred to and without such notice as is mentioned, he would be entitled to retain against the trustee the proceeds of the execution. The main argument has been that such a view of construction disregards the effect of s. 37 and s. 38. It is, of course, clear that one cannot construe one sub-section without due regard to the other relevant provisions of the Act, but, in my judgment, no such conflict is caused by the earlier sections. Section 38 is concerned to define what is the property of the bankrupt divisible among his creditors in the bankruptcy. That phrase, which is made a term of art, is said to comprise, among other things, "the property vested in the bankrupt at the commencement of the bankruptcy": see s. 38 (a). Section 37 (1) says that the bankruptcy is to "be deemed to have relation back to, and to commence at, the time of" ^b the relevant act of bankruptcy. Still, the vesting in the trustee, by the language of s. 18 (1), occurs on and not before the adjudication. One has, therefore, the somewhat artificial conception that there vests on adjudication, among other things, property which was vested in the bankrupt at a past date. Nevertheless, it does not seem to me inaccurate in any respect to say that at the time that the registrar levied his execution he was levying execution on what then were "the goods . . . of a debtor," within the meaning of s. 40 (1). If that be right, then I cannot give such an effect to the phrase "shall be deemed to have relation back to . . . the time of the act of bankruptcy" in s. 37 (1) as to disentitle the registrar to say that he was doing something comprised within the terms of s. 40 (1), and, as he had completed that which he was doing before the relevant date and without

H

any such notice as is specified in s. 40 (1), he is, by the necessary inference of the language, entitled to retain what he got from it.

My principal difficulty in the case has been caused by the language of VAUGHAN WILLIAMS, J., in *Wild v. Southwood* (1). If that decision (though it is a decision of a judge of first instance) were directly in point, even though I might disagree with it, I should be disinclined to overrule it after a period of fifty-five years (during which, incidentally, a new Bankruptcy Act has come into operation, substantially identical in terms with the Act considered by VAUGHAN WILLIAMS, J.), for in such a period of time many persons, and, particularly, the official receiver and his department, would, presumably, have regulated their affairs according to the decision. But, in the first place, it is not a decision directly in point. As JENKINS, L.J., has pointed out, it was an essential characteristic of the facts in *Wild v. Southwood* (1) that the execution had not been completed, and, therefore, as the judge pointed out, in so far as the execution creditor (or what was equivalent to the execution creditor) sought to rely on s. 45 (1) of the Act of 1883 (now s. 40 (1) of the Act of 1914), he was disabled from claiming the benefit of the sub-section because he had not completed the execution. On the other hand, it is true that certain language used by VAUGHAN WILLIAMS, J., seems to give a greater effect than I myself would be disposed to give to the words which I have read from s. 37 (1) of the Act of 1914 (which corresponds to s. 43 of the Act of 1883), as he said ([1897] 1 Q.B. 319) that, at the date of the summons taken out to obtain the charging order, "the bankrupt's interest in the partnership had ceased to be his interest," viz., by the doctrine of relation back. I think that phrase is not strictly accurate, but, at least, requires qualification. I think it is part of the reasoning that the learned judge treated the doctrine of relation back as being necessary to his conclusion. He also gave to s. 45 of the Act of 1883 (which corresponds to s. 40 of the Act of 1914) the label "restrictive provision." But, in my judgment, the language used by him being, as I have ventured to suggest, not entirely accurate without qualification, it does not really affect the matter of construction whether one calls s. 45 (1) of the Act of 1883 (and, therefore, s. 40 (1) of the Act of 1914) restrictive or whether one calls it protective (as LINDLEY, L.J., appeared to do in *Re O'Shea's Settlement* (2)). The precise point in *Wild v. Southwood* (1) being different from that with which we are concerned, I am not prepared to say that the language of the judgment is of such a character that we ought to treat it as laying down a principle covering this case and to assume that that principle has been followed during the period which has elapsed since the decision. I, therefore, do not think that *Wild v. Southwood* (1) ought to prevent me from giving effect to what I regard as the true construction of these sections. I agree with the reasoning of JENKINS, L.J., with what he has said as regards the question of the Crown being bound, and with his conclusion that the appeal should be dismissed.

MORRIS, L.J.: I find myself in full agreement with the conclusion and the reasoning of the judgments which have been given.

Appeal dismissed.

Solicitors: *Solicitor, Board of Trade* (for the official receiver); *Treasury Solicitor* (for the registrar).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re 42-48 PADDINGTON STREET AND 62-72 CHILTERN STREET, ST. MARYLEBONE. MARKS & SPENCER, LTD. v. LONDON COUNTY COUNCIL AND ANOTHER.

[CHANCERY DIVISION (Harman, J.), October 25, 26, November 14, 1951.]

A *Town and Country Planning—Unfinished buildings—“ Works for the erection of a building ”—Completion of clearance of site—Erection of new building not begun—Separate contracts for clearance and building—Town and Country Planning Act, 1947 (c. 51), s. 78 (1).*

Town and Country Planning—Interim development—Conditional permission—Limitation of time for commencement and completion of work—No reason given for imposing condition—Validity of condition—Town and Country Planning Act, 1932 (c. 48), s. 10 (3).

B In August, 1937, the plaintiffs entered into a building agreement with P.E., under which, on the completion of agreed buildings on a certain site, the plaintiffs would become entitled to a lease of the premises for ninety years at an agreed rent. It was provided that the demolition of the existing buildings on the site must be started by mid-summer, 1938, and that the erection of the new buildings be completed by Christmas, 1939. The time limits, were, however, in fact extended beyond the date of these proceedings. C By August, 1938, all consents to the building scheme under the London Building Act, 1930, the Restriction of Ribbon Development Act, 1935, and the Town and Country Planning (General Interim Development) Order, 1933, had been obtained. Plans for the new buildings were approved, and on June 9, 1939, the plaintiffs entered into a written contract with contractors for the demolition of the existing buildings, which was completed by Aug. 2, 1939. At that time war with Germany was regarded as imminent and no contract for new building was entered into, and during the war the building project remained in abeyance. Execution of the scheme was resumed in November, 1948, when the plaintiffs gave notice to the London County Council of their intention to proceed. The council refused to sanction the development of the site, and the Central Land Board refused the plaintiffs' claim to exemption from development charge. The plaintiffs claimed that planning permission must be deemed to be granted to them by virtue of the Town and Country Planning Act, 1947, s. 78 (1). E

F **HELD:** where a contract had been entered into for both the demolition of existing buildings and the erection of new ones, that might be sufficient to constitute “ works for the erection . . . of a building ” within s. 78 (1) although only the demolition work had been carried out, but where, as in the present case, the demolition contract stood alone, the work of demolition had been finished, and no contract for the erection of a new building had been entered into before the appointed day, no “ works for the erection of a building ” had been “ begun but not completed ” before that day.

G The permission granted to the plaintiffs under the interim development order was dated Aug. 9, 1938, and was subject to a number of conditions of which the first was that the work should be commenced within six months and completed within eighteen months of Aug. 1, 1938, “ failing which the consent shall become null and void.”

H **HELD:** the condition relating to time was a condition within the contemplation of the Town and Country Planning Act, 1932, s. 10 (3), and, therefore, was not *ultra vires*; it was not necessary under that sub-section that the council should state their reasons for imposing conditions in granting the permission sought; and, therefore, even if the plaintiffs had begun the erection of a building before the appointed day (July 1, 1948), within s. 78 (1) of the Act of 1947, the works could not immediately before that day “ have been completed . . . in accordance with permission granted ” within the sub-section.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 78, see HALSBURY'S STATUTES, Second Edn., Vol. 25, p. 590.

ADJOURNED SUMMONS to determine, *inter alia*, whether, on the true construction of the Town and Country Planning Act, 1947, s. 78, the plaintiffs had not before the appointed day (July 1, 1948) begun, but not completed, works for the erection of a building on a certain site, and (ii) whether, on the true construction of the Town and Country Planning Act, 1932, s. 10 (3), and the Town and Country Planning (General Interim Development) Order, 1933, the plaintiffs had immediately before the appointed day had valid permission to complete the said works.

Rowe, K.C., J. R. Willis and V. M. C. Pennington for the plaintiffs.

Russell, K.C., and H. E. Francis for the first defendant, the London County Council.

Denys B. Buckley for the second defendant, the Central Land Board.

Cur. adv. vult.

Nov. 14. **HARMAN, J.**, read the following judgment. To succeed in this application the plaintiffs must satisfy the conditions imposed by the Town and Country Planning Act, 1947, s. 78 (1), which, so far as here relevant, is in the following terms:

" . . . where any works for the erection . . . of a building have been begun but not completed before the appointed day, then if immediately before that day those works could have been completed . . . in accordance with permission granted . . . under an interim development order . . . planning permission shall, by virtue of this section, be deemed to be granted under Part III of this Act in respect of the completion of those works."

The site concerned is a considerable one, fronting on East Street and Paddington Street, Marylebone, and forming part of the Portman estate. If the "works" of the plaintiffs on that site satisfied the conditions of the section, then they are entitled to complete those works without the permission (which has been refused) of the first defendant, the London County Council, and without paying a development charge to the second defendant, the Central Land Board.

The relevant facts are not seriously in dispute. They begin with a building agreement entered into in August, 1937, by the plaintiffs with a representative of the Portman estate. Under this agreement the plaintiffs would become entitled, on the completion of the agreed buildings on the site, to a lease for ninety years at a rent rising to £840 a year. The agreement provided for a forfeiture if the intended lessee should fail to proceed with or complete the works in accordance with the agreement, by sched. III to which the demolition of the old buildings must be begun by mid-summer, 1938, and the erection of the new ones completed by Christmas, 1939. These time limits have been extended beyond the present date. At the time this agreement was made, there was a number of buildings standing on the site held under leases which would all expire in March, 1938. The rents of these properties amounted in the aggregate to about £500 a year. In April, 1938, the plaintiffs' architects completed a written specification for the demolition of the old buildings. In June, 1938, the plaintiffs obtained vacant possession of the last occupied portion of the old buildings and by August, 1938, they had obtained all the consents necessary to their re-building scheme under the London Building Act, 1930, the Restriction of Ribbon Development Act, 1935, and the Town and Country Planning (General Interim Development) Order, 1933 (S.R. & O., 1933, No. 236). About the same time the Portman estate approved the re-building plans which were for administrative offices connected with the plaintiffs' business, and all was ready to go forward. The plaintiffs' architects then sent out offers to a number of builders, and tenders were received in October, 1938, which were not considered satisfactory by the plaintiffs on the ground of expense, and they were minded, instead of accepting any of them,

to entrust the work to Bovis, Ltd., contractors who had done work for them in the past on what may very roughly be called a "cost-plus" basis. No steps, however, were taken during the autumn or winter of that year (1938-39) and in March, 1939, some pressure was forthcoming from the Portman estate on the footing that the new buildings were due for completion at Christmas of that year. Stirred to action by this, the plaintiffs decided to proceed with the demolition of the old buildings, and on June 9, 1939, entered into a written

A contract with demolition contractors for this purpose. Under this document, the plaintiffs had to pay (as they did) £595 and the contractors had to complete the demolition (as they did) by Aug. 2, 1939. There was included in the work of demolition the clearance of the cellars under the old buildings, part of which were intended to be used in connection with the new buildings to be erected, although further excavation would have been necessary.

- B Mr. Lees, estate manager of the plaintiffs, who was cross-examined before me, stated that when the plaintiffs entered into this contract they intended to proceed, after the demolition was completed, with their re-building scheme. This evidence I accept. Indeed, the conclusion seems obvious, for persons in the plaintiffs' position, who are paying some £800 a year in rent, do not demolish buildings which might reasonably be expected to let for a considerable part at
- C any rate of that sum unless they intend to replace them by other buildings more to their purpose. The plaintiffs admit that no contract was ever entered into with Bovis, Ltd., and no instructions were given to that or any other firm to begin the new buildings. In fact, by the time the demolition was complete, no one was thinking much of new buildings. War was imminent and, even before the demolition was complete, application on behalf of the fire fighting services
- D then being trained to use this site had been made. This permission was granted, and the re-building project was for the time set aside, and, of course, remained in abeyance during the war and for some time thereafter. That it was never abandoned is common ground. It was not actively taken up again until November, 1948, when the plaintiffs sent written notice to the defendant council of their intention to proceed with what was described in their letter as "the
- E completion of the building work authorised by your council under the Town and Country Planning Act, 1932, and the Town and Country Planning (General Interim Development) Order, 1933." In May, 1949, the defendant council, purporting to act under the Act of 1947, refused to sanction what was described as the development of the site. Thereafter, there was an application to the second defendant for exemption from development charge, which was refused,
- F and the present application is the outcome.

To succeed the plaintiffs must satisfy two conditions: (i) that works for the erection of a building had been begun but not completed before the appointed day, *i.e.*, July 1, 1948; (ii) that immediately before that day those works could have been completed in accordance with permission granted under an interim development order. The plaintiffs aver that they have satisfied both these

G conditions. The defendants deny it. I will discuss these questions in the order stated.

As to the first question, counsel for the plaintiffs argued that the whole purpose of the purchase of the site was to re-build on it; that the approved plan for this was deferred, but never abandoned; that the object of the demolition carried out was the first step towards the new building; that there was no need to have

H begun re-building or to have a building contract, but that the condition was satisfied if there were works of a physical nature done on the site for the purpose of erecting buildings; that the demolition done satisfied the condition because, being carried out for the purpose of re-building, it must be part of it, and that what was begun, but not completed, before the appointed day was the entire plan for demolition and re-building. He called in aid s. 12 (2) of the Act of 1947 to show that this demolition, being part of a re-building scheme, would require permission under the Act as being a development of the land because it was

“the carrying out of building . . . or other operations in, on, over or under land . . .”,

demolition being (he argued) an “other operation” when considered in connection with re-building. He also referred to s. 80 of the Act by way of contrast and to show how the Act deals with a case where, though permission might have been granted for a change of user before the appointed day, no work had actually been begun. Counsel for the defendant council argued that the work done was mere demolition—done, no doubt, with the ultimate purpose of re-building—but that construction was no part of what was done. He argued that s. 78 deals with works which require planning permission under the earlier Acts and that demolition was not such a work, there being nothing in the Act of 1932 about demolition requiring any permission except in s. 17, which deals with historic buildings. He argued further that the work of demolition, which was the only work done, was not unfinished at the critical date and that it was impossible to go on the site on that date and point at any works as being unfinished works.

I propose to walk warily among the intricacies of this puzzling legislation and to decide no more than I need. In my judgment, it is really a question of fact whether, at the critical date, works for the erection of a building had been begun, but were not finished on the site. It was agreed before me that “works,” by reason of the use of the plural, must connote physical operations on the site. It is clear that the erection of a building need not have been begun, because otherwise no meaning would have been given to the words “works for.” It seems to me that, if there had been here a building contract which involved the demolition of the old buildings before the erection of the new, it might well have been possible to say that, though the performance of the contract had proceeded no further than the demolition of the old buildings, that was, nevertheless, works for the erection of the new. This is not that case. Here the demolition contract stands alone, the contractors’ work was finished, and no further contract ever came into existence. In my judgment, it is not possible to say that the site as it was on the appointed day contained works for the erection of a new building. I am, therefore, of opinion that the plaintiffs fail.

My decision on the first point is sufficient to conclude the case, but it may be desirable that I should express my views on the second point which was fully argued before me. As I have said, the plaintiffs must also show that immediately before July 1, 1948, the works which had been begun could have been completed in accordance with permission granted under an interim development order. I have also shown that by August, 1938, the plaintiffs had obtained all the necessary consents, and were, therefore, in a position at that time to complete the works. The question is whether they remained in that position until July, 1948. This calls for a consideration of the permission granted under the interim development order. This was contained in a document of Aug. 9, 1938, addressed by the council to the plaintiffs’ architects. The permission given is made subject to a number of conditions, the first of which is that the work be commenced within six months and completed within eighteen months from Aug. 1, 1938, “failing which the consent shall become null and void.” The remaining conditions I need not particularise. It is clear, therefore, that, if this condition be good, the plaintiffs cannot satisfy s. 78 (1) of the Act of 1947 because the permission had become void before the relevant date. The plaintiffs, however, argued that the conditions were void for two reasons—(i) that the condition as to time was *ultra vires* the authority and could be disregarded, and (ii) that the conditions were of no effect because no reasons for them were stated in the document.

The relevant section for this purpose is s. 10 (3) of the Town and Country Planning Act, 1932, which provides:

“Where an application for permission to develop land is made to the specified authority in manner provided by the [General Interim Develop-

ment Order, 1933], the authority may, subject to the terms of the order, grant the application unconditionally or subject to such conditions as they think proper to impose, or may refuse the application, and they shall be deemed to have granted the application unconditionally unless within two months from the receipt thereof, or within such longer period as the applicant may agree in writing to allow, they give notice to him that they have decided to the contrary, stating their reasons for so doing . . . ”

- A As to the point about time, it was argued that the conditions imposed must relate to development and have nothing to do with time. I cannot accept this contention. It seems to me that the question of time may be intimately bound up with the question of planning and that it cannot be unreasonable or irrelevant that an authority should fix a time limit to any permission they may grant.
- B If it were otherwise, the authority might be embarrassed by permissions long out of date and inappropriate to changed circumstances. Moreover, in para. 19 of sched. II to the Act of 1932, among the matters to be dealt with by schemes, limitation of time for operations of schemes is mentioned as one element, and it is to be observed that in the Town and Country Planning Act, 1944, s. 46 (1), the grant of permission for a limited period may be made part of any permission granted. For these reasons, I do not accept the first argument. The second
- C argument depends on the words “stating their reasons for so doing.” Do these words apply only where permission is refused, or do they apply also where conditions are imposed? In my judgment, the words “to the contrary” mean a decision to the contrary of a grant, in other words, a refusal. It is natural and proper that where the authority refuse to grant permission, they should state their reasons for so doing, in order that the applicant may not be embarrassed
- D in the appeal to the Minister which he may make. Where, however, conditions are imposed on a consent, the applicant is not embarrassed if he desires to appeal against the imposition of the conditions, as he knows what they are. For these reasons, I am of opinion that the permission granted validly imposed the conditions it contained, and that, therefore, the plaintiffs were not free to proceed
- E in 1948 and the provisions of s. 10 (3) of the Act of 1932, by which the authority must be deemed to have granted the application unconditionally, do not apply.

- For these reasons, in addition to those stated under the first head, I am of opinion that the plaintiffs fail to make out their case and that the summons should be answered by declaring, in answer to question 1, that on the true construction of s. 78 (1) of the Act of 1947 the plaintiffs had not before the appointed
- F day begun, but not completed, works for the erection of their building, and, in answer to questions 2 and 3, that on the true construction of s. 10 of the Act of 1932 the plaintiffs immediately before the appointed day had not a valid permission to complete the said works nor should they be deemed to have such a permission. I answer question 4 by saying the development charge under
- G Part VII of the Act of 1947 can be lawfully determined by the second defendants and that the plaintiffs will be bound to pay it.

Order accordingly.

Solicitors: *J. C. Parry* (for the plaintiffs); *J. G. Barr* (for the first defendant); *Treasury Solicitor* (for the second defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

R. v. FULHAM, HAMMERSMITH AND KENSINGTON RENT
TRIBUNAL. *Ex parte* GORMLY.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Slade and Devlin, JJ.),
November 2, 20, 1951.]

*Rent Control—Furnished house—Rent fixed on landlord's application—Further
reference by new tenant—No change of circumstances—Jurisdiction to entertain
new reference—Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 2 (2).*

A

On Aug. 25, 1949, on the application of the landlord a rent tribunal fixed the rent of a furnished house at £4 a week, which rent was registered by the local authority under s. 3 (2) of the Furnished Houses (Rent Control) Act, 1946. On July 16, 1951, on the reference of a new tenant the tribunal ordered a further reduction of the rent of the premises, no change of circumstances being alleged.

B

HELD: the rent fixed by a rent tribunal under s. 2 (2) of the Act and registered under s. 3 (2), was the rent payable in respect of the premises and not merely the rent payable as between the particular parties who took the case to the tribunal; that rent remained until, if it were fixed for a period, the expiration of that period, or until it was altered by the tribunal on an application made under s. 2 (3) of the Act on consideration of changed circumstances; in the present case, in the absence of changed circumstances, the tribunal had no jurisdiction to entertain the tenant's reference; and, therefore, the decision of Aug. 25, 1949, fixing the rent at £4 a week remained in force.

C

R. v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Marks
[1951] 2 All E.R. 465, applied.

D

FOR THE FURNISHED HOUSES (RENT CONTROL) ACT, 1946, s. 2, s. 3 and s. 4, see
HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 1086 and 1088.

Cases referred to:

- (1) *R. v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Marks*,
[1951] 2 All E.R. 465; [1951] 2 K.B. 694; 115 J.P. 453.
- (2) *Lazarus-Barlow v. Regent Estates Co., Ltd.*, [1949] 2 All E.R. 118; [1949]
2 K.B. 465; [1949] L.J.R. 1539; 2nd Digest Supp.
- (3) *Lloyd v. Cook, Goudge v. Broughton, Simson v. Miatt, Bartram v. Brown,*
Barker v. Hutson, [1929] 1 K.B. 103; 97 L.J.K.B. 657; 139 L.T. 452;
92 J.P. 199; Digest Supp.
- (4) *King v. York*, (1919), 88 L.J.K.B. 839; 31 Digest, Replacement, 634, 7427.
- (5) *R. v. Paddington & St. Marylebone Rent Tribunal. Ex p. Bedrock Invest-*
ments, Ltd., [1948] 2 All E.R. 528; [1948] 2 K.B. 413; [1949] L.J.R.
284; 112 J.P. 367; 2nd Digest Supp.

E

F

MOTION for an order of *certiorari* to bring up and quash an order of the Fulham, Hammersmith and Kensington Rent Tribunal, made on July 16, 1951, reducing the rent of a furnished letting which had already been fixed by a previous decision of the tribunal, dated Aug. 25, 1949. The order of July 16, 1951, had been made on the reference of a new tenant and no change of circumstances was alleged.

G

R. B. Willis for the landlord.

J. P. Ashworth for the tribunal.

H

Cur. adv. vult.

Nov. 20. The following judgments were read.

LORD GODDARD, C.J.: This is an application by the landlord for an order of *certiorari* to bring up and quash a decision of the tribunal dated July 16, 1951, whereby they reduced the rent of the premises, 23, Kenilworth Road,

Ealing, from £208 to £132 per annum. On July 20, 1949, the landlord applied to the tribunal to determine the reasonable rent of the flat, which was then let on a monthly tenancy as a furnished flat to one Mrs. Johnson at four guineas a week. On Aug. 25, 1949, the tribunal fixed the rent at £208 per annum, thereby reducing the original rent by 4s. per week. Mrs. Johnson subsequently quitted the flat, which was afterwards let to a Mr. Wilson. On Sept. 26, 1950, on Wilson's application, the tribunal purported to reduce the rent from £4 a week to £2 10s., but for reasons into which it is not necessary to enter that decision was quashed on an application for an order of *certiorari* by this court in April of this year. On May 12 Wilson again referred his contract to the tribunal, who heard the case on July 13. The matter was referred to the tribunal as though it was an original reference and not as one for re-consideration on any alleged change of circumstances, and the chairman of the tribunal, who has made an affidavit in the matter, agrees that the matter was dealt with on the footing of its being an original reference.

The determination of the tribunal is set out in a form known as F.R.10. This is not a statutory form but is one prepared by the Minister of Health for notifying decisions, and it is in these terms:

- C "Under s. 2 of the Furnished Houses (Rent Control) Act, 1946, I have to notify you that the rent fixed by the tribunal for the premises specified in the schedule below is as entered at (6) of the schedule, and the rent is so fixed, for the period entered at (7) or, if no such period is entered, for the period of duration of the Act. It will be lawful, however, for the lessor or the lessee or the local authority to refer the case to the tribunal for re-consideration of the rent so entered on the ground of change of circumstance.
- D Your attention is directed to the extracts from the Act printed overleaf."

The schedule then sets out the specification of the premises let, the names and addresses of the lessor and lessee, states that the premises were nearly fully furnished, and that the services provided by the lessor were hot water from the bathroom geyser the lessor having undertaken to pay for the gas for this hot water, and that the rent was reduced by the tribunal from £208 per annum to £132 per annum. The extracts from the Act which are printed on the back of the determination are s. 4, s. 5, s. 9 and s. 11. The period in respect of which the rent is so fixed was left blank. In the earlier determination of Aug. 25, 1949, against item (7) in the determination, namely, the period in respect of which the rent is so fixed, the words "No variation" had been entered, and that determination had been duly registered in the register kept for the purposes of the Act.

The grounds on which the relief was sought are (a) that the tribunal had no jurisdiction to make the decision, and (b) that the tribunal having, by their decision of Aug. 25, 1949, reduced the rent of the premises from £4 4s. a week to £4 a week, in consequence whereof the rent of £4 a week for the said premises was so entered in the register kept by the borough council, the tribunal had no jurisdiction to reduce the rent of the premises further except on the grounds of change of circumstances, which was at no time alleged. On the other hand, it was argued on behalf of the tribunal that the determination in August, 1949, was on a reference of a then existing tenancy, that it was only between the landlord and Mrs. Johnson, who was then the tenant, and that it was open to any subsequent tenant to refer the new letting to the tribunal, who were entitled to hear the case *de novo* and without regard to whether there had been any change of circumstance or not. If the form F.R. 10 were a statutory form it would, in my opinion, not be arguable that the tribunal, having once reduced the rent and stated no period for which the rent so reduced was to remain, could again reduce it. Their decision would have been that the rent remained for the period of the duration of the Act. The form, however, is not a statutory form, though at the same time it seems to me to have strong persuasive force as showing that,

in the opinion of the department responsible for the administration of the Act, if no special period was prescribed, the determination held so long as the Act was in force, irrespective of any change of parties to the tenancy.

We have to determine the question, and the first section which we have to consider is s. 2 (1) of the Furnished Houses (Rent Control) Act, 1946. This sub-section provides, omitting immaterial words, that

"Where a contract has . . . been entered into whereby one person (hereinafter referred to as the 'lessor') grants to another person (hereinafter referred to as the 'lessee') the right to occupy as a residence a house or part of a house . . . in consideration of a rent which includes payment for the use of furniture or for services . . . it shall be lawful for either party to the contract . . . to refer the contract to the tribunal for the district, and where any such contract . . . is so referred to the tribunal, they may by a notice in writing . . . require . . . such information as they may reasonably require . . . "

By sub-s. (2) the tribunal are to enter on consideration of the reference and, after making such inquiry as they think fit and giving the parties the opportunity of being heard, they shall approve the rent payable under the contract or reduce it to such sum as they may in all the circumstances think reasonable, or may, if they think fit, dismiss the reference. Sub-section (3) provides:

"Where the rent payable for any premises has been entered in the register in accordance with the provisions hereinafter contained, it shall be lawful for the lessor or the lessee or the local authority to refer the case to the tribunal for re-consideration of the rent so entered on the ground of change of circumstances . . . "

In that case power is given to the tribunal, if they think fit, to increase the rent. By sub-s. (5) an approval, reduction, or increase may be limited to rent payable in respect of a particular period, and by sub-s. (6)

" . . . a tribunal shall not be required to entertain a reference made otherwise than by the local authority if they are satisfied, having regard to the length of time elapsing since a previous reference made by the same party or to other circumstances, that the reference is frivolous or vexatious."

Section 3 provides for the local authority keeping a register for the purposes of the Act and prescribes what is to be entered therein, including the rent as approved, reduced, or increased, and, where the approval, reduction or increase is limited in respect of a particular period, a specification of that period. In passing, it may be observed that by s. 11 a certified copy of the register shall be receivable in evidence in all courts and in any proceedings, and that any person requiring a certified copy shall be entitled to obtain it on payment of the prescribed fee. The regulations made under the Act provide that the register shall be open to public inspection at the offices of the local authority during their normal hours of business. Section 4 (1) provides:

"Where the rent payable for any premises is entered in the register under the provisions of this Act, it shall not be lawful to require or receive—
(a) on account of rent for those premises in respect of any period subsequent to the date of such entry, (or, in a case in which a particular period is specified, in respect of that period) payment of any sum in excess of the rent so entered."

Section 9 (1) provides:

"A person who requires or receives any payment in contravention of s. 4 of this Act shall be guilty of an offence and be liable . . . to a fine not

exceeding £100 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment . . . ”

and, in addition, may be ordered to repay the amount paid.

A It is true that on reading s. 2 (1) it would appear that any contract in respect of furnished premises can be referred either by a landlord or a tenant. In my opinion, it is necessary to consider the Act as a whole and to see whether, from the other sections to which I have referred, it is possible for any number of applications to be made by successive tenants who do not allege that any change of circumstances has taken place since the rent was determined on the first application. If on the first application the rent was fixed for a particular period no one would doubt that on the expiration of the period a further application could be made, whether by the original tenant or one to whom the premises had been let subsequently, and that whether there had been a change of circumstances or not.

B Counsel for the landlord argued that, once the rent had been fixed, it applies *in rem* to the premises for the period for which it had been fixed, and, if no period had been fixed, then for the duration of the Act, and he placed reliance on *R. v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Marks* (1). The attention of the court in that case was not called to the decision of the Court of Appeal in *Lazarus-Barlow v. Regent Estates Co., Ltd.* (2) in which the Court of Appeal had considered how far it was right to refer to a determination under the Rent Control Acts as being equivalent to a judgment *in rem*. EVERSLED, L.J., said ([1949] 2 All E.R. 122):

D “The words ‘the Acts apply *in rem*’ have been used, by way perhaps of analogy, to illustrate the point that, given certain facts, the Acts will or may operate not merely in relation to a particular tenancy of some premises and between the parties to that tenancy, but in relation to the premises as such, for example, ‘by attaching to a dwelling-house a standard rent which applies to the whole house, and, where necessary, also applies by apportionment to every part’: *per* GREER, L.J., in *Lloyd v. Cook* (3) ([1929] 1 K.B. 135); and see also the earlier case of *King v. York* (4) where a Divisional Court held that it was the house itself and not a particular tenant that was protected. Though we have examined carefully all the cases cited to us in argument it is clear that in none of them was the point raised, still less decided, that a determination of the facts essential to and involving the applicability of the Acts to any premises pronounced by a court of competent jurisdiction operated as conclusive evidence for or against persons not parties or privies to the judgment.”

F I do not understand that the Court of Appeal in that case meant to overrule the earlier decisions which have, I think, laid down that a standard rent applied to the *res*, that is, the house, and so would remain as the rent for all purposes, subject only to permitted increases. For my part, I do not propose to decide this case on that ground. It will be observed that s. 2 (2) refers to “the rent payable under the contract” which may be approved or reduced, and s. 2 (3) and s. 4 (1) refer to “the rent payable for any premises,” and that, in my opinion, means the rent payable in consequence of the decision of the tribunal and it is that rent which has to be entered in the register. What, I ask myself, is the object of the register which the Act requires to be kept? It cannot, I think, be merely for the purpose, as counsel for the tribunal suggested, of enabling a prospective tenant or someone who was, perhaps, thinking of buying the premises to test the market in the sense of finding out the sort of rents which were being approved or fixed by the local tribunal. I think the object must be to enable any person to see what the particular rent is for particular premises, though it may be only for a particular period. The keeping of registers by local authorities is a familiar feature of legislation dealing with rent control. Before the war, when Acts were passed dealing with the de-control of premises, registers

had to be kept of those premises which had been, but were no longer, subject to rent control, and entry in the register was necessary to perfect the de-control. This, no doubt, was to enable persons to find out conclusively whether the Acts applied to a particular house or not. Under the Landlord and Tenant (Rent Control) Act, 1949, which deals with the fixing by a tribunal of standard rents of premises let for the first time after Sept. 1, 1939, a register has to be kept of the determinations. This seems to me to point strongly to the intention that decisions of tribunals should be registered for the information of the public, that the rent so registered should be the rent payable in respect of the premises and not merely the rent payable between two particular parties who first took the case to the tribunal, and that that rent should remain until it is altered by the tribunal on an application made under s. 2 (3) on a consideration of changed circumstances. To my mind, s. 4 of the Act is even more compelling. Once the rent payable for any premises is entered in the register it becomes unlawful for a landlord not merely to receive, but also to require, which I interpret as meaning to ask for, any increased rent, and, if he does, he is exposed to the penalty of six months' imprisonment or a fine of £100, or both. Section 4 and s. 9, which between them create the offence and impose the penalties, are printed on the notice of determination which is sent out.

In my opinion, it would be most undesirable to give an interpretation to this Act which would leave the question whether a criminal offence had been committed to be determined on nice considerations of s. 2, and I cannot think it was intended that on a change of tenancy a landlord could be allowed to ask for a higher rent than that which was entered in the register and could then say he had committed no offence against s. 4 because the tenant might be entitled to go to the tribunal and ask them once again to consider the rent. Equally it seems to me that the Act can scarcely have contemplated a landlord being harassed by repeated applications where no change of circumstances was alleged, and it seems to me that, if the argument for the tribunal is right, although on the first application they may have fixed a rent for a particular period, such as six months, if within that period a further letting took place, as well might be the case on a weekly or monthly tenancy, the landlord might again be taken to the tribunal by a tenant who sought a reduction. It was suggested in argument that there might be a danger of a landlord in collusion with some other person making an application to the tribunal to fix a rent which, in fact, was more than the premises were worth, so that he could charge subsequent tenants more than the premises were worth. From what this court knows of the proceedings of the tribunals I think it is very unlikely that any such thing could happen. Our experience is that the tribunals always visit the premises and see them for themselves. There is the further protection that the local authority can, if necessary, intervene, and there is also the consideration that, if some collusive proceedings were taken, it would amount to a fraud on the tribunal, and where a fraud was proved I have little doubt that this court could intervene if necessary by an order of *certiorari* to get rid of a decision which the tribunal had been misled into making. In my opinion, the decision of Aug. 25, 1949, stands, and, as no change of circumstances was alleged, the tribunal had no jurisdiction to reduce the rent which had been registered, and for these reasons I think the order for *certiorari* must go. I would add that **DEVLIN, J.**, who has read this judgment, agrees with it.

SLADE, J.: I agree. I think the point which arises for decision in this case has already been concluded in the landlord's favour by the decision of this court in *R. v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Marks* (1) and by the decision of the Court of Appeal in *R. v. Paddington & St. Marylebone Rent Tribunal. Ex p. Bedrock Investments, Ltd.* (5) which this court applied in *R. v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Marks* (1). It was implicit in each of those two decisions, and formed one of the reasons for

A the decision both of the Court of Appeal in *R. v. Paddington & St. Marylebone Rent Tribunal. Ex p. Bedrock Investments, Ltd.* (5) and of this court in *R. v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Marks* (1), that a determination and registration under the Furnished Houses (Rent Control) Act, 1946, operated *in rem*, at least to the extent that it was not limited to the particular tenancy of the particular premises which came before the tribunal and which resulted in the registration, but that it operated to determine the status of the premises as such. I do not read either of those decisions as being limited to the particular contract, and I think it was those considerations which EVERSHED, L.J., had in mind when he stated in the passage which my Lord has cited in *Lazarus-Barlow v. Regent Estates Co., Ltd.* (2) that the words "the Acts apply *in rem*" had been used to show that the Acts will or may operate, not merely in relation to a particular tenancy of the premises and between the parties to that tenancy, but in relation to the premises as such.

B It is true that *Lazarus-Barlow v. Regent Estates Co., Ltd.* (2) was not cited to the court in *R. v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Marks* (1), but I understand *Lazarus-Barlow v. Regent Estates Co., Ltd.* (2), a decision of the Court of Appeal, to decide merely that the fact that the Rent Restrictions Acts might operate *in rem* did not mean that judgments under those Acts were conclusive against all persons and for all purposes, for example, to decide so as to bind persons who were neither parties nor privies to the decision in relation to facts which arose for determination whether a particular letting, meaning thereby a letting for the purposes of the Rent Restrictions Acts, was or was not a letting to which the Acts applied on a material date, such as Sept. 1, 1939. That, I think, is all that *Lazarus-Barlow v. Regent Estates Co., Ltd.* (2) decided, and that it in no way undermined the many determinations of the Court of Appeal for the purposes of the Rent Restrictions Acts that a determination of the standard rent operated *in rem* so as to fix the status of the premises. In my view, in the two cases I have mentioned the court came to the conclusion, and it was one of the reasons for their decision, that a registration of the rent under the Furnished Houses (Rent Control) Act, 1946, also operated *in rem* to that extent. That is why I think the point which arises for decision in this case has already been concluded in the landlord's favour, both by the decision of the Court of Appeal, which binds us, in *R. v. Paddington & St. Marylebone Rent Tribunal. Ex p. Bedrock Investments, Ltd.* (5), and by the decision of this court in *R. v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Marks* (1), which, whether it strictly binds us or not, I should certainly follow.

F *Order for certiorari.*
Solicitors: *Freeborough & Co.* (for the landlord); *Solicitor, Ministry of Health* (for the tribunal).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re E. W. SAVORY, LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), November 19, 1951.]

Company—Winding-up—Voluntary winding-up—Cumulative preferential dividends in arrears—Priority of payment of arrears over repayment of capital to ordinary shareholders—Date at which arrears to be calculated.

A

The articles of a company provided, *inter alia*: "5B. The preference shares in the present capital shall confer on the holders the right to a fixed cumulative preferential dividend at the rate of £6 per cent. per annum on the capital paid up thereon and shall rank both as regards dividends and capital in priority to all other shares, both present and future."

B

HELD: on the true construction of art. 5B the preference shareholders were entitled in the winding-up of the company to arrears of the six per cent. cumulative preferential dividend on their preference shares, calculated up to the commencement of the winding-up, in priority to any repayment of capital to the holders of ordinary shares.

Re Walter Symons, Ltd. ([1934] Ch. 308), and *Re F. de Jong & Co., Ltd.* ([1946] 1 All E.R. 556), applied.

C

Re Wood, Skinner & Co., Ltd. ([1944] Ch. 323), distinguished.

AS TO RIGHTS OF PREFERENCE SHAREHOLDERS IN A WINDING-UP, see HALSBURY, 1949 Edn., Vol. 5, p. 765, para. 1248; and FOR CASES, see DIGEST, Vol. 10, pp. 1005-1008, Nos. 6975-6989, and Digest Supp.

D

Cases referred to:

(1) *Re Walter Symons, Ltd.*, [1934] Ch. 308; 103 L.J.Ch. 136; 150 L.T. 349; Digest Supp.

(2) *Re Metcalfe (William) & Sons, Ltd.*, [1933] Ch. 142; 102 L.J.Ch. 121; 148 L.T. 82; Digest Supp.

(3) *Re Wood, Skinner & Co., Ltd.*, [1944] Ch. 323; 113 L.J.Ch. 215; 171 L.T. 37; 2nd Digest Supp.

E

(4) *Re F. de Jong & Co., Ltd.*, [1946] 1 All E.R. 556; [1946] Ch. 211; 115 L.J.Ch. 173; 174 L.T. 299; 2nd Digest Supp.

(5) *Scottish Insurance Corp'n., Ltd. v. Wilsons & Clyde Coal Co., Ltd.*, [1949] 1 All E.R. 1068; [1949] A.C. 462; [1949] L.J.R. 1190; 2nd Digest Supp.

F

(6) *Re Isle of Thanet Electricity Supply Co., Ltd.*, [1949] 2 All E.R. 1060; [1950] Ch. 161; 2nd Digest Supp.

(7) *Re Dominion Tar & Chemical Co., Ltd.*, [1929] 2 Ch. 387; 98 L.J.Ch. 448; 142 L.T. 15; Digest Supp.

(8) *Birch v. Cropper, Re Bridgewater Navigation Co., Ltd.*, (1889), 14 App. Cas. 525; 59 L.J.Ch. 122; 61 L.T. 621; 10 Digest 1003, 6965.

G

ADJOURNED SUMMONS to determine, *inter alia*, (i) whether in the voluntary winding-up of E. W. Savory, Ltd., the holders of the preference shares in the capital of the company (a) were entitled to arrears of the six per cent. cumulative preferential dividend on their preference shares in priority to any repayment of capital to the holders of the ordinary shares, or (b) were not entitled to any such arrears; (ii) if the answer to question (i) were in the terms of alternative (a) thereof, whether such arrears were to be calculated (a) up to the commencement of the winding-up of the company or (b) up to the date of repayment.

H

Instone for the liquidator.

M. M. Wheeler for the preference shareholders.

H. H. Monroe for the ordinary shareholders.

WYNN-PARRY, J. (having stated question (i) as set out above): The relevant article is art. 5B, which was adopted by special resolution of the company on May 8, 1931, and provides:

A "The preference shares in the present capital shall confer on the holders the right to a fixed cumulative preferential dividend at the rate of £6 per cent. per annum on the capital paid up thereon and shall rank both as regards dividends and capital in priority to all other shares, both present and future."

In *Re Walter Symons, Ltd.* (1) the relevant provision was contained in cl. 5 of the memorandum, and, so far as relevant, was as follows:

B "The preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of twelve per cent. per annum on the capital for the time being paid up thereon . . . and shall rank both as regards dividends and capital in priority to the ordinary shares, but shall not confer the right to any further participation in profits or assets . . ."

C MAUGHAM, J., held that, on the true construction of that provision, the preference shareholders were entitled in a liquidation, in priority to the holders of the ordinary shares, to payment of the arrears of the fixed cumulative preferential dividend and to repayment of capital. In the course of his judgment MAUGHAM, J., said ([1934] Ch. 312):

D "I think it is conceded, at any rate I think it is clear, that, but for the words 'and shall rank both as regards dividends and capital in priority to the ordinary shares,' the preference shareholders would not be entitled to claim in a winding-up payment of the arrears of fixed cumulative preferential dividend at the rate of twelve per cent. The question, therefore, is reduced to this: What is the true meaning of the words that I have last cited? To my mind, it is reasonably clear on construction that they refer to something which is to take place in the winding-up. Not only does that appear from the word 'rank,' but it also appears from the reference to capital, which of course would not be distributable if the company were a going concern . . ."

E

MAUGHAM, J., up to that point had construed words which, in all material respects, are similar to the words which I have to construe. He continued (*ibid.*):

F ". . . and, finally, the words 'but shall not confer the right to any further participation in profits or assets' seem to me to point very strongly in favour of the view that it is a clause which in this case is dealing with what is to happen in the winding-up."

G Putting aside for the moment any consideration of the circumstance that at that time the decision in *Re Metcalfe (William) & Sons, Ltd.* (2) was good law, it is clear from the words which MAUGHAM, J., used that he would have been prepared to place on the clause he was construing the construction which he did place on it even in the absence of those last words

"but shall not confer the right to any further participation in profits or assets,"

H because he introduces those words by the co-ordinate conjunction "and" coupled with the word "finally." Later, he says (*ibid.*, 313):

"Now, how am I to construe the word 'dividends' in the phrase 'both as regards dividends and capital,' regarding that, as I have said I do, as a phrase meaning 'in the winding-up'? On the whole, though not without hesitation, I have come to the conclusion that the word 'dividends' should be construed as meaning 'arrears of fixed cumulative preferential dividend.' This clause is dealing, at any rate in this place, with the rights

of preference shareholders who are stated to be entitled as of right to a fixed cumulative preferential dividend."

That passage appears to me to apply in full force to the words which I have to construe, and, therefore, so far as it goes, that case is a decision which the holders of the preference shares in this case are entitled to pray in aid.

In *Re Wood, Skinner & Co., Ltd.* (3) the relevant provision was contained in cl. 5 of the memorandum, and it reads, so far as material, as follows:

"Such preference shares shall confer the right to a fixed cumulative dividend of £6 per cent. per annum on the capital paid up thereon and shall rank both as regards dividends and capital in priority to the ordinary shares with power to increase the capital."

COHEN, J., held that, after payment of or provision for the debts and liabilities of the company and the repayment of the preference capital, the preference shares were not entitled to any further priority over the ordinary shares for payment of arrears of dividend, and he distinguished *Re Walter Symons, Ltd.* (1). In the course of his judgment, he said ([1944] Ch. 327):

"I have no doubt in my mind, and I think that it is reasonably clear on the authorities to which my attention was called, that the preference shareholders, had there been any surplus after repaying capital on both preference and ordinary shares, would have been entitled to participate *pari passu* with the ordinary shareholders in the distribution of the surplus assets."

In other words, COHEN, J., was recognising the circumstance that at that date the decision in *Re Metcalfe* (2) was good law. The effect of that decision was that, in the absence of words pointing to the contrary, the holders of preference shares were entitled to participate with the holders of ordinary shares in surplus assets. It is also to be observed (a point which was commented on in the later case of *Re F. de Jong & Co., Ltd.* (4)) that in the provision in cl. 5 of the memorandum of *Wood, Skinner & Co., Ltd.* there was no provision for the cumulative dividend to be a preferential dividend, and, therefore, there was not the same line of reasoning open in that case as was adopted by MAUGHAM, J., in *Re Walter Symons, Ltd.* (1).

In *Re F. de Jong & Co., Ltd.* (4) (at the date of which the decision in *Re Metcalfe* (2) was still to be regarded as good law) the Court of Appeal had to consider an article in the following terms:

"The said preference shares shall carry the right to a fixed cumulative preferential dividend at the rate of six per cent. per annum on the capital for the time being paid up thereon respectively, and shall have priority as to dividend and capital over the other shares in the capital for the time being, but shall not carry any further right to participate in the profits or assets."

In the course of his judgment MORTON, L.J., having read the first part of the relevant article, said ([1946] 1 All E.R. 557):

"That part of the sentence is perfectly clear. It is dealing with dividends payable out of the profits of the company, *i.e.*, dividends in the true and ordinary sense while the company is a going concern. It is to be noted that the word 'preferential' clearly shows that the dividend on those preference shares is to have priority over the dividend on the ordinary shares. The next part of the sentence is: . . . 'and shall have priority as to dividend and capital over the other shares in the capital for the time being.' To what does that portion of the sentence refer? To my mind it refers to the rights in a winding-up."

It will be seen that MORTON, L.J., has taken the first two points that MAUGHAM, J., on very similar words, took in *Re Walter Symons, Ltd.* (1). MORTON, L.J., continues (*ibid.*):

A "I say that for three reasons. First, the provision as to having priority as to dividend must, I think, refer to a winding-up because the word 'preferential' has already established the priority of the preference shareholders as to dividend, while the company is a going concern. Secondly, the words 'priority as to capital' refer naturally to a distribution of the assets in the winding-up . . . The third reason is that one would expect to find, somewhere in the articles, provisions dealing, not only with the rights of the preference shareholders as to dividends while the company is a going concern, but also provisions as to what are to be the rights of the preference shareholders in a winding-up. Unless the passage which I have just read deals with those rights in a winding-up, there is no provision at all informing the preference shareholders what their rights in a winding-up are to be."

C In my view, the observations of MAUGHAM, J., and MORTON, L.J., in *Re Walter Symons, Ltd.* (1), and *Re F. de Jong & Co., Ltd.* (4), respectively are of the greatest possible help in resolving the problem which I have before me. They are observations which were made on provisions which, in all material respects, were similar to the provision which I have to construe. As a matter of construction, MAUGHAM, J., and MORTON, L.J., came to the conclusion that the twofold reference to the preferential nature of the dividend rights of the preference shareholders pointed almost of themselves conclusively to the result that the words "shall rank both as regards dividends and capital" should be construed as referring to the time when the company has gone into liquidation. The only difference between the provision which I have to construe and the provisions in the memorandum of Walter Symons, Ltd., and the articles of F. de Jong & Co., Ltd., lies in the absence in the present case of the words "but shall not confer the right to any further participation in profits or assets" which are to be found in *Re Walter Symons, Ltd.* (1), and the almost similar language in *Re F. de Jong & Co., Ltd.* (4). It will be borne in mind, as I have already pointed out, that MAUGHAM, J., would have been prepared to decide the case before him without reference to those words, but he regarded their presence as finally concluding the matter. COHEN, J., in *Re Wood, Skinner & Co., Ltd.* (3), treated those words as of the greatest importance, and, in distinguishing the earlier decision of *Re Walter Symons, Ltd.* (1), pointed out that the presence of those words was almost decisive. Perhaps the same emphasis is not to be found placed on them in *Re F. de Jong & Co., Ltd.* (4), but it is to be remembered that all those three cases were decided when *Re Metcalfe* (2) was still considered to be good law. The result of the decision of the House of Lords in *Scottish Insurance Corp., Ltd.* v. *Wilsons & Clyde Coal Co., Ltd.* (5) was that *Re Metcalfe* (2) was overruled. The decision of the House of Lords was considered and applied in the Court of Appeal in *Re Isle of Thanet Electricity Supply Co., Ltd.* (6).

H Without going into the matter in any further detail, I agree with the submission put forward by counsel for the preference shareholders that the result of the decision of the House of Lords in *Scottish Insurance Corp., Ltd.* v. *Wilsons & Clyde Coal Co., Ltd.* (5), as interpreted by the Court of Appeal in *Re Isle of Thanet Electricity Supply Co., Ltd.* (6), is that a provision such as that to be found at the end of cl. 5 of the memorandum in *Re Walter Symons, Ltd.* (1) is to be implied in this case as matter of construction, and that, therefore, the preference shareholders in this case discharge the onus which is thrown on them by the decision of the Court of Appeal in *Re Isle of Thanet Electricity Supply Co., Ltd.* (6), I, therefore, propose to declare that the holders of the preference shares are entitled to the arrears of the six per cent. cumulative preferential

dividend on their preference shares in priority to any repayment of capital to the shareholders of the ordinary shares.

[HIS LORDSHIP further held that the preference shareholders were entitled to receive the gross amount of such arrears and not merely the said amount less income tax, and heard argument on the question numbered (ii) above.]

WYNN-PARRY, J.: The article in question, so far as express words are concerned, is silent on this point. It is true, as counsel for the preference shareholders pointed out, that provision may be made in the articles of association giving the holders of preference shares the right to receive arrears of dividend down to the date of repayment, but, *prima facie*, and without any reference to authority, I should have thought that, in the absence of any such express words extending the right of the holders of the preference shares in an article, the true construction of which is to give the holders of preference shares a right to arrears of dividend, they would have the right to those arrears up to the date of the winding-up of the company, when the whole position becomes crystallised. Counsel for the preference shareholders sought to rely on some words in the judgment in *Re Dominion Tar & Chemical Co., Ltd.* (7), where EVE, J., in reference to arrears of preferential dividend, used the word "interest." EVE, J., said ([1929] 2 Ch. 389):

" . . . but all arrears of the interest payable to the preference shareholders at the rate fixed by the contract between them and the company . . . ";

and from that counsel for the preference shareholders sought to argue that, in the case of an article like this, I should treat the right to dividend as being in all respects analogous to a right to receive interest. Counsel further relied on a passage in the judgment of SIR RAYMOND EVERSLED, M.R., in *Re Isle of Thanet Electricity Supply Co., Ltd.* (6), where he says ([1949] 2 All E.R. 1067):

" I think that, during the sixty years which have passed since *Birch v. Cropper* (8) was before the House of Lords, the view of the courts may have undergone some change in regard to the relative rights of preference and ordinary shareholders—and to the disadvantage of the preference shareholders, whose position has, in that interval of time, become somewhat more approximated to the role which Sir Horace Davey attempted to assign to them, but which LORD MACNAGHTEN rejected in *Birch v. Cropper* (8), namely, that of debenture holders."

In my view, neither of those passages separately nor the two cumulatively provide a sufficient reason for construing an article such as art. 5B in this case (which is wholly silent on the point) as one which confers on the holders of the preference shares the right to their arrears beyond the date of the liquidation, and I, therefore, answer the question in that sense.

Order accordingly.

Solicitors: Peacock & Goddard, agents for Bevan, Hancock & Co., Bristol (for all parties).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

In the Estate of WAYLAND.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pearce, J.), November 21, 1951.]

Will—Revocation—Revocation of foreign will—English will containing revocation clause—Will expressed to apply only to estate in England—Revocation of earlier will made in Belgium and disposing only of property in Belgium.

A *Probate—Grant—Foreign will disposing only of property abroad—Administration of Justice Act, 1932 (c. 55), s. 2 (1).*

On Apr. 6, 1947, the testator, a British subject domiciled in England, made a will in Brussels in accordance with the law of Belgium. This will was expressed to deal only with his Belgian property. On July 26, 1949, he made a will in England which contained a revocation clause, but in which he went on to declare: "... this will is intended to deal only with my estate in England." When giving instructions for his English will, he informed the solicitor that he had made a Belgian will in respect of his Belgian estate, and, before and after making his English will, he wrote to his Belgian solicitor in regard to the custody of his Belgian will.

B HELD: (i) the revocation clause in the English will was intended to revoke all former wills dealing with English property, and was not intended to, and did not, revoke the Belgian will.

Dictum of SIR JAMES HANNEN, P., in Dempsey v. Lawson (1877) (2 P.D. 107), applied.

Collins v. Elstone ([1893] P. 1), distinguished.

D (ii) under the Administration of Justice Act, 1932, s. 2 (1), the court had jurisdiction to make a grant of probate notwithstanding that there was no property in England, and, therefore, probate could be granted of the Belgian will even though it disposed only of property in Belgium.

AS TO EXPRESS REVOCATION, see HALSBURY, Hailsham Edn., Vol. 34, p. 78, para. 110; and FOR CASES, see DIGEST, Vol. 44, pp. 321-324, Nos. 1542-1559.

E FOR THE ADMINISTRATION OF JUSTICE ACT, 1932, s. 2 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 791.

Cases referred to:

- F** (1) *Gladstone v. Tempest*, (1840), 2 Curt. 650; 163 E.R. 538; Digest Supp.
 (2) *Dempsey v. Lawson*, (1877), 2 P.D. 98; 46 L.J.P. 23; 36 L.T. 515; 41 J.P. 696; 44 Digest 322, 1544.
 (3) *Collins v. Elstone*, [1893] P. 1; 62 L.J.P. 26; 67 L.T. 624; 44 Digest 323, 1558.
 (4) *Lowthorpe-Lutwidge v. Lowthorpe-Lutwidge*, [1935] P. 151; 104 L.J.K.B. 71; 153 L.T. 103; Digest Supp.
G (5) *In the Goods of Tucker*, (1864), 3 Sw. & Tr. 585; 34 L.J.P.M. & A. 29; 164 E.R. 1402; 23 Digest 82, 703.
 (6) *In the Goods of Coode*, (1867), L.R. 1 P. & D. 449; 36 L.J.P. & M. 129; 16 L.T. 746; 23 Digest 82, 708.

H MOTION by the executors of Sir William Wayland for the revocation of a grant of probate of an English will, dated July 26, 1949, and a codicil thereto, and for a fresh grant of probate of two Belgian wills, dated Apr. 6, 1947, and of the English will and codicil.

The Belgian wills, which were made in accordance with the law of Belgium, dealt only with the testator's Belgian property. There was a revocation clause at the beginning of the English will, but the testator went on to declare that the will was intended to deal only with his estate in England. The applicants claimed that the revocation clause in the English will did not operate to revoke the Belgian wills, and that, under the Administration of Justice Act, 1932, s. 2 (1),

probate could be granted of the Belgian wills even though they disposed only of property in Belgium.

Simon, K.C., for the applicants.

PEARCE, J.: The testator made five testamentary dispositions. The first was a will made on Apr. 6, 1947, in Brussels. This was expressed to deal only with his Belgian property and was made in accordance with the law of Belgium with the help of a Belgian lawyer. Being made by a British subject domiciled in England, it would be admissible to probate under the Wills Act, 1861, s. 1, unless it was revoked and unless the fact that it did not deal with any property in England prevented the making of a grant. That will remained in the custody of the Belgian lawyer. Secondly, on the same day the deceased made a copy of that will in his own handwriting in the presence of his attorney. According to the law of Belgium, that copy is also a good will, and, therefore, it too would be admissible to probate. The testator kept that copy and it was found in his desk after his death. Thirdly, he made a codicil to his Belgian will dated Oct. 27, 1948. That codicil was written on English paper in the testator's handwriting and was found among his papers after his death. Had it been written in Belgium it would have been valid. As, however, it was presumably not written in Belgium, it is not valid according to Belgian law. It is not valid by English law since it is not witnessed, and, therefore, it may be disregarded. Fourthly, he made a will dated July 26, 1949, which expressly provides that it shall only relate to property in England. That will contains a revocation clause. Fifthly, he executed a codicil to his English will.

Two questions arise: (a) whether the Belgian wills are revoked by the English will; (b) whether there is any power to admit the Belgian wills to probate in England since they do not dispose of any English property. The estate consists of property to the value of about £3,000 in Belgium and to the value of about £64,000 in England. If the executors do not obtain a grant of the Belgian wills in England, under the law of Belgium duty becomes payable on the whole of the testator's estate including the £64,000 in England. That duty would largely exceed the amount of the Belgian assets. The practical effect would be that the executors would have to abandon the Belgian property since, if they tried to deal with it, the taxes would far exceed its value. This result would be unfair, and if a grant can properly be made it is right to make it.

On July 20, 1949, a few days before the testator made his English will, he wrote to his Belgian lawyer making provision for the future custody of his Belgian will. By a letter of Aug. 10, 1949, shortly after the execution of the English will, he wrote to his Belgian lawyer saying: "I note you will take charge of my will which Collette drew out for me"—i.e., his original Belgian will. When he was giving instructions in England for his English will his solicitor asked him what should be done about the Belgian estate. He answered: "Don't worry about that. My Belgian lawyer will take care of it as I have made a Belgian will." It is clear to me from those circumstances that the testator was unaware that the revocation clause in his English will might operate to revoke the Belgian wills and that he did not intend it so to do.

In *Gladstone v. Tempest* (1) cheques written in 1833 by the deceased on his bankers, but not intended to have effect until after his death, were pronounced for as part of the testamentary disposition of the deceased, although in 1834 he had formally executed a will disposing of the whole of his property and containing a full clause of revocation. In his judgment SIR HERBERT JENNER said (2 Curt. 653):

"But it has been over and over again laid down that probate of a paper may be granted of a date prior to a will with a revocatory clause, provided the court is satisfied that it was not the deceased's intention to revoke that particular legacy or benefit."

In *Dempsey v. Lawson* (2) SIR JAMES HANNEN, P., said (2 P.D. 107):

"Even if the second instrument contains a general revocatory clause, that is not conclusive, and the court will, notwithstanding, consider whether it was the intention of the testator to revoke a bequest contained in a previous will."

A *Collins v. Elstone* (3) is to a different effect. In that case the testatrix had inserted a revocation clause in a mistaken belief that it would not revoke a former will and it was there held by SIR FRANCIS JEUNE, P., that he was unable to allow the earlier will to stand. In *Lowthorpe-Lutwidge v. Lowthorpe-Lutwidge* (4) LANGTON, J., in dealing with the question whether a general revocatory clause revoked an earlier testamentary exercise of a power of appointment, found, on the facts of that case, that it did so revoke it. Dealing with *Collins v. Elstone* (3), **B** he said ([1935] P. 156):

C "I need not, perhaps, refer to *Collins v. Elstone* (3), a decision of LORD ST. HELIER in which he refused entirely to allow words of revocation to be, as it were, erased, even though the testatrix had been specifically advised that they meant something different from what they really did. If it is necessary to make any distinction, it may be said that that case was more a statement of law than of fact. It really is a question in each case for the court to decide: Is there evidence, and sufficient evidence, to establish that the testator did not intend to revoke? I do not think really the law is more complicated than that."

D LANGTON, J., then said that a strong burden was on the person asserting that the clause of revocation did not in fact revoke all previous testamentary dispositions.

Counsel for the applicants argues that it matters not how heavy the burden on him is, since the facts of this case make it clear that the testator was not intending to revoke his Belgian wills. I agree. Moreover, this revocation clause is different from that in *Collins v. Elstone* (3). It comes at the beginning of the will and in the next line but one the testator says:

"I declare that my domicile is England and that this will is intended to deal only with my estate in England."

F If the revocation clause is read to mean: "I revoke all former wills dealing with English property," it is consistent with the later words "this will is intended to deal only with my estate in England." If it is read as revoking the Belgian wills, then the English will would deal with estate other than his estate in England, and the provisions would be inconsistent. In my view, the former is the right construction. The surrounding circumstances leave me in no doubt that that is the construction which the testator intended.

G There remains the question whether I can admit the Belgian wills to probate. Before 1932 there is no doubt that this court would not have admitted them to probate. In *In the Goods of Tucker* (5) the deceased had died in France, leaving personal estate there, but none in England. The headnote reads:

H "... it was alleged, that by the law of France her husband, from whom she had eloped, could not establish his claim to her property there without a grant from this court—Held, that the court had no jurisdiction to make a limited grant to enable him to substantiate his claim to the property in the courts of France."

In his judgment SIR JAMES WILDE said (3 Sw. & Tr. 586):

"The foundation of the jurisdiction of this court is, that there is personal property of the deceased to be distributed within its jurisdiction. In this case, the deceased had no property within this country, and the court has therefore no jurisdiction."

In *In the Goods of Cooode* (6) SIR JAMES WILDE held to the same effect, and for the same reasons, that this court could not make a grant where there was no property within its jurisdiction.

The Administration of Justice Act, 1932, s. 2 (1), provides:

"Notwithstanding anything in s. 20 or any other of the provisions of the [Supreme Court of Judicature (Consolidation) Act, 1925], the High Court shall have jurisdiction to make a grant of probate or administration in respect of a deceased person notwithstanding that the deceased person left no estate."

Counsel for the applicants has argued that, since the passing of that Act, the *ratio decidendi* of *In the Goods of Tucker* (5) and *In the Goods of Cooode* (6) has disappeared and that this court is entitled to make a grant of probate even though it is of a will under which no property passes in this country. In DICEY'S CONFLICT OF LAWS, 6th ed., p. 301, this is evidently regarded as being the case, as it is there stated, under the heading "Administration":

"The court has jurisdiction to make a grant in respect of the property of a deceased person, either (i) where such property is locally situate in England at the time of his death; or (ii) where such property has, or the proceeds thereof have, become locally situate in England at any time since his death; but the circumstance that the deceased left no property whatsoever in England is not by itself a bar to a grant."

In support of the concluding words, the Administration of Justice Act, 1932, s. 2 (1) is cited. Among the illustrations given under that heading is the following (*ibid.*, 310):

"The wife of an Englishman residing and domiciled in England is separated from him and living in France. She dies there intestate, leaving movables in France, but leaving no property in England. The husband cannot establish his claim in France to her property without an English grant. The court has jurisdiction to make a grant notwithstanding that there is no property in England."

The footnote to that illustration says:

"Administration of Justice Act, 1932, s. 2 (1). For the position before the Act, see *In the Goods of Tucker* (5)."

I think that that is correct and that I am, by virtue of the Act, entitled to make a grant in respect of the Belgian wills. Since the making of a grant will obviate an injustice to the estate in respect of the Belgian property, it is proper that a grant should be made. There will, therefore, be a revocation of the grant in respect of the English will and codicil and there will be a grant in respect of the two Belgian wills, the English will and the English codicil.

Order accordingly.

Solicitors: *Field, Roscoe & Co.*, agents for *Hallett & Co.*, Ashford, Kent (for the applicants).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

BOOTS v. E. CHRISTOPHER & CO.

[COURT OF APPEAL (Somervell, Denning and Hodson, L.JJ.), October 26, November 16, 1951.]

Agent—Estate agent—Commission—Duty of vendor not to prevent agent earning commission—Failure to claim specific performance or damages from defaulting purchaser.

A The plaintiff instructed the defendants, a firm of estate agents, to find a purchaser of his business, and it was agreed that only in the event of the defendants finding the plaintiff a purchaser able and willing to purchase at the price of £2,500, or at such lower figure as might be accepted by the plaintiff, the defendants' commission "would be at the rate of five per cent. of the total purchase price obtained." The defendants introduced B S. as a person able and willing to purchase the business and a written contract was entered into between the plaintiff and S., who paid a deposit of £250 to the defendants as stakeholders. Subsequently, S. repudiated the contract and authorised the defendants to pay the deposit to the plaintiff. C The plaintiff accepted the deposit and did not seek against S. a decree of specific performance of the contract or damages for its breach. When he demanded the deposit from the defendants, they claimed to be entitled to deduct from it the full amount of their commission.

D HELD: on the true construction of the contract, commission was only payable when the purchase price was received on completion; the plaintiff was under no obligation to sue S. for specific performance or for damages so as to enable the defendants to obtain their commission; and, therefore, he had not, by a wrongful act, prevented the defendants earning their commission and he was entitled to the payment to him of the deposit free from any deductions.

Beningfield v. Kynaston (1887) (3 T.L.R. 279) and *dictum* of DENNING, L.J., in *Dennis Reed, Ltd. v. Goody* ([1950] 1 All E.R. 923), applied.

E AS TO REMUNERATION OF AGENT, see HALSBURY, Hailsham Edn., Vol. 1, pp. 257-263, paras. 432-436; and FOR CASES, see DIGEST, Vol. 1, pp. 488-528, Nos. 1664-1861.

Cases referred to:

- (1) *James v. Smith* (1921), [1931] 2 K.B. 317, n.; 100 L.J.K.B. 585, n.; 145 L.T. 457, n.; Digest Supp.
- F (2) *McCallum v. Hicks*, [1950] 1 All E.R. 864; [1950] 2 K.B. 271; 2nd Digest Supp.
- (3) *Beningfield v. Kynaston*, (1887), 3 T.L.R. 122, 279; 1 Digest 518, 1802.
- (4) *Dennis Reed, Ltd. v. Goody*, [1950] 1 All E.R. 919; [1950] 2 K.B. 277; 2nd Digest Supp.
- (5) *Knight, Frank & Rutley v. Gordon*, (1923), 39 T.L.R. 399; Digest Supp.
- G (6) *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 2nd Digest Supp.
- (7) *Peacock v. Freeman*, (1888), 4 T.L.R. 541; 1 Digest 511, 1764.
- (8) *Platt v. Depree*, (1893), 9 T.L.R. 194; 1 Digest 512, 1766.
- (9) *Passingham v. King*, (1898), 14 T.L.R. 392; 1 Digest 512, 1767.
- (10) *Skinner v. Andrews & Hall*, (1910), 26 T.L.R. 340; 1 Digest 511, 1762.
- H (11) *Martin v. Perry & Daw*, [1931] 2 K.B. 310; 100 L.J.K.B. 582; 145 L.T. 455; Digest Supp.
- (12) *Fowler v. Bratt*, [1950] 1 All E.R. 662; [1950] 2 K.B. 96; 2nd Digest Supp.
- (13) *Menzies, Bruce-Low & Thomson v. M'Lennan*, (1895), 32 Sc. L.R. 231; 42 Digest 134, e.

APPEAL by the plaintiff from an order of STABLE, J., dated Apr. 24, 1951, whereby he held that the defendants, a firm of estate agents, were entitled to

commission although the prospective purchaser of the plaintiff's property introduced by them had failed to complete the contract.

The plaintiff, who was claiming from the defendants the return of the deposit forfeited by the prospective purchaser, contended that he was under no obligation to bring an action against the purchaser for specific performance or for damages to enable the defendants to obtain their commission. STABLE, J., held that by failing to do so the plaintiff was at fault and that the defendants had earned their commission. A

S. Rees for the plaintiff.

G. Howard for the defendants.

SOMERVELL, L.J.: This is an appeal from a decision of STABLE, J., concerning the right of a firm of estate agents to commission. At the material time the plaintiff was the owner of a sub-post office and shop at Worthing, and towards the end of 1949 he was minded to sell the stock and goodwill of the business. He put the matter in the hands of the defendants who introduced a Mr. Sneezum. Mr. Sneezum also had, in some other part of the country, a shop and a sub-postmastership, and he proposed to sell that business and buy the plaintiff's. A written agreement was entered into under which the plaintiff became bound to sell, and Mr. Sneezum, subject to conditions which were fulfilled, became bound to buy, the business, and a deposit of £250 was paid to the defendants as stakeholders. Later, Mr. Sneezum repudiated the contract and authorised the defendants to pay over the deposit to the plaintiff. The plaintiff could have sought specific performance of the contract, or he could have claimed damages, but he accepted the forfeiture of the deposit. When the plaintiff asked the defendants to hand him the deposit, they claimed that they were entitled to deduct the amount of their commission. The question is whether they are entitled to do so. D

The many cases in which commission agency contracts have come before the court, turn, in the main, on the particular terms of the contract between the person who employs the agent and the agent. There are some cases where very general words are used, and there are useful passages in some of the authorities regarding what I think may rightly be called the *prima facie* basis of a contract of this kind, a basis which, as SCRUTTON, L.J., pointed out in *James v. Smith* (1921) (1) ([1931] 2 K.B. 320), can be excluded by plain words. As DENNING, L.J., said in *McCallum v. Hicks* (2) ([1950] 1 All E.R. 865): E

"When a house owner goes to a house agent and asks him to 'find a purchaser,' that means that the agent is to find a person who will actually complete the purchase of the house, it being understood that the agent's commission is to be paid out of the purchase price. That is the common understanding of men in these matters." F

It is, therefore, with that general background that one approaches the construction of contracts of this kind, although, of course, if the words are plain, the parties may have agreed to something different. G

The contract in the present case is to be found in two documents. The first was a letter which was sent by the defendants to the plaintiff, the last paragraph but one of which is in these terms:

"In the event of you now, or in the future, instructing us to find a purchaser for your business, our usual terms are that no commission is payable until a person who is able and willing to purchase on terms agreed to by you has been introduced by us." H

It will be noted that in that letter there is no reference to percentage or how the commission is to be calculated. On Nov. 26, 1949, the defendants wrote again thanking the plaintiff for a letter which gave certain particulars about the business and saying:

"We would confirm that only in the event of our finding you a purchaser at the price of £2,500, stock at valuation, or at such lower figure as may be accepted by you, our commission would be at the rate of five per cent. of the total purchase price obtained, and no other charges whatsoever."

A It may well be that what is contained in that letter is writing out in express terms, subject, of course, to the percentage, which is new, what would have been the construction of the earlier letter, but, whether that is so or not, I am clear that the two documents must be read together and that the second letter is a contractual document. The important words for the purpose of this issue are the percentage "of the total purchase price obtained." That means that the commission is due as and when the purchase price is obtained, and I think "obtained" in this context means "received" and is not satisfied by the figure in the contract, albeit a binding contract, which may or may not be received.

B There is no question here that the purchase price, apart from the deposit (to which I will refer later), was not received, and, therefore, I think that under this contract the defendants are not entitled to their commission unless they can establish that its non-receipt was due to some act by the plaintiff which would enable them to invoke the doctrine familiar in this area as in others.

C Put in its strongest form it is that if one party, by a wrongful act, prevents the fulfilment of a condition which would entitle the other party to reward, the party who has prevented the fulfilment of that condition cannot rely on its non-fulfilment as an answer to a claim for the reward.

A number of cases were referred to, the earliest of which is possibly conclusive in the present case having regard to the construction which I have put on this contract. That was *Beningfield v. Kynaston* (3) which came before a Court of Appeal, consisting of LORD ESHER, M.R., BOWEN and FRY, L.JJ. The plaintiff was an auctioneer and estate agent whom the defendant requested to obtain a purchaser for an estate. The plaintiff was to have "the usual commission out of the purchase-money." The plaintiff found a purchaser of the estate for £5,250 and the purchaser-paid the deposit. The contract contained the condition that

E "if from any cause the purchase shall not be completed on June 1, the purchaser shall pay interest, and if the purchaser shall fail to comply with the conditions, the sum of £525 shall be forfeited."

The purchaser failed to complete and so forfeited the deposit money, which was retained, and the estate was put up for sale by auction and was sold to a purchaser who had not been introduced by the plaintiff. The plaintiff claimed commission on the £5,250. LORD ESHER, M.R., said (3 T.L.R. 279) that he thought

F "... that the defendant had employed the plaintiff, the agent, on condition of paying him his commission out of purchase-money received from a purchaser obtained by the agent."

G That case was complicated by the fact that there had been a re-sale, and LORD ESHER pointed out that the plaintiff could not take advantage of the existence of the new purchaser. He then refers to what had happened in that case, but has not happened in this, *viz.*, that the defendant had agreed to pay commission at whatever was the usual rate on the amount of the deposit. BOWEN, L.J., concurred and said (*ibid.*, 280):

H "The primary question . . . was what was the contract originally entered into. In every case that must be a question of fact . . . Here the contract was to pay commission out of the purchase-money. It was not to pay commission if a purchaser was found, whether he completed or not. Here it was to pay it only if the purchase-money was received. The construction of the contract was that the commission should be paid only if the purchase-money was received, and received from the purchaser found by the agent."

Then he goes on to say that the subsequent purchaser was not the one found by the agent. FRY, L.J., agreed. He said (*ibid.*):

"On the failure to complete under the first contract there arose a right to retain the deposit as forfeited, but that was not the purchase-money. The proposed purchaser made default in paying it."

Then he said that it was not necessary to decide whether the deposit was a part of the purchase-money as the defendant had agreed to treat it as if it were so and to pay commission on it, but the purchase-money, at all events, had not been received and so the commission on the purchase price had not been earned. In that case an action for specific performance or for damages might have been brought and the purchase price recovered over and above the amount of the deposit, but it is a decision of this court that, in a contract which, in my opinion, for this purpose, is similar to the present contract, the fact that a purchaser failed to complete and forfeited his deposit money does not entitle the agent to say that he has earned his commission.

In *Dennis Reed, Ltd. v. Goody* (4) the person introduced had withdrawn from the negotiations before any binding contract had been made. The defendants had never been in default and the plaintiffs, therefore, it was said, had not introduced a person "ready, able and willing to purchase." In the course of his judgment DENNING, L.J., made some observations on the general position which, I think, are relevant and helpful. He said ([1950] 1 All E.R. 923):

"Some confusion has arisen because of the undoubted fact that, once there is a binding contract for sale, the vendor cannot withdraw from it except at the risk of having to pay the agent his commission. This has led some people to suppose that commission is payable as soon as a contract is signed, and I said so myself in *McCallum v. Hicks* (2) ([1950] 1 All E.R. 866). This, however, is not correct. The reason why the vendor is liable in such a case is because, once he repudiates the contract, the purchaser is no longer bound to do any more towards completion, and the vendor cannot rely on the non-completion in order to avoid payment of commission, because it is due to his own fault . . . If, however, the vendor could show that the purchaser would not, in any event, have been able or willing to complete, he would not be liable for commission . . . When it is not the vendor, but the purchaser, who withdraws, the case is entirely different, for, even though a binding contract has been made, nevertheless, if the purchaser is unable or unwilling to complete, the agent is not entitled to his commission . . . The vendor is not bound to bring an action for specific performance or for damages simply to enable the agent to get commission. If, however, the vendor does get his money, he will probably be liable to pay the commission out of it."

That passage must be read subject to any special terms in the contract, but, in my opinion, it is applicable—it is, of course, *obiter*—to a contract in the terms of the contract in the present case. It is unnecessary to refer to what DENNING, L.J., said in *McCallum v. Hicks* (2). That was *obiter*. On re-consideration he has put it in a way which I would respectfully adopt. It comes to this, that where the basis of the contract is that the commission is payable out of the purchase price or when the purchase price is paid, that involves that the purchaser must remain both able and willing to complete up to the time of completion. The only occasion on which the commission is payable if the money is not paid is when the non-completion is due to the fault of the vendor.

Can it be said that the failure of the vendor to take proceedings for specific performance is a circumstance which enables it to be said that the non-receipt of the money is due to his fault? I do not think so, and *Benningfield v. Kynaston* (3) is an authority on that point. One cannot say that it is the fault of the vendor not to have launched litigation of this kind. It is true that on the evidence in the present case there was a finding by the learned judge that Mr. Sneezum

would have been in a financial position to complete the contract, but I do not know whether the plaintiff had any means of finding that out at the time in question. I base my judgment on the fact that the purchaser defaulted, and that would appear to be the basis of the judgment in *Beningfield v. Kynaston* (3).

In the present case STABLE, J., after setting out the facts, said:

A "All I have to decide is, having regard to the matters set out in the three letters that I have read and having regard to the course the negotiations took and to the written agreement which was made, aye or no, have the agents rendered those services which entitled them to receive the remuneration at the amount agreed? In my opinion, they have."

B Where I differ, with respect, from the learned judge is in my construction of these letters. He was proceeding on the basis that the commission was earned if a purchaser was introduced who was willing, when he signed the contract, to complete and who remained financially able to complete at all material times. For the reasons which I have tried to give, I do not think, having regard to the wording of the letters and the contract between the parties, that one can, as it were, stop at the moment when the binding contract was entered into and say that commission was then earned irrespective of whether the purchase price was
C ever paid. For these reasons I think this appeal should be allowed.

D DENNING, L.J.: I agree. It is plain that the commission is only payable when the purchase price is paid. The words "total purchase price obtained" only express what would otherwise be implicit in the words "finding a purchaser." The question is: What is the position when a binding contract has been made but the purchaser withdraws before the time for completion? Is the agent then
E entitled to his commission or not? I confess that I have spoken with two voices on this matter. In *McCallum v. Hicks* (2) I said that the agent would be entitled to commission because, if the purchaser did not complete, the vendor could recover the amount of the commission from the purchaser by way of damages, but in the later case of *Dennis Reed, Ltd. v. Goody* (4) I said that the vendor was not bound to bring an action simply to enable the agent to get his commission.
F After hearing the arguments in this case I think that my second thoughts were best. The right view is that the readiness, the willingness, and the ability must be present at "the proper time," which is the time for completion: see *per* ATKIN, L.J., in *James v. Smith* (1921) (1) ([1931] 2 K.B. 322) and *per* HODSON, J., in *Dennis Reed, Ltd. v. Goody* (4) ([1950] 1 All E.R. 927). In the present case the purchaser was not willing at the time for completion. The agent, therefore,
F was not entitled to his commission.

It was suggested that the plaintiff was at fault in that he forfeited the deposit instead of suing for specific performance or for damages. I do not think he was at fault, for the simple reason that he was not bound to bring an action. He was entitled to content himself with accepting the deposit. *Beningfield v. Kynaston* (3) shows that. I agree that, if a vendor gets the full purchase price as a result
G of an action for specific performance—or if he gets damages which include the amount of the commission he has to pay to the agent—he would have to pay the agent his commission. It is true that in such a case the purchaser could not properly be said to be "willing" to complete. He would have only completed under compulsion. That means that the claim for commission would not be recoverable on the contract as such. It would, however, be recoverable in an
H action for restitution, or, if you please, on an implied contract. But what is the position if the vendor gets paid part only of the damages or the purchaser forfeits the deposit? Is the agent entitled to nothing? No claim can be made for commission on the contract as such, but it may well be said that, if the vendor takes the benefit of the agent's services to that extent, he should pay a reasonable remuneration in an action for restitution, which may be a good deal less than full commission. In *Beningfield v. Kynaston* (3) and *Knight, Frank & Rutley v. Gordon* (5) the vendor expressed himself as agreeable to pay commission on the

actual money received. No claim is made here, however, for a reasonable remuneration. The defendants' claim is for commission on the full purchase price, even though it has not been paid by Mr. Sneezum and the plaintiff is not in default. The defendants seek to make their full commission a first charge on the deposit. That they are not entitled to do under this contract. I agree, therefore, that the appeal should be allowed.

HODSON, L.J.: I agree with the construction placed on this contract, which is contained in the two letters, the first undated and the second dated Nov. 26, 1949, and the particulars of the property contained in the intermediate document. A

It was argued by counsel for the defendants that the word "obtained" did not point to the purchase price being obtained at the time of completion by the vendor, but rather to it being obtained by the agent as the figure contracted to be paid. If there were an ambiguity in that letter of Nov. 26, 1949, it would have to be construed against the defendants, but I agree with my Lords that there is really no ambiguity and that the word "obtained" means "obtained on completion." B

The learned judge referred to the observation of SCRUTTON, L.J., in *James v. Smith* (1921) (1) when he said ([1931] 2 K.B. 320): C

"It is quite open to the parties to use language that makes it clear that the commission is only payable on the money ultimately received or which might have been received but for the vendor's fault."

He also referred to the language of LORD RUSSELL of KILLOWEN in *Luxor (Eastbourne), Ltd. v. Cooper* (6) ([1941] 1 All E.R. 44) when he said: D

"The position will no doubt be different if the matter has proceeded to the stage of a binding contract having been made between the principal and the agent's client. In that case, it can be said with truth that a 'purchaser' has been introduced by the agent. In other words, the event has happened upon the occurrence of which a right to the promised commission has become vested in the agent. From that moment, no act or omission by the principal can deprive the agent of that vested right." E

After quoting these passages, the learned judge said:

"... they are not authority for the proposition that if, having entered into a binding contract in which the purchaser cannot withdraw without laying himself open either to a claim for damages or specific performance or forfeiture of his deposit, the agent loses his right to commission simply because the purchaser—albeit he is able to perform his contract—decides that he will not." F

The learned judge seems to have taken the view that in the present case it was the vendor's fault that the transaction went off. I confess I was, at first, attracted by that view, because it might well be said that the purchase price would have been obtained if the vendor had chosen to take steps to get it by an action for specific performance or damages. Indeed, in taking that view the learned judge, I think, was in the company of HUDDLESTON, B., in *Beningfield v. Kynaston* (3), when he said (3 T.L.R. 123), in circumstances which are, for the purposes of this argument, similar: G

"There was a distinct contract to pay it—that is, to pay it out of the purchase money. A purchaser was found who had signed the contract, so that the relation of purchaser was created, and that was brought about by the plaintiff. The sum of £525 was actually paid on the purchase, and in case of default of completion interest was due and payable on the purchase money until completion. The seller also had a right to make forfeit of the deposit and re-sell the property, and if there were a loss on the re-sale he could sue H

the defendant for it. It was idle to say that the party did not purchase—for the deposit was paid. He failed, however, to complete, and the deposit was forfeited, but the seller still retained the right to sue on the contract if there were a loss on the re-sale.”

That judgment was reversed on appeal. In *Dennis Reed, Ltd. v. Goody* (4) DENNING, L.J., stated plainly ([1950] 1 All E.R. 923) that the vendor was not bound to bring an action for specific performance or damages simply to enable the agent to get commission. I agree with that view, if I may say so with respect. I accept the contention of counsel for the plaintiff that the vendor is not in fault if he does not use the remedies which are open to him to enforce the contract when it has been repudiated by the purchaser, and, therefore, I agree that this appeal succeeds.

Appeal allowed.
Solicitors: *Vizard, Oldham, Crowder & Cash*, agents for *Parker & Bangor-Jones*, Worthing (for the plaintiff); *Bellamy, Bestford & Co.* (for the defendants).
[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

C GROVE v. EASTERN GAS BOARD.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.JJ.), November 19, 1951.]

Gas—Entry of premises for purpose of inspection—Right of forcible entry to collect money from meter—Gas Act, 1948 (c. 67), sched. III, para. 34 (1).

The plaintiff's premises were supplied with gas for domestic purposes by the defendant gas board, and a pre-payment meter had been installed. An officer authorised by the board and in possession of a duly authenticated document showing his authority called to collect money from the meter, but, having failed after frequent attempts to gain access to the premises, broke a pane of glass near the door, entered the premises, and, on leaving, replaced the glass, thereby making the premises secure. In an action by the plaintiff against the board for trespass,

HELD: the powers of entry conferred on the board by para. 34 (1) of sched. III to the Gas Act, 1948, which should be read in conjunction with para. 36, included, when necessary, a power of forcible entry, and, in the circumstances, the board were not liable in trespass.

FOR THE GAS ACT, 1948, sched. III, para. 34 (1) and para. 36, see HALSBURY'S STATUTES, Second Edn., Vol. 10, pp. 973, 974.

APPEAL by the plaintiff from an order of HILBERY, J., dated May 28, 1951, whereby he held that the defendants, the Eastern Gas Board, were not liable in trespass for a forcible entry into the plaintiff's premises to collect money from the gas meter.

For the plaintiff it was contended that the right of forcible entry was confined to entry for the purposes mentioned in para. 35 (1) of sched. III to the Gas Act, 1948, after notice had been given, and did not include entry under para. 34 (1).

Melford Stevenson, K.C., and *Pearl* for the plaintiff;
Gardiner, K.C., and *B. Lewis* for the gas board.

SOMERVELL, L.J.: This is an appeal from a decision of HILBERY, J. The plaintiff claimed damages for trespass and alleged that

“the defendants, by their servants or agents, wrongfully broke into the [plaintiff's] premises by removing a front window and thereby entered the said premises.”

The defendants, the Eastern Gas Board, admitted that they entered the premises, and there is no dispute that they did so by breaking a pane of glass near a door. They admitted that they opened the door and went in. When they left the

house they replaced the pane of glass in the proper manner, and the premises were as secure after they left as they were before they entered. Their defence, in substance, was that they were entitled to do what they did under statutory powers contained in the Gas Act, 1948.

The plaintiff lived at 51, Tudor Road, Edmonton, which was a house supplied with gas for domestic purposes. Prior to the setting up of the various gas boards under the Gas Act, 1948, he was supplied by the Tottenham and District Gas Company. He had in his house a meter and a coin box. The procedure with the coin box is one which is familiar. The consumer puts a coin into the box and he then gets a supply of gas. When the amount of gas for which the coin was inserted has been exhausted, the supply ceases and another coin has to be put in. The board wanted to collect the money which had accumulated in the coin box and, I dare say, to inspect the meter and perform other routine duties and the evidence was that they could not get in as there was nobody in the house. On three occasions they put through the letter box printed pre-paid postcards saying that their collector had made a call and failed to gain access and asking the plaintiff to state on the card a time, giving forty-eight hours' notice, when it would be convenient to him for a servant of the board to obtain admittance. None of those cards was used. The plaintiff admitted that a card dated July 12, 1949, had been received, but he disputed receiving the other cards. The learned judge found as a fact that the other cards were left and that they must have been seen by the plaintiff or his wife or both of them. Although it may not be material to the question of construction which we have to decide, it is right to state that, on the facts as found by the learned judge, considerable time was allowed to elapse and steps were taken to enable the plaintiff to tell the board when it would be convenient for him to let their representative enter the premises. This case turns on whether they were authorised by the statute to enter in the way they did. The learned judge decided that they were and the plaintiff appeals.

Paragraph 34 (1) of sched. III to the Gas Act, 1948, provides:

"Any officer authorised by an area board may at all reasonable times on the production of some duly authenticated document showing his authority, enter any premises in which there is a service pipe connected with the gas mains of the board, in order to inspect the meters, fittings and works for the supply of gas, or for the purpose of ascertaining the quantity of gas consumed or supplied, except in a case where the occupier of the premises has applied in writing to the board for the disconnection of the service pipe from the mains and the board have failed to disconnect it within a reasonable time."

Paragraph 35 provides:

"(1) Where—(a) a person occupying premises supplied with gas by an area board ceases to require such a supply; or (b) a person entering into the occupation of any premises previously supplied with gas by an area board does not take a supply of gas from the board or hire such of the pipes, meters, fittings or apparatus on the premises as belong to the board; or, (c) an area board are authorised to cut off the supply of gas from any premises, it shall be lawful for an officer authorised by the board after twenty-four hours' notice to the occupier under the hand of an officer so authorised, or if the premises are unoccupied to the owner or lessee of the premises, to enter the premises at all reasonable times for the purpose of removing and to remove any pipes, meters, fittings or apparatus, through which the supply was given to the first-mentioned premises. (2) The notice required to be given by the last preceding sub-paragraph may, in the case of unoccupied premises, the owner or lessee of which is unknown to the area board and cannot be ascertained after diligent inquiry, be given by affixing it upon a conspicuous part of the premises not less than forty-eight hours before the premises are entered. (3) Where an area board have reasonable cause to suspect that gas is escaping in any premises, it shall be lawful for

an officer authorised by the board to enter the premises for the purpose of inspecting the gas fittings and preventing the escape and to inspect such fittings and carry out any work necessary to prevent such escape."

A It was submitted below, although not, I think, pressed in this court, that the words in para. 34 (1), "production of some duly authenticated document showing his authority," indicate that, unless there is somebody on the premises to whom the document can be produced, the powers conferred by the paragraph, whatever they may be, cannot be exercised. There is no dispute here that the representative of the board who made the entry had a duly authenticated document showing his authority, and that a neighbour, seeing this man about to enter the house, made some inquiries and the representative produced his card. I do not accept the argument as I have stated it, and I agree with the learned judge where he B says that para. 34 (1) requires that the entry for the purposes mentioned in that paragraph must be at a reasonable time and that the officer making the entry must, if required, produce a duly authenticated document showing his authority to anyone reasonably requiring him to do so.

The main question here is whether para. 34 (1) authorises a forcible entry. To determine that point of construction it is necessary to read para. 36 and C para. 37. Paragraph 36 provides:

"Where, in pursuance of any powers conferred by this schedule, entry is made on any premises by an officer of an area board, the officer shall ensure that the premises are not left less secure by reason of the entry, and the board shall make good or pay compensation for any damage caused by the officer in entering the premises, in carrying out any inspection or work D therein or in making the premises secure."

Paragraph 37 provides:

"If any person obstructs any officer exercising powers under either of the three last preceding paragraphs or any other power of entry conferred by this schedule, he shall be liable on summary conviction to a fine not exceeding £5." E

Counsel for the plaintiff submitted that a right of entry on to premises is one which, if conferred, requires to be expressed in plain terms. I agree. On the other hand, I think it is right to bear in mind, in any case where the question arises, the subject-matter with which the Act of Parliament which has to be construed is dealing. The Gas Act, 1948, deals with the supply of gas, and, F as everybody knows and the terms of the Act show, the supply of gas involves a meter and other apparatus in the house. The meter requires to be read and the apparatus to be inspected from time to time, and there is provision for this common method of supply under which—no doubt, for the convenience of the consumer—he is enabled to pay by putting coins in a box. In that context and having regard to that subject-matter, there would, I think, be no cause for any G surprise if one found that those who supply the gas were given power to inspect the meters and to collect the money which is owed to them for gas which has been already supplied.

The learned judge—I think rightly—regarded para. 36 as of great importance. In the context of this paragraph of the schedule, and, perhaps, broadly speaking, a power of entry conferred by a statute is, *prima facie*, a power, H if necessary, of forcible entry. There would be no need for statutory authorisation if all that the representatives of the gas board were allowed to do was to enter and read the meter if the consumer was willing to admit them to the place where the meter was. Therefore, *prima facie*, I would have said that para. 34 (1) imposed a power of forcible entry, and that construction is strongly reinforced by para. 36. Paragraph 36 is quite general, and I can see no grounds for confining, as counsel for the plaintiff would seek to do, the word "entry" in it to entry under para. 35. The natural construction is that it

covers entries made in pursuance, as it says, "of any powers conferred by this schedule." That it implies a power of forcible entry is plain from its terms, because the officer has to ensure that the premises are not left less secure by reason of his entry. Counsel submits that the learned judge did not have sufficient regard to the fact that the later words in para. 36 refer to making good or paying compensation for damage caused not only in entering the premises or in making them secure, but also in carrying out any inspection or work therein, and he would seek to confine its operation (so far as para. 34 (1) is concerned) to damage arising out of inspection or work therein. I can see no reason for confining it in that way. I think that, as it refers to entry and clearly contemplates forcible entry in pursuance of any power conferred by the schedule, it reinforces the *prima facie* construction which I have already put on para. 34 (1), viz., that the fact that that paragraph gives a statutory authorisation to enter would lead to the conclusion that it was authorising forcible entry where necessary.

Counsel for the plaintiff also referred to the differences between paras. 34 (1) and 35 (1) and relied on the fact that under para. 35 (1), where the premises are unoccupied, notice has to be given, whereas there is no provision for notice in para. 34 (1), the suggestion being that a right of forcible entry would normally be preceded by some formal notice. Evidence (which was not objected to) was given that para. 34 (1) might well be required in the case where, as, apparently, sometimes happens, the consumer is seeking to divert the gas from going through the meter and thereby to escape payment for it, and it was said by a witness who had a great deal of experience that where the board have reasons for suspecting that that may be happening, if they had to give notice it might defeat the whole object of an inspection, whereas, if they had the right to inspect without notice, they might discover acts of that kind. But, in any event, I cannot think that the provision as to notice enables one to come to the conclusion that forcible entry is excluded from para. 34.

The learned judge came to the conclusion that under the earlier legislation there was clearly a power to make forcible entry, in circumstances such as these, under the statutory predecessor of para. 34. He also referred to s. 17 (1) of the Act of 1948, which provides that

" . . . all property, rights, liabilities and obligations which, immediately before such date as may be appointed by order of the Minister . . . were property, rights, liabilities and obligations of an undertaker to whom this Part of this Act applies, shall on the vesting date vest by virtue of this Act and without further assurance in such area board as may be determined by order of the Minister."

I think he had in mind that that section, *prima facie*, would point to the conclusion that one would expect to find the gas boards with the same rights in this respect as the old gas companies or gas undertakings had under the earlier legislation. I find it unnecessary to deal with that aspect of the matter or to come to a final conclusion on it, but I will say a word or two about it. The predecessors of paras. 34 (1) and 35 (1) were to be found in s. 21 and s. 22 of the Gasworks Clauses Act, 1871, which were amended by the Gas Undertakings Act, 1934, s. 21. There was evidence that s. 21 of the Act of 1871, which was the predecessor of para. 34 (1), had been regarded by gas undertakings as authorising entries such as were made in the present case. It is certainly capable of that construction, but the structure of the provisions which are now found in paras. 34 and 35 were dealt with in a different way in the Act of 1871. Section 21, after using words which, for the present purposes, are similar to the words in para. 34 (1) provided:

" . . . and if any person hinder such officer . . . as aforesaid at any reasonable time, he shall for every such offence forfeit to the undertakers a sum not exceeding £5."

There was an argument open that that was the only sanction, and that, if someone seeking to inspect met with obstruction, all he could do was to take out a summons and could not enter forcibly. I do not say that that would be right, but it was a possible argument and it might have been reinforced by the fact that when one comes to s. 22, the predecessor of para. 35, there is there, as there is not in s. 21, a reference to the repair of damage caused by entry. What might have been decided about those sections, if they had come before the courts, is a question on which it is unnecessary to speculate. The difficulties, if any, seem to me to have been cleared up by the form which the legislation now takes, and to which I have referred, in sched. III to the Gas Act, 1948.

Counsel for the plaintiff criticised that part of the judgment in which the learned judge said:

"If a forcible entry under para. 35 . . . when the premises were unoccupied was the only case where a forcible entry doing damage was required to be made good, one would have expected para. 36 in terms to have limited the liability to make good to an entry under para. 35. It does not."

In substance I agree with that conclusion. Paragraph 36, with its reference to "entry," follows on two paragraphs dealing with "entry," and I see no reason of construction why it should not be construed as applying to both the paragraphs which immediately precede it. For these reasons I think the learned judge came to the right conclusion, and this appeal must be dismissed.

JENKINS, L.J.: I agree. It is, perhaps, worth while adding a reference to para. 14 (3) of sched. III to the Act of 1948, as it is a provision on which some reliance was placed by counsel for the board. That sub-paragraph occurs in a paragraph dealing with the keeping of meters in order, and provides:

"The board shall have access to and be at liberty to remove, inspect and replace any meter at all reasonable times . . ."

It was referred to by counsel for its use of the expression "shall have access," and I think there is some force in the argument based on the contrast between that expression, "shall have access," and the expressions "may . . . enter" or "it shall be lawful . . . to enter" which occur in para. 34 (1) and para. 35 (1) of the schedule. The contrast seems to me to suggest that whereas in the matter dealt with by para. 14 (3), a right of access is conferred on the board, in para. 34 to para. 37 something more than that is being dealt with. It is a power of entry which might, in relation to the matter dealt with by para. 14 (3), be described as a power ancillary to the right of access, a power which, in that particular case, would make the right of access effective against the will of the occupier of the house.

As to para. 34 (1), on the construction of which the case ultimately depends, I have little to add to what my Lord has said. The argument of counsel for the plaintiff against the view that this paragraph authorises forcible entry turned, so far as the language of para. 34 (1) itself was concerned, mainly on the words

"may at all reasonable times on the production of some duly authenticated document showing his authority . . ."

Counsel suggested that the words "may at all reasonable times" would be wholly inappropriate if it was contemplated that a representative of the board could effect an entry forcibly whether the house was occupied or not, but it has to be borne in mind that obstruction of the duly authorised representative of the board constitutes an offence under para. 37 for which a fine is exigible. The words "may at all reasonable times" in para. 34 (1) would thus be apt to deal with the case of an unseasonable visit by the representative of the board, perhaps in the small hours of the morning, and would make it clear that, if the occupier was in bed at the time and proposed to remain there, leaving the door locked and bolted, he would not, in such circumstances, have committed an offence for which he was liable to be tried under para. 37. Beyond that, it is to be noticed

that the expression "at all reasonable times" occurs also in para. 35 (1), which admittedly, and, indeed, expressly, includes the case of unoccupied buildings. As to the words in para. 34 (1) "on the production of some duly authenticated document showing his authority," I confess that I was impressed by the argument founded on those words at an early stage in our hearing of the case, but I now find myself satisfied that it cannot reasonably bear the construction sought to be placed on it by counsel for the plaintiff. He says, in effect, that the right of entry arises only on production of some duly authenticated document showing the authority of the person seeking entry to somebody authorised to admit him—that is to say, to somebody on the premises. I find that construction, in the context, impossible to accept. It would narrow down the right of entry, so far as I can see, to the case where there was somebody on the premises who opened the door, and, on seeing the document of authority, let the representative of the board into the premises, and entry would be unlawful, not only in the case contended for by counsel, *i.e.*, the case which actually happened here where there was something in the nature of a forcible entry, but also in the case where the front door of the premises was actually standing open but there was nobody at home and, therefore, nobody to whom the document of authority could be produced. That seems to me to be a *reductio ad absurdum* of the argument, and it constrains me to take the view that "on the production of some duly authenticated document showing his authority" simply means "subject to the production, when called on, of such a document."

A further argument of counsel for the plaintiff was that under para. 35 (1), notice is expressly required, whereas there is no such requirement under para. 34 (1). I think the answer to that distinction is the one given by my Lord. The difference between the objects of the two paragraphs is this. Paragraph 34 is concerned with inspection of the meters, fittings and works for the supply of gas and ascertainment of the quantity of gas consumed or supplied, matters which involve no radical alteration in the fixtures on the premises. Paragraph 35 (1) is directed to the removal of pipes, meters, fittings or apparatus through which the supply is given to the premises in cases in which the supply is, for one reason or another, to be discontinued. The object of the visit there, therefore, is to carry out works which may affect the condition of the premises and may raise a question of who was the owner of some particular fitment or some question of that sort. In cases of that kind it would be desirable that notice should be given, not merely because the board intends to enter the premises, but because it is intended that work shall be carried out on the premises which may concern the interests of the owner or occupier. In my view, therefore, that distinction throws little light on the question which we have to decide. Paragraph 35 (1), in my view, is more important in that it must be construed as extending to forcible entry, where necessary, inasmuch as it includes unoccupied premises, and the power would be idle as regards unoccupied premises if it only extended to premises where there was, for example, some door ajar or window open so that entry could be obtained without doing anything amounting, even technically, to a forcible entry. Paragraph 35 (3) also assists the defendants' side of the matter, for that is the paragraph which deals with an escape of gas—deals, that is to say, with a state of emergency which might be fraught with grave danger to anyone in the vicinity. Counsel for the plaintiff, as I understood him, conceded that in that case the power to enter must, as a matter of common sense, be taken to extend to forcible entry in order to make the provision effective. Thus, in addition to the disputed provision in para. 34 (1), there are provisions in para. 35 (1) and (3) for entry in circumstances in which forcible entry must be intended to be included.

Finally, in para. 36 there is a provision extending to all cases in which entry has been authorised in the preceding sections, and it says:

"Where, in pursuance of any powers conferred by this schedule, entry is made on any premises by an officer of an area board, the officer shall ensure

that the premises are not left less secure by reason of the entry, and the board shall make good or pay compensation for any damage caused by the officer in entering the premises, in carrying out any inspection or work therein or in making the premises secure."

A Whatever might be said of para. 34 (1) if it stood alone, it seems to me that, when it is read in conjunction with para. 35 (1) and (3) and para. 36, the conclusion is irresistible that in each and every one of the cases mentioned, including the case under para. 34 (1), the enactment contemplates, and, on its true construction, enacts, that entry may be effected even though it has to take the form of a forcible entry. Paragraph 36 says in terms that the officer shall ensure that the premises are not left less secure by reason of the entry. That, to my mind, unmistakably indicates that the case is contemplated in which a lock has to be forced, or a B window opened, or something of that kind done, which, if left in that state would make the premises less secure. Then there is a reference to "any damage caused by the officer in entering the premises." That, again, strongly indicates something in the nature of forcing a door or the catch of a window. No distinction is made in para. 36 between the various cases which have been dealt with in the preceding paragraphs, and I think it shows that all of them are treated on C the same footing and that in every case a forcible entry, where necessary, in the particular circumstances, is contemplated and allowed under the Act.

I think no useful purpose would be served by discussing in detail the provisions of the Gasworks Clauses Act, 1871. Suffice it to say that, in my view, it is reasonably plain, on the construction of the provisions now in force, that forcible entry in a case like the one now before the court is authorised. I think there D might have been more room for argument on the matter had it still turned on the terms of the legislation of 1871, but that is not the question we have to decide. So far as the Act of 1948 is concerned, I have no doubt that the learned judge reached a right conclusion on the true construction of the relevant provisions. I agree, therefore, that the appeal fails and must be dismissed.

E HODSON, L.J.: The question in this appeal depends on the construction of para. 34 to para. 37 inclusive of sched. III to the Gas Act, 1948. The learned judge placed a construction on them with which I agree and with the reasons for which I also agree. I think that the construction, that forcible entry, where necessary, is contemplated, is reinforced, as counsel for the defendants pointed out, by reference to para. 14 (3) of the schedule, which provides that the board shall have access to premises for the purpose of the inspection of meters. As F he said, it is difficult to see the necessity for para. 34 unless that paragraph justifies forcible entry. I mention that because I think it has some bearing on another matter which has been discussed, *viz.*, the effect of the Acts of 1871 and 1934, because in the Act of 1871, as counsel for the defendants also pointed out, by s. 19 the undertakers had the right of access to premises for the purpose of G inspection. That reinforces the conclusion at which the learned judge arrived, that even under the old legislation the position was the same, although I agree with my Lords that the position is not so clear under the earlier Acts as it is under the Act of 1948. I agree that the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Hamilton-Hill & Evershed* (for the plaintiff); *Avery, Son & Fairbairn* (for the gas board).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

BROMLEY AND OTHERS *v.* TRYON AND OTHERS.

[HOUSE OF LORDS (Lord Simonds, L.C., Viscount Jowitt, Lord Normand, Lord Morton of Henryton and Lord Tucker), October 9, 10, November 29, 1951.]

Will—Shifting clause—Validity—Uncertainty.

By her will, dated July 4, 1890, a testatrix, who died on Jan. 23, 1892, A
devised her D. estate to the use of M. (the second son of H.B.) for life
with remainder to his first and every other son in tail male, with remainder
to his first and every other son in tail general, with remainder to his first
and every other daughter in tail general. There followed similar limitations
to A. (the third son of H.B.) for life, with remainders to his issue, and to H.
(the fourth son of H.B.) for life, with remainders to his issue, with remainder B
to the use of the first and every other daughter of H.B. in tail general,
with remainders over. The will proceeded: "Provided always and I
hereby declare that if any son daughter or other issue of the said [H.B.]
within the scope of the limitations hereinbefore contained shall by any
means whatsoever become actually entitled to the possession or the receipt
of the rents and profits of the family estate of [Sir H.] the father of the
said [H.B.] meaning thereby the [S. estate] . . . or the bulk thereof C
whether consisting of the same premises as that estate now consists of
or in any manner altered in the way of addition substitution diminution
or otherwise . . . then and so often as the same shall happen and thereupon
every estate hereinbefore limited for life or in tail male or in tail to the
son or daughter of the said [H.B.] who or any of whose issue shall so D
become entitled and (as to any such son or daughter to whom an estate
for life is hereinbefore limited) to the first and other sons and the first and
other daughters successively of such son or daughter shall absolutely
determine and the said premises hereinbefore devised shall go and remain
to the uses upon the trusts and with and subject to the powers provisos and
declarations to upon with and subject to which the same premises would E
have stood limited and settled by virtue of this my will if such son or
daughter had died and there had been a general failure of his or her issue.
But nevertheless without prejudice as to any son or daughter of the said
[H.B.] to whom an estate for life is hereinbefore limited to any jointure
yearly rentcharge or portions which may have been charged by such son
or daughter under the respective powers for those purposes hereinafter F
contained before such son or daughter shall have become entitled in
possession to the said [S. estate] as aforesaid and without prejudice to any
powers remedies or terms of years for securing or raising any such jointure
or portions respectively."

In 1897 the S. estate was re-settled, and by the re-settlement it was held
for H.B. for life (he died in 1905), then for R. (H.B.'s eldest son) for life G
with remainder to his sons in tail male, remainder to M. for life with
remainder to his sons in tail male, remainder to A. for life with remainder
to his sons in tail male, remainder to H. (who died a bachelor in 1915)
for life with remainder to his sons in tail male. There followed remainders
in tail general to daughters of H.B.'s sons, with remainder to E. (the daughter
of H.B.) and her issue, with remainders over. On May 13, 1906, R., the H
life tenant in possession of the S. estate under the re-settlement, died
without issue male. On July 9, 1906, M., who was then life tenant in
possession of the D. estate under the will and, in the event, the next entitled
to the S. estate on the death of R., disclaimed his life interest under the
re-settlement to avoid the operation of the shifting clause in the will.
As a result of M.'s disclaimer, A. became entitled to the S. estate as tenant
for life under the re-settlement, and had been in possession ever since.

The question now arose whether the shifting clause in the will had so been brought into operation as to defeat the interests of A. and his issue in the D. estate.

HELD: (i) on their true construction the words "or the bulk thereof" in the shifting clause of the will were not so vague and uncertain that a court could not determine what was the condition on which defeasance took place, as the ordinary meaning of the words "the bulk" was "the greater part" and in the context in which those words appeared in the clause they meant "the greater part in value," and, therefore, the shifting clause satisfied the test laid down in *Clavering v. Ellison* (1859) (7 H.L.Cas. 707), and was valid.

(ii) the language of the shifting clause did not admit of the construction that it was only to operate at a moment when a person became entitled to both estates in possession, and, on the true construction of the clause, as A. had become actually entitled to the possession or receipt of the rents and profits of the S. estate, then every estate for life or in tail in the D. estate limited to him or his issue was absolutely determined and A. and his issue were excluded from succession to the D. estate.

Decision of the COURT OF APPEAL (*sub nom. Re Wilson's Will Trusts*) ([1950] 2 All E.R. 955), affirmed.

AS TO SHIFTING CLAUSE, see HALSBURY, Hailsham Edn., Vol. 29, pp. 784-788, paras. 1092-1096; and FOR CASES, see DIGEST, Vol. 44, pp. 1115-1118, Nos. 9669-9683.

Cases referred to:

- (1) *Clavering v. Ellison*, (1859), 7 H.L.Cas. 707; 29 L.J.Ch. 761; 11 E.R. 282; *affg.*, (1857), 8 De G.M. & G. 662; 44 E.R. 545; *affg.*, (1856), 3 Drew. 451; 61 E.R. 975; 44 Digest 440, 2667.
- (2) *Clayton v. Ramsden*, [1943] 1 All E.R. 16; [1943] A.C. 320; 112 L.J.Ch. 22; 168 L.T. 113; 2nd Digest Supp.
- (3) *Sifton v. Sifton*, [1938] 3 All E.R. 435; [1938] A.C. 656; 107 L.J.P.C. 97; 159 L.T. 289; Digest Supp.
- (4) *Re Hinckes*, [1921] 1 Ch. 475; 90 L.J.Ch. 335; 124 L.T. 681; *affg.*, [1920] 2 Ch. 511; 44 Digest 472, 2913.
- (5) *Re Lanyon*, [1927] 2 Ch. 264; 96 L.J.Ch. 487; 137 L.T. 806; 44 Digest 456, 2782.
- (6) *Re Sandbrook*, [1912] 2 Ch. 471; 81 L.J.Ch. 800; 107 L.T. 148; 44 Digest 444, 2686.

APPEAL by the third, fourth, fifth, sixth, seventh and eighth defendants, Sir Arthur Bromley and certain of his issue, from an order of the Court of Appeal (SIR RAYMOND EVERSHED, M.R., ASQUITH and JENKINS, L.J.J.), dated Oct. 20, 1950, and reported [1950] 2 All E.R. 955, *sub nom. Re Wilson's Will Trusts*.

Tryon v. Bromley-Wilson and Others, reversing an order of HARMAN, J., dated May 5, 1950, on a question in regard to the construction of a shifting clause in the will of Gertrude Sophia Wilson.

By her will, dated July 4, 1890, the testatrix, who died on Jan. 23, 1892, settled the Dallam Tower estate, which formed part of her estate, on certain limitations to the use of the second and younger sons and their issue and the daughters and their issue of Henry Bromley, the son of Sir Henry Bromley, the fourth baronet (who was at the date of the will tenant for life in possession of the Stoke Hall estate). The will contained a shifting clause whereby "... if any such son or daughter or other issue of ... Henry Bromley within the scope of the limitations hereinbefore contained shall ... become actually entitled to the possession or the receipt of the rents and profits of ... the Stoke Hall estate ... or the bulk thereof whether consisting of the same premises as that estate now consists of or in any manner altered ... then

and so often as the same shall happen and thereupon every estate herein-before limited . . . shall absolutely determine and the [Dallam Hall estate] shall go and remain to the uses upon the trusts . . . upon . . . which the same premises would have stood limited and settled by virtue of this my will if such son or daughter had died and there had been a general failure of his or her issue . . .” Under the will the first defendant, Sir Maurice Bromley-Wilson (the second son of Henry Bromley) became tenant for life of the Dallam Hall estate. In 1906, in the events which happened, he became next entitled to the Stoke Hall estate under a re-settlement of that estate made in 1897, but he disclaimed his life interest under the re-settlement to avoid the operation of the shifting clause in the will, and the third defendant, Sir Arthur Bromley (the third son of Henry Bromley), became entitled under the re-settlement to a life interest in the Stoke Hall estate. Sir Maurice being now over seventy years of age and without issue, it became necessary for the proper administration of the Dallam Tower estate to determine who would become beneficially entitled to that estate on his death without issue, and the question was raised by an originating summons taken out by Charles Edward Tryon, the only surviving son of Mrs. Esther Tryon (the only daughter of Henry Bromley) and his infant daughter, Cicely Susan Esther Tryon. HARMAN, J., held that, as a matter of construction, the effect of the shifting clause was not, in the events which happened, to deprive Sir Arthur Bromley and his issue of their interests in the Dallam Tower estate. On an appeal by the plaintiffs from the decision of the learned judge it was further contended on behalf of Sir Arthur Bromley and his issue that the shifting clause was so uncertain in its terms as to be invalid. The Court of Appeal held (i) that the shifting clause was valid, and (ii) that, on its true construction, and in the events which had happened, the Dallam Tower estate stood limited under the will as if Sir Arthur Bromley had died and there had been a general failure of his issue, and that it was not necessary, for the defeasance to operate in favour of any individual, that that person should have come into actual possession of his or her interest in the Dallam Tower estate.

Harold Christie, K.C., and *A. F. M. Berkeley* for the appellants.

Milner Holland, K.C., and *Wilfrid Hunt* for the respondents.

The House took time for consideration.

Nov. 29. The following opinions were read.

LORD SIMONDS, L.C.: My Lords, this appeal raises a question as to the validity and effect of a clause, familiarly known to conveyancers as a “shifting clause”, contained in the will, dated July 4, 1890, of Gertrude Sophia Wilson who died on Jan. 23, 1892. At the date of her will the testatrix was, subject to certain prior interests, including a life interest in her sister Emily, entitled in fee to an estate known as the Dallam Tower estate, situate in the counties of Westmorland and Lancaster. She was a connection of one Sir Henry Bromley, the fourth baronet, who was at the date of her will tenant for life in possession of an estate known as the Stoke Hall estate situate in the county of Nottingham, and she was minded, as plainly appears from her will, to settle the Dallam Tower estate on his grandchildren and remoter issue in such a manner as to ensure that, if any such grandchild or his issue became entitled to the Stoke Hall estate, then such grandchild or issue should lose whatever interest they took under her will in the Dallam Tower estate. The substantial question is whether the clause in her will by which she has sought to carry out her intention is wanting in the precision which is a condition of the validity of a condition subsequent.

It will be convenient if, before I come to the relevant clause, I remind your Lordships of the few material facts including the devolution of title to the Stoke Hall estate. As I have already said, at the date of the will of the testatrix,

Sir Henry Bromley, the fourth baronet, was tenant for life in possession of the Stoke Hall estate and subject thereto the estate stood limited to his son, also named Henry, who afterwards became the fifth baronet, for life with remainder to Robert Bromley, the eldest son of the fifth baronet, who later became the sixth baronet, in tail male with remainders over. As will presently appear, the estate was, after the death of the testatrix, re-settled by the fifth baronet (who had by the death of his father in 1895 succeeded to the title)

- A as tenant for life in possession and his eldest son, Robert, as tenant in tail. The pedigree of the Bromley family, so far as is necessary for understanding the re-settlement and the will of the testatrix and the questions which arise thereout, is as follows. (i) The fifth baronet had four sons and one daughter, all of whom were born in the lifetime of the testatrix. (ii) His eldest son, Robert Bromley, the sixth baronet, died on May 13, 1906, and had no male issue. (iii) His second son, the respondent, Sir Maurice Bromley-Wilson (hereinafter called "Sir Maurice") the seventh and present baronet, is seventy-six years of age. He has been married twice but has never had any issue. His present wife is over seventy years of age. (iv) The third son is the appellant, Sir Arthur Bromley (hereinafter called "Admiral Bromley"). He has had issue one son only, the appellant, Rupert Howe Bromley, who is married and has had issue two children only, the infant appellants, Rupert Charles Bromley and Maurice David Bromley. Admiral Bromley has had issue four daughters, of whom the eldest is the appellant, Marion Victoria Bromley, and the next daughter is the appellant, Anne Lloyd, who is married and has issue. None of the children of Admiral Bromley was born in the lifetime of the testatrix. (v) The fourth son of the fifth baronet was Herbert Assheton Bromley who died on Apr. 24, 1915, a bachelor. (vi) The only daughter of the fifth baronet is Esther, who has been married once only, namely to Charles Robert Tryon. She has had issue four sons, of whom the eldest Henry Robert Tryon died in early infancy on Aug. 21, 1913. Her second son is the respondent, Charles Edward Tryon, and he has had issue two children only, both daughters, of whom the elder is the infant respondent, Cicely Susan Esther Tryon, and the younger died in early infancy. (vii) The respondents, John Tryon and Thomas Charles Tryon, are the younger sons of Mrs. Tryon and the respondent, David John Tryon, is the only son of the respondent, John Tryon.

The Stoke Hall estate was, as I have said, re-settled after the death of the testatrix. This was effected by a re-settlement, dated Feb. 26, 1897, following on the usual disentailing deed. The material limitations of the re-settlement

- F are as follows: (i) the fifth baronet for his life; (ii) remainder to his said eldest son, Robert, for his life; (iii) remainder to the sons of such eldest son, Robert, successively according to seniority in tail male; (iv) remainder to Sir Maurice for his life and then to his sons successively according to seniority in tail male; (v) remainder to Admiral Bromley for his life and then to his sons successively according to seniority in tail male; (vi) remainder to Herbert Assheton Bromley G for his life and then to his sons successively according to seniority in tail male; (vii) remainder to Rupert Fitzroy Bromley (a nephew of the fifth baronet) for life and then to his sons successively according to seniority in tail male; (viii) remainder to the use that each of the persons (other than Rupert Fitzroy Bromley) to whom estates in tail male had been limited should take successively and in the same order estates in tail general; (ix) remainder to Mrs. Tryon for H her life and then to her sons successively according to seniority in tail male and then to her daughters successively in tail general with other remainders over.

I must now return to the will of the testatrix which I can state shortly. She thereby devised the freehold part of the Dallam Tower estate on the following limitations: (i) to the use of her mother (who died in 1892) during her life; (ii) to the use that her cousin, Frances Carlton (who died in 1919), should receive for her life a yearly rentcharge of £400; (iii) subject as aforesaid to the use of Sir Maurice (the second son of the fifth baronet) during his life with remainder

to his sons successively according to seniority in tail male with remainder to such sons successively according to seniority in tail general with remainder to his daughters successively according to seniority in tail general; (iv) with remainder to the use of Admiral Bromley during his life with similar remainders to his sons and then to his daughters all successively in tail as aforesaid; (v) with remainder to the use of Herbert Assheton Bromley during his life with similar remainders to his sons and then to his daughters all successively in tail as aforesaid, but these limitations failed as he died a bachelor; (vi) with remainder to the use of the fifth and every other son of the fifth baronet thereafter to be born successively in tail, but this limitation also failed as there was no such son; (vii) with remainder in the words following:

" . . . to the use of the first and every other daughter of the said Henry Bromley [referring to the fifth baronet] hereafter to be born successively according to seniority in tail general . . . "

(viii) with remainders over to various members of the Hulton family.

These limitations were followed by a proviso, which in certain events reduced estates in tail to estates for life, and then by the shifting clause which I must state verbatim. It was in these terms:

" Provided always and I hereby declare that if any son daughter or other issue of the said Henry Bromley within the scope of the limitations hereinbefore contained shall by any means whatsoever become actually entitled to the possession or the receipt of the rents and profits of the family estate of Sir Henry Bromley the father of the said Henry Bromley meaning thereby the Stoke Hall estate near Newark in the county of Nottingham or the bulk thereof whether consisting of the same premises as that estate now consists of or in any manner altered in the way of addition substitution diminution or otherwise and so that this proviso shall not be rendered inoperative by reason of such estate or any part or parts thereof being subjected to any charges or incumbrances whatsoever then and so often as the same shall happen and thereupon every estate hereinbefore limited for life or in tail male or in tail to the son or daughter of the said Henry Bromley who or any of whose issue shall so become entitled and (as to any such son or daughter to whom an estate for life is hereinbefore limited) to the first and other sons and the first and other daughters successively of such son or daughter shall absolutely determine and the said premises hereinbefore devised shall go and remain to the uses upon the trusts and with and subject to the powers provisos and declarations to upon with and subject to which the same premises would have stood limited and settled by virtue of this my will if such son or daughter had died and there had been a general failure of his or her issue But nevertheless without prejudice as to any son or daughter of the said Henry Bromley to whom an estate for life is hereinbefore limited to any jointure yearly rentcharge or portions which may have been charged by such son or daughter under the respective powers for those purposes hereinafter contained before such son or daughter shall have become entitled in possession to the said Stoke Hall estate as aforesaid and without prejudice to any powers remedies or terms of years for securing or raising any such jointure or portions respectively."

I need mention only one other provision of this will and I do so because learned counsel for the appellants suggested that it had some bearing on the question that your Lordships have to decide. I refer to the power thereby conferred on every person made tenant for life of the Dallam Tower estate either before or after he should become entitled in possession to charge the estate with a jointure or portions, with a proviso that such jointure or portions should not be chargeable on the estate or be payable or carry interest unless and until such person or some issue of his or hers should, or if of full age would, have become entitled to the

possession or receipt of the rents and profits of the estate. The testatrix also devised all her other freehold estates, subject to certain limitations which need not be stated, on the same limitations and subject to the same provisions as the Dallam Tower estate, and she gave to her trustees all her copyhold and leasehold hereditaments on trusts corresponding with the same limitations and bequeathed certain chattels to devolve as heirlooms with the estate.

- A The sister of the testatrix, who had a life interest in the estate, survived her by a few weeks only, and thereupon Sir Maurice became tenant for life in possession of the Dallam Tower estate and of the properties and heirlooms settled therewith, and so he has remained to this day. On May 13, 1906, on the death without issue male of the sixth baronet, Sir Maurice was next entitled to a life estate in possession in the Stoke Hall estate under the re-settlement of 1897,
- B but, apprehending that the result of his entering into possession of that estate would be to bring into operation the shifting clause in the will of the testatrix and so to forfeit his interest in the Dallam Tower estate, on July 9, 1906, by a deed-poll of that date, he disclaimed the life estate limited to him by the re-settlement. The validity of this disclaimer was challenged by certain members of the family, but in proceedings commenced in 1911 in the Chancery Division
- C it was declared by NEVILLE, J., that Sir Maurice was entitled to an estate for life in the Dallam Tower estate. It has been urged on your Lordships that the effect of this judgment is that the question now raised as to the validity of the shifting clause is *res judicata*. I do not think it necessary to determine this question, but it is clear that it cannot be true of one at least of the present appellants who was neither a party, nor privy in estate to a party, to the 1911 proceedings.

- D The disclaimer of Sir Maurice being thus effective, Admiral Bromley became and was from July 9, 1906, beneficially entitled under the 1897 re-settlement to a life estate in the Stoke Hall estate or the bulk thereof within the meaning of the clause. It is important now to notice just what is the question that is to be determined, and I am for the time being ignoring a point on which HARMAN, J., decided in favour of the appellants. Learned counsel for the appellants sought at an early stage in his argument to raise the following question. He said: "Assume that the shifting clause is not void for uncertainty, yet on the facts Admiral Bromley did not come within it. He did not become actually entitled to the possession of the Stoke Hall estate or the bulk thereof within the meaning of the clause." Your Lordships were, however, unanimously of opinion that
- F this argument was not open to him. The unchallenged evidence on which the case proceeded before HARMAN, J., and the Court of Appeal was that Admiral Bromley had, since the death of the sixth baronet in 1906, been in possession of the Stoke Hall estate. I cite only the following passages. HARMAN, J., said:

- G " . . . [Sir Maurice] retained the Dallam Tower estate which he had and the Stoke Hall estate went over to Admiral Sir Arthur Bromley in 1906 and he has been in possession of it ever since."

So, also, JENKINS, L.J., said ([1950] 2 All E.R. 958):

- H "The result, however, of that disclaimer was that Sir Arthur did become actually entitled to possession or receipt of the rents and profits of the Stoke Hall property, his interest being accelerated by Sir Maurice's disclaimer. It was, no doubt, defeasible in the event of the birth of issue to Sir Maurice, but nevertheless was unquestionably an interest under which he became actually entitled to possession or to receipt of the rents and profits."

In these circumstances it was not open to the appellants to argue that Admiral Bromley's interest did not become subject to the operation of the shifting clause if it was a valid clause, though the actual or hypothetical facts of his case could be used to illustrate its uncertainty.

For reasons connected with the proper administration of the Dallam Tower estate, in 1950 it became urgently necessary to determine who, in the event of the death of Sir Maurice without issue, would become beneficially entitled to that estate. The choice lay between Admiral Bromley and his issue if the shifting clause had not operated, and Mrs. Tryon and her issue if it had, and this question, which was raised by an originating summons in the Chancery Division, has been decided by HARMAN, J., in favour of Admiral Bromley, but by the Court of Appeal in favour of Mrs. Tryon and her issue. A

My Lords, I have so far not mentioned the point on which HARMAN, J., found it possible to decide this case in favour of the appellants. I can do so very shortly, for I am entirely satisfied with the way in which the Court of Appeal disposed of it. If I understand his judgment, the learned judge proceeded on the footing that, on the reading of the will as a whole, the testatrix intended to give and gave an election to the person who, being in possession of either estate, then became entitled to the other, and that, inasmuch as such an election became in certain events impossible on the literal meaning of the clause, it must be so read as only to operate at a moment when a person became entitled to both estates in possession. But I agree with JENKINS, L.J., that this view proceeds on a false hypothesis. The language of the shifting clause is too clear to admit of it. There is not even an ambiguity. No other contention is possible than that, Admiral Bromley having become actually entitled to the possession or receipt of the rents and profits of the Stoke Hall estate, thereupon every estate for life or in tail in the Dallam Tower estate limited to him or his issue was absolutely determined. Nor can I find anything in the jointure and portions clause, to which I have referred, that in any way leads to a different conclusion. B

I come then to the point which was not argued before HARMAN, J., but was chiefly relied on in the Court of Appeal and in this House, *viz.*, that the clause is altogether void for uncertainty. It is a question which I must approach with this familiar principle in the foreground of my mind: D

" . . . that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine." E

See *Clavering v. Ellison* (1) *per* LORD CRANWORTH (7 H.L. Cas. 725). The attack on the language of the shifting clause was based mainly, if not entirely, on the four simple words "or the bulk thereof." These words, it was said, were so vague and uncertain that a beneficiary might not be able to know, nor a court to determine, whether that to which he succeeded for a life or other interest was the Stoke Hall estate "or the bulk thereof." It was said, and I think rightly said, that it was immaterial that in many, perhaps the great majority of cases, there could be no doubt whether he had done so. It would be sufficient if from the vagueness of the very words the court cannot determine what is the condition on which defeasance takes effect. No better example of this can be found than in *Clayton v. Ramsden* (2) where the condition of defeasance was marriage to a person "not of Jewish parentage and of the Jewish faith." It was irrelevant that of multitudes it might be predicated with certainty that they did or did not satisfy the condition. It was sufficient to hold both limbs of it void for uncertainty that the words themselves were incapable of precise definition. So, also, in *Sifton v. Sifton* (3), where the condition, which was regarded as a condition subsequent, was that payment was to be made to a daughter of the testator only so long as she should continue to reside in Canada, it was held that the term "reside" was too vague to enable the court and the parties concerned to see precisely and distinctly on what events the payments to the daughter were to cease. The question then is whether the words "or the bulk thereof" are of this nature. F

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My Lords, the shifting clause, as it appears in the will before us, is of respectable antiquity. It appears to have been the invention of the late MR. DAVIDSON, one of the great masters of the art of conveyancing, and to have been printed for the first time in his PRECEDENTS AND FORMS IN CONVEYANCING, 2nd ed., vol. IV, p. 516 [Precedent XXV, cl. 24a], which appeared in 1864. It was adopted in KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING, 2nd ed., vol. 2, p. 566, which appeared in 1883, and is to be found in numerous subsequent editions. Its validity has never, so far as counsel on either side have been able to find out, been questioned. In *Re Hinckes* (4), which came first before ASTBURY, J., and then the Court of Appeal, this very clause was under consideration, and, though its invalidity would have solved the difficulties of one at least of the parties, it did not occur to the distinguished counsel concerned to raise the question. In how many settlements the clause may have found a place, in how many instances estates may have been forfeited on the footing of its validity, no one can say. If, indeed, on a consideration of the clause, I came to the clear conclusion that the words in question had no precise meaning, I should be bound to give effect to my opinion. A long course of conveyancing practice cannot, I think, even where titles may be founded on it, be given the same effect as a line of judicial authority. But at the lowest I should hesitate long before I concluded that words which had for nearly a hundred years passed unchallenged by conveyancers, men often profoundly learned in the law of real property and apt to dwell on nice distinctions of language, were after all incapable of sufficiently precise definition.

What, then, am I to say of the words "the bulk thereof" in the clause and the context in which I find them? It is worth while, I think, to examine the context a little further. The words "the Stoke Hall estate . . . or the bulk thereof" are followed by words which clearly show that the testatrix had in mind that the Stoke Hall estate might be altered substantially in size, character and value before the opening of any particular succession, and, though it be altered by addition, substitution, diminution or otherwise, and be subjected to any charges or incumbrances whatsoever, it is still for the purpose of this clause "the Stoke Hall estate." The question, then, is whether in the context the words "the bulk thereof" have no clear meaning? It was urged that the first and insoluble difficulty lay in this, that it was impossible to determine whether bulk referred to size or value, and in this connection reference was made to the fact that in *Re Hinckes* (4) LORD STERNDAL, M.R., and YOUNGER, L.J., refrained from expressing an opinion as to its meaning. I should regret it, my Lords, if, whenever a learned judge does not express an opinion on a point which for the purpose of the case it is unnecessary for him to determine, it should be thought to follow that the point was incapable of determination. For myself, I should have no doubt that in such a clause and context as this, where it is clear that the settled property may consist of land or capital moneys liable to be invested in land, the choice between size and value is easily made. Just as when I say, by no means colloquially, but in formal language, that a man has left the bulk of his fortune or of his estate to X, I refer to value and not to area or size, so when a testatrix refers to the bulk of a settled estate which may be composite of land and money, it is value, not area or size, that is intended. Then it was said that, even so, the words are uncertain in content, for it is purely a question of degree what constitutes the "bulk." I cannot accept this contention. I think that according to the ordinary use of language the bulk means the greater part, which may, according to the subject-matter, refer to area, number or value. And that I may not be thought guilty of a solution which is equally obscure, I will add that "greater part" means anything over one half. I am of opinion that the words "the bulk thereof" are not subject to the same vice as were the words "of the Jewish faith" in *Clayton v. Ramsden* (2) and "reside" in *Sifton v. Sifton* (3) and as the expression "relation by blood" was thought to be by the Privy Council ([1938]

3 All E.R. 443) in *Sifton v. Sifton* (3), though RUSSELL, J., had determined otherwise in *Re Lanyon* (5).

In deference to the argument of learned counsel who sought to illustrate the alleged obscurity of the relevant words by reference to the facts of the present case, I will only add this. It does not follow because the words of a defeasance clause are sufficiently clear to give the clause validity, that there may not be cases in which its application is difficult, and I apprehend that, if there is a real doubt, the court will show the same favour to a vested estate in applying the clause as it does in construing it. But in the present case I do not find in the facts as proved, whether as illustrative of the difficulty of construction or of application, anything which would lead me to a conclusion favourable to the appellants. I have said that the main argument on invalidity was directed to the words "or the bulk thereof." Some reference was also made to the expressions "within the scope of the limitations hereinbefore contained" and "shall by any means whatsoever become actually entitled." But I am wholly unable to see any sort of ambiguity in those words, though the result of them may be capricious. This appeal should, in my opinion, be dismissed.

VISCOUNT JOWITT: My Lords, I concur.

LORD NORMAND: My Lords, I agree with the opinion of the Lord Chancellor and with that which my noble and learned friend, LORD MORTON OF HENRYTON, is about to deliver and which I have had the advantage of reading.

LORD MORTON OF HENRYTON: My Lords, this appeal must clearly be determined on the footing that in 1906 the first appellant, Admiral Bromley, became tenant for life in possession of the Stoke Hall estate mentioned in the will of the testatrix, Miss Wilson. The only affidavit filed in this case so states, and this fact was admitted before HARMAN, J., and in the Court of Appeal.

Two questions remain for decision by your Lordships' House. First, whether the "shifting clause" in the testatrix' will is valid or is void for uncertainty, and, secondly, if that clause is valid, whether on the true construction of the will it has already operated to exclude Admiral Bromley and his issue from ever succeeding to the Dallam Tower estate. The shifting clause has already been read, and I shall not read it again. The attack on its validity is based principally on the words "or the bulk thereof." It is said on behalf of the appellants that "bulk" is a vague and indefinite word, which introduces uncertainty into the clause. If this is so, the appeal must succeed. As LORD CRANWORTH said (7 H.L. Cas. 725) in *Clavering v. Ellison* (1):

"... from the earliest times, one of the cardinal rules on the subject has been this: that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine."

The same rule was expressed by PARKER, J., in *Re Sandbrook* (6) in the following terms ([1912] 2 Ch. 477):

"... conditions subsequent, in order to defeat vested estates, or cause a forfeiture, must be such that from the moment of their creation the court can say with reasonable certainty in what events the forfeiture will occur."

There is no doubt that the shifting clause now under consideration is a condition subsequent. It is, therefore, necessary to consider the question whether, from the moment of the testatrix' death, the court has been able to say, with reasonable certainty, in what events a forfeiture of the Dallam Tower estate will occur. If this question is answered in the negative, the shifting clause is

void, and the interests of Admiral Bromley and his issue in the Dallam Tower estate are in no way affected by the fact that in 1906 Admiral Bromley succeeded to the whole of the Stoke Hall estate. A convenient method of answering this question is to set out the steps which must be taken if it is alleged, at any time after the testatrix' death, that a particular individual, whom I shall call XY, has incurred a forfeiture under the shifting clause, and to consider what doubts, if any, arise as to each step. The first step is to establish that XY is

A " . . . [a] son daughter or other issue of the said Henry Bromley within the scope of the limitations hereinbefore contained . . . "

HARMAN, J., construed the words " within the scope of the limitations hereinbefore contained " as meaning " entitled in possession under the limitations hereinbefore contained." He remarked that this was " perhaps not a very easy construction of the words ", but he adopted it to give effect to what he thought must be the testatrix' intention, and he placed some reliance on the use of the word " determine." This point was fully dealt with by JENKINS, L.J. ([1950] 2 All E.R. 961), in a passage with which SIR RAYMOND EVERSHED, M.R., and ASQUITH, L.J., agreed. He thought that the phrase in question meant simply " to whom the property is limited under the limitations hereinbefore contained " and was unambiguous. I agree with his conclusion and with each step in his reasoning.

Next it must be established that XY has

D " . . . by any means whatsoever become actually entitled to the possession or the receipt of the rents and profits of the family estate of Sir Henry Bromley the father of the said Henry Bromley meaning thereby the Stoke Hall estate near Newark in the county of Nottingham or the bulk thereof whether consisting of the same premises as that estate now consists of or in any manner altered in the way of addition substitution diminution or otherwise and so that this proviso shall not be rendered inoperative by reason of such estate or any part or parts thereof being subjected to any charges or incumbrances whatsoever . . . "

The words " by any means whatsoever," are, to my mind, capable of only one meaning, though they might, in certain circumstances, give rise to great hardship, and it is not suggested that there is any difficulty in identifying the estate which the testatrix described as " the Stoke Hall estate." At the date of her will and also at the date of her death, Sir Henry Bromley, the fourth baronet, was tenant for life in possession of the Stoke Hall estate. I shall first consider a case in which it is alleged that XY has become entitled to the whole of the Stoke Hall estate. The person so alleging must establish that the property to which XY has succeeded can be identified with the Stoke Hall estate mentioned in the will. There may have been, since the testatrix' death, disentailing deeds, re-settlements of part only of the estate, sales and mortgages. All these events, however, have been contemplated by the testatrix in the words which she has used, and any difficulties which might arise as to identity would be merely difficulties of proof. They would not be the result of any ambiguity in the testatrix' will. Next I consider a case in which it is alleged that XY has become entitled, not to the whole, but to " the bulk ", of the Stoke Hall estate. I shall take, as an example, a case in which, as a result of various dealings, the Stoke Hall estate is represented, at the time when the succession opens, by £50,000 consols, a grouse moor and three farms, and XY has succeeded to part of this collection of properties. How is it to be determined whether the part to which he has succeeded is or is not " the bulk " of the Stoke Hall estate ?

My Lords, in my view, the ordinary meaning of the words " the bulk " is " the greater part " and I see no reason for giving them any other meaning in this will. Nor do I see any reason to doubt that, in the context in which they occur, they mean the greater part in value. If the testatrix had been referring

to land, and nothing but land, there might have been some doubt whether she meant the greater part in acreage or the greater part in value, but she is referring to an estate which may be "in any manner altered in the way of addition substitution diminution or otherwise," so that the subject-matter may consist partly of land, partly of money or investments, and partly of chattels settled to devolve as heirlooms. When the phrase "the bulk" is applied to such a subject-matter, I can give it no other meaning than "the greater part in value." The result is that, if a doubt arose whether XY had become entitled to the bulk of the Stoke Hall estate, it would only be necessary to value the items of property making up the Stoke Hall estate at the time of XY's succession, and then to ascertain whether the value of the items to which XY became entitled was or was not more than half the value of the whole. Here again practical difficulties as to the basis of valuation might arise, but they would not be due to any ambiguity in the words used by the testatrix. A

The result is that, in my judgment, the shifting clause satisfies the test laid down in *Claverling v. Ellison* (1) and other cases and is valid. And if its validity is established, there can be no doubt that Admiral Bromley comes within its terms. He is one of the "issue of the said Henry Bromley within the scope of the limitations hereinbefore contained," and in 1906 he became "actually entitled" in possession to the Stoke Hall estate. Thereupon the Admiral and his issue became excluded from the succession to the Dallam Tower estate. I would dismiss the appeal. B

LORD TUCKER: My Lords, I concur.

Appeal dismissed. D

Solicitors: *Rider, Heaton, Meredith & Mills* (for all parties).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

ALLIANCE BUILDING SOCIETY v. AUSTEN. E

[CHANCERY DIVISION (Roxburgh, J.), November 19, 27, 1951.]

Contempt of Court—Committal—Execution of writ of possession—Resumption of possession by person evicted. F

On Oct. 12, 1951, in execution of a writ of possession a sheriff's officer evicted the defendant from a flat and gave vacant possession to the plaintiffs. On Oct. 25, 1951, it was found that the defendant had re-occupied the flat. The plaintiffs moved the court to commit the defendant for contempt, but the learned judge adjourned the application for one week on the defendant's stating that he had vacated the premises and promising not to return. On the resumed hearing, it appearing that the defendant had remained in occupation in the meantime, G

HELD: although the ordinary remedy after the recovery of possession by a person evicted under a writ of possession was to apply *ex parte* to a master for a writ of restitution, the court had jurisdiction to commit for contempt in such circumstances, and it was proper to exercise that jurisdiction in the present case. H

Dictum of POLLOCK, B., in *Lacon v. De Groat* (1893) (10 T.L.R. 25), applied.

AS TO REMEDY FOR RESUMPTION OF POSSESSION AFTER EXECUTION OF WRIT OF POSSESSION, see HALSBURY, *Hailsham Edn.*, Vol. 7, p. 15, para. 20; and FOR CASES, see DIGEST, Vol. 41, pp. 77, 78, Nos. 101-104.

Case referred to:

(1) *Lacon v. De Groat*, (1893), 10 T.L.R. 24; 41 Digest 78, 103.

MOTION by the plaintiffs that the defendant might be committed to prison for a contempt of court in recovering possession by force or stratagem of a flat at 35 Blythe Vale, Catford, London, after execution of a writ of possession in respect thereof.

J. W. Mills for the plaintiffs.

The defendant appeared in person.

ROXBURGH, J.: Mr. Cockarill, a partner in the firm of Killick & Knight, auctioneers and estate agents, deposes that:

"On Oct. 12, 1951, I met the sheriff's officer at No. 35 Blythe Vale, Catford, in the county of London. In execution of a writ of possession dated Oct. 2, 1951, the sheriff's officer evicted the above-named defendant Cecil Austen from the ground floor flat at the premises and gave vacant possession of the same to myself as agent for the plaintiffs the Alliance Building Society . . . The lock on the front door of the flat was changed and the flat was locked up. On Oct. 25, 1951, I again went to No. 35 Blythe Vale. I found the defendant asleep in the ground floor flat from which he had been evicted as aforesaid. His goods and furniture were also still there."

A Mrs. Elen deposes:

"I am the tenant of the upper part of the house known as 35 Blythe Vale, Catford . . . On the evening of Oct. 12, 1951 . . . on entering the said house I observed that the said Cecil Austen had re-entered his flat and he appeared to have done so through a window. Ever since Oct. 12, 1951, the said Cecil Austen has continued to reside in the said ground floor flat and he is still residing there."

This matter came before me a week ago, and I was then disinclined to commit the defendant to prison. It seemed to me that the normal procedure in such a case as this is that stated in the *ANNUAL PRACTICE*, 1950, p. 844:

"Writ of restitution. Where, after entry of the sheriff under a writ of possession, or after the plaintiff has been put in possession by the sheriff, the defendant forcibly or by stratagem resumes possession of the property, the plaintiff may have a writ of restitution. Application for the writ should be made *ex parte* to the master in chambers on an affidavit of facts (to be left at Room 120), and an order will be made for the writ to issue."

I desire to emphasise that, in my judgment, that comparatively inexpensive procedure should be regarded as the normal procedure, and my decision in the present case should not be treated as an encouragement to bring further motions of this character. I asked the defendant whether he had given up possession, and he said he had. I then asked him whether he would promise me not to go back, and he gave me that promise. I thereupon stood the motion over for a week with a view to seeing whether he kept the promise which he had given me. He has not done so. The promise was not in the form of an undertaking, and it was not intended by me to be such, but it is a very material matter for the purpose of this motion, because what is the good of issuing a writ of restitution if this is the defendant's attitude? If he is prepared to treat as of no consequence a promise which he makes to me, am I to anticipate that he will pay greater respect to the sheriff's officer? Is there not every reason to apprehend that, even if a writ of restitution were executed, he would slip back again if it were

physically possible to do so? Therefore, I have considered anxiously whether I have jurisdiction to send the defendant to prison for contempt.

The matter seemed to me to be one of some difficulty. There is a clear and categorical statement in the *ANNUAL PRACTICE*, 1950, p. 802:

“Recovery of possession by force or fraud after execution of writ of possession is a contempt.”

Only one case, *Lacon v. De Groat* (1), is cited for that proposition. That case was decided in 1893 and it is certainly curious that this question seems never to have been the subject-matter of any later reported case. That, I think, emphasises the importance of what I have said at the outset, *viz.*, that this procedure should be regarded as abnormal, and that the writ of restitution should be regarded as the normal procedure. At the same time, there are, I think, in the judgments of the Divisional Court in *Lacon v. De Groat* (1) sufficiently clear passages to justify me in thinking that this is a case in which I can and should commit the defendant to prison for contempt. The facts in that case were by no means identical with the present case, though they have many points of resemblance, but it is rather in the judgments than in the facts of that case that I find my justification. POLLOCK, B., said (10 T.L.R. 25):

“In a case like this, where judgment had been given that the plaintiff shall recover possession of premises and a writ has been issued to the sheriff to deliver possession: if the officer has been apparently put in possession and the defendant chooses at some later time to change his mind and came back to the premises and by craft or force to again obtain possession, it was right that an attachment should be issued against him on the ground that he had not really given up possession. Whenever, the writ being put in force, the defendant or anybody who assists him, does not fully and honestly give up possession, but only colourably does so, the judge applied to may and ought to find that the process of the court had not been obeyed, and that there had been a contempt of court.”

In my judgment, those passages clearly cover the present case. It is not necessary to decide whether the defendant got in by force or stratagem. It was by one or the other, and he got in on the very same day that he was ejected and has been there ever since. Having told me untruthfully that he had gone out, he gave me a promise that he would not go back, and straight away he broke that promise. It seems to me that his conduct is of a kind which cannot be tolerated if the law of this country is to be enforced. Therefore, I make an order committing him to prison.

Order accordingly.

Solicitors: *Boxall & Boxall*, agents for *Cardens*, Brighton (for the applicant).
[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

GOSPEL AND ANOTHER v. PURCHASE (INSPECTOR OF TAXES).

[HOUSE OF LORDS (Lord Simonds, L.C., Lord Normand, Lord Morton of Henryton, Lord Tucker, Lord Asquith of Bishopstone), October 22, 23, November 29, 1951.]

A *Income Tax—Profits—Death of taxpayer—Periodical payments under deceased's contracts received by executors—Liability of payments to tax—Income Tax Act, 1918 (c. 40), sched. I, sched. D, cases II, III, VI.*

Under three agreements made in 1940 with various film companies, H. agreed to direct, produce, or act in certain films and to assign a story and "shooting script" owned by him. He was to be paid under contract (a) £5,000, payable during production, and a certain proportion of the gross profits from the distribution which was to be paid to him monthly by the company as the gross receipts came in. Under contract (b), H. was to receive £2,000 and a sum equal to 14/49ths of the company's share in the ultimate net profits, and under contract (c) £5,000 during the making of the film, £10,000 to be paid within two years and six months after the trade show of the film and a sum equal to two-thirds of the sums from time to time received by the company in respect of the film to be paid within one year from the receipt by the company of such sums. On June 1, 1943, H. died, having received in his lifetime the £5,000 under contract (a), the £2,000 under contract (b), and the initial £5,000 under contract (c). As regards contract (c), it appeared that H. had agreed in his lifetime that there should be a variation (although no agreement to that effect had been signed), and his executors agreed that for the £10,000 there should be substituted £11,000 payable by four annual instalments of £2,000 in 1943, 1944, 1945, and 1946 and a final instalment of £3,000 not later than Dec. 31, 1947, and further that in lieu of two-thirds of receipts the company was to pay two-thirds of receipts in excess of £11,000. Under the three agreements the executors from time to time received payments on account of the agreed proportion of receipts in 1945, 1946, and 1947. The executors were assessed to income tax in respect of (i) the instalments of the lump sum (under contract (c)), and (ii) the periodical payments of receipts.

HELD: the payments made to the executors retained the quality of remuneration for H.'s professional activities and they did not assume on H.'s death a different character so as to fall within cases III or VI of sched. D of sched. I to the Income Tax Act, 1918, and, therefore, as H. had ceased to carry on his profession, they were not liable to taxation.

AS TO CHARGE TO TAX UNDER CASES III AND VI OF SCHED. D OF SCHED. I TO THE INCOME TAX ACT, 1918, see HALSBURY, Hailsham Edn., Vol. 17, pp. 178-189, paras. 372-389, and pp. 202-208, paras. 419-426; and FOR CASES, see DIGEST, Vol. 28, pp. 62-77, Nos. 316-421, and pp. 81, 82, Nos. 451-462.

Cases referred to:

- (1) *Davies v. Braithwaite*, [1931] 2 K.B. 628; 100 L.J.K.B. 619; 145 L.T. 693; 18 Tax Cas. 198; Digest Supp.
- (2) *Bennett v. Ogston*, (1930), 15 Tax Cas. 374; Digest Supp.
- (3) *Asher v. London Film Productions, Ltd.*, [1944] 1 All E.R. 77; [1944] K.B. 133; 113 L.J.K.B. 149; 170 L.T. 17; 2nd Digest Supp.
- (4) *Howe (Earl) v. Inland Revenue Comrs.*, [1919] 2 K.B. 336; 88 L.J.K.B. 821; 121 L.T. 161; 7 Tax Cas. 289; 28 Digest 111, 683.

APPEAL by the taxpayers from an order of the Court of Appeal dated Apr. 5, 1950, allowing in part an appeal by the Crown from an order of CROOM-JOHNSON, J., dated Nov. 1, 1949, dismissing the Crown's appeal from a decision of the Special Commissioners of Income Tax who discharged certain assessments made

on the taxpayers as the executors of Leslie Howard Stainer, deceased. A cross-appeal by the Crown was withdrawn during the hearing.

Graham-Dixon, K.C., and *Tribe* for the taxpayers.

Grant, K.C., and *R. P. Hills* for the Crown.

The House took time for consideration.

Nov. 29. The following opinions were read.

LORD SIMONDS, L.C.: My Lords, the question in this appeal is whether the appellants, who are the executors of the late Leslie Howard Stainer, are assessable to income tax on certain sums which had been earned by him in the course of his profession as a film actor and producer but in the events that happened fell due for payment after his death. A cross-appeal was presented on behalf of the Crown in respect of certain other sums which in the courts below were held not to be assessable to tax, but it was withdrawn at the Bar of your Lordship's House. Leslie Howard Stainer, who was professionally known as Leslie Howard, was killed by enemy action on or about June 1, 1943. He had in the exercise of his profession entered into certain contracts, current at his death, under which the sums in question were paid, and about them I must say a few words.

The relevant contracts were: (a) an agreement of Oct. 31, 1940, made between British National Films, Ltd., and Mr. Howard under which he was to act as producer and associate director of, and take the leading part in, a film called "Mr. Pimpernel Smith." He was also to assign to the company the story and the "shooting script" of which he was the owner. It was expressly provided that the picture when completed and all rights therein were to be the sole property of the company and that nothing in the agreement was to constitute a partnership between the parties. For his services in producing, directing, and acting in the picture Mr. Howard was to be paid by way of remuneration £5,000 payable during production and a certain proportion of the gross receipts from the distribution after certain agreed deductions. This proportion was to be paid to him monthly by the company as the gross receipts came in. Mr. Howard fully performed the services required of him, the film was made in 1940, and he duly received the £5,000. No question arises in regard to this sum. But during the years ended Apr. 5, 1945, 1946, and 1947 sums were received by the company from the distribution of the picture, and sums representing the proportions due to Mr. Howard were paid to the appellants as his executors without any deduction for income tax. These sums were included in the assessments now in dispute. (b) An agreement of Dec. 13, 1940, made between Ortus Films, Ltd., and Mr. Howard under which he was to perform in a film to be called "The 49th Parallel," the full copyright in which was to belong to the company. As remuneration Mr. Howard was to receive, and duly received, £2,000 (as to which no question arises) and he was also to receive a sum equal to 14/49ths of the company's share in the ultimate net profits of the distribution of the film. Under this agreement also sums were paid to the appellants in the years ended Apr. 5, 1945 and 1946, and were included in the disputed assessments. (c) An agreement of Sept. 18, 1940, made between Misbourne Pictures, Ltd., and Mr. Howard under which he was to act as producer-director of, and perform in, a film to be called "The First of the Few," the full copyright of the work being vested in the company. Under this agreement Mr. Howard's remuneration was to be (i) £5,000 during the making of the film, (ii) £10,000 to be paid within two years and six months after the trade show of the film, and (iii) a sum equal to two-thirds of the actual sums from time to time received by the company in respect of the exploitation of the film, such two-thirds share to be paid within one year from the receipt by the company from time to time of such sums. This film was made in 1941 and 1942 and the trade show was in August, 1942. No question arises with regard to the £5,000 which was duly paid to Mr. Howard in his lifetime.

Mr. Howard appears to have agreed with the company in his lifetime that there should be a variation of the remuneration secondly and thirdly provided for, but he died before any agreement had been signed. The appellants, however, agreed with the company that for the £10,000 there should be substituted the sum of £11,000 payable by four instalments of £2,000 each not later than Dec. 31, 1943, 1944, 1945 and 1946, and a final instalment of £3,000 payable not later than Dec. 31, 1947, and further that in lieu of the two-thirds of the sums received in respect of the exploitation of the film the company was to pay a sum equal to two-thirds of the sum so received in excess of £11,000. During the years ended Apr. 5, 1945, and 1946, sums were paid to the appellants by the company without deduction of tax and these sums were included in the disputed assessment.

It will be seen, therefore, that the assessments included (a) certain instalments of a lump sum, and (b) periodical payments of certain gross receipts. The appellants appealed against the assessments to the Special Commissioners who discharged them but at the request of the respondent stated a Case for the opinion of the High Court. On Nov. 1, 1949, CROOM-JOHNSON, J., before whom the matter came, dismissed the appeal and confirmed the determination of the Special Commissioners. The respondent, accordingly, appealed to the Court of Appeal which allowed the appeal except so far as related to the instalments of the £11,000, and the 14/49ths under contract (b). The court consisting of SIR RAYMOND EVERSHED, M.R., and SOMERVELL and JENKINS, L.JJ., were unanimous in holding that the instalments of the sum of £11,000 and the said 14/49ths were not assessable to tax, but by a majority, JENKINS, L.J., dissenting, held that the other payments were so assessable. The cross-appeal of the Crown having been withdrawn, it is only with these payments that your Lordships are concerned.

My Lords, having given to this case all the consideration that I can, I am conscious that I can add little or nothing to the dissenting judgment of JENKINS, L.J. *, with every word of which I agree. I respectfully adopt it, and only make these observations in deference to the opinion of the majority of the Court of Appeal and the argument of learned counsel for the Crown. It will be convenient, my Lords, if I state the material provisions of the Income Tax Act, 1918. The disputed assessments are made under case III or, alternatively, case VI of sched. D. Tax under sched. D is chargeable in respect of (a) the annual profits or gains arising or accruing in the United Kingdom from any trade, profession, employment, or vocation, whether carried on in the United Kingdom or elsewhere, and (b) all interest of money, annuities and other annual profits or gains not charged under sched. A, B, C or E and not specifically exempted from tax. It is chargeable under a number of cases, of which I must mention cases II, III and VI. Case II is tax in respect of any profession, employment, or vocation not contained in any other schedule; case III is tax in respect of profits of an uncertain value and of other income described in the rules applicable to that case, and case VI is in respect of any annual profits or gains not falling under any other case and not charged by virtue of any other schedule. The tax is chargeable subject to and in accordance with the rules applicable to the several cases, and of these rules I need mention two only. First, a rule applicable to case II provides that the tax shall extend to every employment as therein mentioned, and shall be computed on the full amount of the balance of profits, gains, and emoluments of the professions, employments, or vocations. Secondly, a rule applicable to case III provides that the tax shall extend to any interest of money whether yearly or otherwise or any annuity or other annual payment as therein mentioned, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods.

* See p. 1076, *post*.

It is common ground between the parties that the position would be precisely the same if Mr. Howard had not died, but had retired from his profession in 1943. His liability to tax would be the same as that of his executors. It is further agreed that, had Mr. Howard been still carrying on his profession at the time when the sums in dispute were received, they would have been properly included in the account of the profits, gains, and emoluments of his profession under case II and would not have fallen under any other case. It was not suggested that the sums received in respect of any particular contract could be isolated: all of them would be aggregated with any other profits of his professional activity and the balance after deducting the expenses properly deductible would be chargeable under case II: see *Davies v. Braithwaite* (1) ([1931] 2 K.B. 628). But, it was said, and this is the short point of the case, that Mr. Howard died before the sums were received, and in the hands of his executors, as they would have been in his hands if received by him after his retirement, they are no longer to be regarded as the profits and gains of his profession, but assume a different character and fall under case III or case VI.

My Lords, if this contention had not found favour with the learned Master of the Rolls and SOMERVELL, L.J., I should not have thought it arguable. The principle which is applicable here was stated with his usual clarity by ROWLATT, J., in *Bennett v. Ogston* (2), and I will cite his words (15 Tax Cas. 378):

"When a trader or a follower of a profession or vocation dies or goes out of business . . . and there remain to be collected sums owing for goods supplied during the existence of the business or for services rendered by the professional man during the course of his life or his business, there is no question of assessing those receipts to income tax; they are the receipts of the business while it lasted, they are arrears of that business, they represent money which was earned during the life of the business and are taken to be covered by the assessment made during the life of the business, whether that assessment was made on the basis of bookings or on the basis of receipts."

I am satisfied that this is a correct statement of the relevant principle of income tax law, though I have some doubt—it is not necessary to decide it—whether the learned judge correctly applied the principle in the case before him. If so, there seems to me to be an end of the case. How else could these sums come to the hands of Mr. Howard or his executors than as the remuneration for his professional activities, the reward for services rendered by him during his life and unpaid for at his death? It appears to me wholly irrelevant that they were not payable until after his death and equally so that they were not and could not be quantified until after that event. They retained the essential quality of being the fruit of his professional activity. If in all the circumstances it was not possible to bring the sums into account in the years in which they were earned, as I will assume to be the case, the result is not to change the character of the payment, but to exhibit that some professional earnings may escape the income tax net. The withdrawal of the cross-appeal shows that lump sum payments made in the circumstances of the present case do so escape.

My Lords, it appears to me that the issue is confused by raising in general terms the question whether professional remuneration may in certain circumstances assume a different character for tax purposes when the taxpayer is dead or has retired. At least, *Asher v. London Film Productions, Ltd.* (3) is no authority for such a proposition. In that case there was no question of the same sum assuming a different quality in changing conditions. I am content to assume that there may be such a case though I find it difficult to imagine. But here I cannot see how or where the change takes place. The source of these payments was the professional activity of Mr. Howard. It was never anything else. It is true that his remuneration took the form of annual payments which, if other conditions were satisfied, might fall within case III. But other conditions were

not satisfied, for *ex hypothesi* the source of the remuneration was the exercise of a profession falling within case II.

Then your Lordships were pressed, particularly by junior counsel for the Crown, with the argument that the remuneration of Mr. Howard took the form of an "income bearing asset" which became assessable after his death in the hands of his executors. I am not sure that I correctly apprehend the argument, though I can well understand that, if a professional man receives as remuneration for his services the sum of £1,000 $2\frac{1}{2}$ per cent. consols and retains them, he will suffer deduction of tax from the interest. But I do not understand in what sense the sums of money receivable by Mr. Howard can be described as an income bearing asset. At one time it appeared to be urged that the several contracts, which at once imposed obligations on Mr. Howard and created rights in him, were income bearing assets, the income being the remuneration paid under them. JENKINS, L.J., described this argument as "placing a strained and artificial construction on these contracts" and I am content to dismiss, without using more vigorous language, a contention that wholly disregards both the form and substance of the transaction. If I am right in thinking that the sums in question were not assessable under case III because they were nothing else than remuneration professionally earned by Mr. Howard in his lifetime, this disposes also of the alternative claim under case VI. In the result, I am of opinion that the appeal should be allowed and the cross-appeal dismissed, with costs, and I move your Lordships accordingly.

LORD NORMAND: My Lords, I concur.

D LORD MORTON OF HENRYTON: My Lords, I also concur.

LORD TUCKER: My Lords, I also concur.

LORD ASQUITH OF BISHOPSTONE: My Lords, I entirely agree with the opinions expressed by my noble and learned friends and would only wish to add a few sentences.

E It seems quite clear that the payments the liability of which to tax is in issue were exclusively the fruit or aftermath of the professional activities of Mr. Leslie Howard during his lifetime. This was, as a matter of historical fact, their source, and their only source. The fact that he died before some of this fruit had been garnered or its amount could be ascertained cannot alter that historical fact. He, and he alone, had done everything necessary to provide the harvest.

F Secondly, I adhere to the statement of principle—never apparently challenged in any reported case—of ROWLATT, J., in *Bennett v. Ogston* (2) where, in a passage already cited by the Lord Chancellor, he says (15 Tax Cas. 378):

G "When a trader or a follower of a profession or vocation dies or goes out of business . . . and there remain to be collected sums owing for goods supplied during the existence of the business or for services rendered by the professional man during the course of his life or his business, there is no question of assessing those receipts to income tax; they are the receipts of the business while it lasted, they are arrears of that business, they represent money which was earned during the life of the business and are taken to be covered by the assessment made during the life of the business, whether that assessment was made on the basis of bookings or on the basis of receipts."

H Applying this principle to the facts of the present case *prima facie* the resulting conclusion can only be that the payments in issue escape tax.

It is, however, contended by the Crown that in *Bennett v. Ogston* (2) the reason why the principle involving exemption did not apply was that when the money-lender died there was outstanding an income bearing asset (*viz.*, that part of the principal which was then unrepaid) which continued to earn income, as it were, in its own right. It was argued for the Crown that the same was the case

here, the income bearing asset consisting of the contracts made by Mr. Leslie Howard whereunder the payments in question were posthumously made.

There seems to me, however, to be a very clear distinction between "income bearing assets" for the purpose of this type of case and the contracts in question. If Mr. Leslie Howard had stipulated for payment in blocks of shares or bonds, or any other instruments which by their independent vitality generate income, the dividends or interest might well have been taxable in the hands of his executors. The contracts in the present case enjoy, in my view, no such independent vitality. The consideration for what Mr. Howard was to do—to act or manage—was not the grant of a contract or contracts, but the payment of money under the terms of those contracts. Mr. Howard acted for money: he did not act for contracts. The contracts were mere incidental machinery regulating the measure of the services to be rendered by him, on the one hand, and, on the other, that of the payments to be made by his employers. They were not the source, but the instrument, of payment, and his death, in my view, did nothing to divest them of that character. I agree unreservedly with the judgment of JENKINS, L.J., and respectfully concur with the motion of the Lord Chancellor that this appeal should be allowed.

Appeal allowed; cross-appeal dismissed.

Solicitors: *Walter, Burgis & Co.* (for the taxpayers); *Solicitor of Inland Revenue.*

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

FOOTNOTE

Apr. 5, 1950. JENKINS, L.J., read a judgment in which he stated the facts, referred to the terms of the contracts between Mr. Howard and the film companies concerned (hereinafter called contracts "A," "B," and "C") and to the contract (hereinafter called contract "E") made by Mr. Howard's executors varying contract "C", and continued: It is clear that contracts "A," "B" and "C" were in the nature of professional engagements entered into by Mr. Howard in the ordinary course of his profession or vocation as a film actor and film producer. His position in regard to income tax down to the date on which his profession or vocation was discontinued by reason of his death is thus described in the decision of the Special Commissioners:

"While he was alive and working he was assessed under Case II of sched. D [of the Income Tax Act, 1918] in respect of the 'balance of the profits gains and emoluments' of a 'profession or vocation,' the computation of such profits being made on what is termed an 'earnings basis.' It would appear from *Davies v. Braithwaite* (1) that he was correctly so assessed, and the contrary was not suggested by either party before us. It is clear that so long as he was carrying on his profession all the remuneration set out above would fall to be included as a receipt in the account of the profits and gains on which he would be so assessed and that the proper expenses would be deducted therefrom. It follows that none of the payments made to him could at that time be charged on him as 'annual payments' under r. 1 of Case III of sched. D, since they were not in his hands 'pure income profit': see *Howe (Earl) v. Inland Revenue Comrs.* (4) and *Asher v. London Film Productions, Ltd.* (3), where LORD GREENE, M.R., uses that phrase ([1944] 1 All E.R. 80) to distinguish annual payments from payments forming an element in the computation of profits and gains."

On this basis the lump sums of £5,000, £2,000 and £5,000, payable under contracts "A," "B" and "C" respectively, which were duly received by Mr. Howard in his lifetime were brought into account for the purposes of his assessment to income tax under Case II of sched. D, and no question arises in regard to them. There remained the proportion of the gross receipts from the distribution of "Mr. Pimpernel Smith" payable to Mr. Howard under contract "A," the proportion of the ultimate net profits of the distribution of "49th Parallel" payable to him under contract "B," and the £10,000 and two-thirds of the actual sums received in respect of the exploitation of "The First of the Few" payable to him under contract "C," or the amounts substituted for the two last-mentioned items by the arrangement made in his lifetime to which formal effect was given by contract "E."

In the assessments made on Mr. Howard under Case II of sched. D, no account was taken of the shares of receipts or profits prospectively payable to him under the various contracts, and, as the amounts which might be received and the dates at which they

might accrue were entirely unknown, it would obviously have been impossible to bring them into account. No valuation better than a mere guess could have been made of these prospective payments, and, even if it had been practicable to deal with them in that way, the result would have been grossly unfair to Mr. Howard in view of the incidence of surtax. Similarly, no account was taken of the £10,000 prospectively payable to Mr. Howard under contract "C" or of the £11,000 substituted for it by the arrangement to which I have just referred. It was, no doubt, contemplated that all these amounts, as and when received, would be brought into account year by year in assessing Mr. Howard under Case II of sched. D, but Mr. Howard died and his profession was thereby discontinued. This brought to an end the liability of the profits of his profession to tax under Case II of sched. D, subject to the appropriate assessment down to the date of discontinuance and other adjustments provided for under the Finance Act, 1926, s. 31, and subject also to the liability of his executors under the Income Tax Act, 1918, All Schedules Rules, r. 18, as regards any profits or gains which arose or accrued to him before his death, but were not returned by him for assessment in his lifetime, to be assessed to tax in respect thereof at any time within, or within three years after the expiration of, the year of assessment. Recourse was not had to r. 18 within the prescribed period of three years, and it is not in dispute that the liability to tax of Mr. Howard's professional earnings as such is now exhausted. The executors have, however, received since the death of Mr. Howard substantial sums in respect of the shares of receipts or profits payable to him under the several contracts and also in respect of the £11,000 payable in lieu of the £10,000 under contract "C" as varied by contract "E."

It is contended on behalf of the Crown that, although these sums were professionally earned by Mr. Howard in his lifetime, and although they can now no longer be assessed under Case II of sched. D as profits of his profession, this does not conclude the matter, because the particular sums here in question, or, at all events, the sums received by the executors in respect of the shares of receipts or profits accruing under the several contracts, possess in themselves the character of income, irrespective of the continuance or discontinuance of the profession in the course of which they were earned. It is pointed out that, as these shares of receipts or profits were not and could not have been prospectively brought into account in Mr. Howard's lifetime for the purposes of his assessment to tax under Case II of sched. D, they have never in fact borne tax, and unless now taxable in the hands of the executors will escape tax altogether. It is claimed that in these circumstances these shares of receipts or profits can properly be assessed to tax under Case III, or, alternatively, Case VI of sched. D.

Case III is:

"Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this Case."

Rule 1 of the rules applicable to that Case is:

"The tax shall extend to (a) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment, whether such payment is payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise . . . or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods."

Case VI is in these terms:

"Tax in respect of any annual profits or gains not falling under any of the foregoing Cases, and not charged by virtue of any other schedule."

It is, I think, reasonably plain that periodical payments in respect of a contractual right to a share in the receipts or profits of the distribution of a film acquired otherwise than in the course of a trade, profession or vocation falling within Cases I or II of sched. D would be taxable under Case III, r. 1 (a), as falling within the words:

"any . . . annual payment . . . payable . . . either as a charge on any property of the person paying the same . . . or as a personal debt or obligation by virtue of any contract . . ."

See *Asher v. London Film Productions, Ltd.* (3). This does not, however, take the case for the Crown the whole of the way. It may well be that, if Mr. Howard had not been carrying on the profession of a film actor and producer or any other relevant profession, but had (for example) acquired by gift or purchase the copyright in certain films, and had sold those films to a distributor for a lump sum, plus a share in the profits to arise from their distribution, the share in the profits as and when it accrued to him or, after his death, to his executors would have been taxable under Case III of sched. D. I apprehend that in these hypothetical circumstances the share of profits as and when it accrued would have been what LORD GREENE, M.R., described ([1944] 1 All E.R. 30) as "pure income profit" in *Asher v. London Film Productions, Ltd.* (3), while the lump sum would have been capital. But the actual state of the case here is that under contracts "A," "B" and "C" Mr. Howard in the course of his profession rendered

professional services for remuneration consisting of the prescribed lump sums and shares of receipts or profits. This meant that for income tax purposes there was no distinction between the lump sums and the shares of receipts or profits. The former were not pure capital, the latter were not pure income. They were all in one and the same category as professional remuneration liable to be brought into account for the purpose of ascertaining the taxable profit of the profession. This would, I think, be accepted on the part of the Crown as a sufficiently accurate statement of the position as it stood so long as the profession was carried on. It is claimed, however, that, on discontinuance of the profession, a new liability arose with respect to the shares of receipts or profits remaining to be paid, which thereupon assumed the character of annual payments in the nature of pure income profit taxable in the hands of the executors under Case III of sched. D. The Solicitor-General put it that the Crown had an option to tax either under Case II or under Case III, and it is, no doubt, true that in general, where income of a given description is such as to fall within the terms of two heads of charge, the Crown has an option to tax under whichever of the relevant heads it may select. But, as it seems to me, that is not this case. So long as the profession was carried on, these shares of receipts or profits could not be taxed under Case III of sched. D, because they were earnings of a profession and not pure income profit. There was thus no option. It was Case II of the schedule or nothing. After the discontinuance of the profession they could not be taxed under Case II of sched. D as profits of any subsequent period, for the very reason that they were earnings of a profession which had been discontinued, received after such discontinuance. There was thus, again, no option. It was Case III or Case VI of sched. D., or nothing. It appears to me that the argument for the Crown involves not merely the exercise of an option, but the assertion of a new and distinct liability to tax arising on the discontinuance of the profession with respect to payments on account of the shares of receipts or profits received after such discontinuance. Perhaps the best way of putting the point is to describe the shares of receipts or profits as possessing the dual character of (a) professional earnings and (b) annual payments, the argument being in effect that so long as the profession was carried on their character as earnings precluded their assessment as annual payments under Case III of sched. D, but that on the discontinuance of the profession this obstacle was removed and the sums in question became thenceforth simply annual payments to which the previously potential but suspended liability to tax under Case III of sched. D thereupon attached.

The question thus is, in effect, whether, in a case in which a person carrying on a profession performs professional services for remuneration, such as a share in the profits of a firm to be received from time to time over a period, and dies or otherwise discontinues his profession before the whole of such remuneration has been received, the liability to tax in respect of such remuneration (whensoever received) is exhausted by his assessment to tax on the profits of his profession down to the date of such discontinuance under Case II of sched. D, or whether the Crown can treat periodical payments in respect of such remuneration received after such discontinuance (and not, in fact, previously brought into account for tax purposes) simply as annual payments representing pure income profit taxable under Case III of sched. D, disregarding its original character as remuneration earned in the course of the discontinued profession.

The point is one on which there is a remarkable dearth of authority, although one would think it must have arisen over and over again in practice, as remuneration for professional services in the form of a share or percentage of receipts or profits is by no means uncommon. A valuable statement of principle is, however, to be found in the judgment of ROWLATT, J., in *Bennett v. Ogston* (2), which I accept as a correct exposition of the law. The case concerned the business of a moneylender which had been discontinued by his death, and the question was whether the interest element in instalments on promissory notes falling due after his death and collected by his executors was taxable in their hands as "interest of money" under Case III of sched. D, or was simply a deferred receipt of the discontinued business and as such not taxable under that Case. ROWLATT, J., decided that the interest element in the instalments in question was taxable as claimed by the Crown, and in the course of his judgment he said (15 Tax Cas. 378):

"When a trader or a follower of a profession or vocation dies or goes out of business—because Mr. Needham [counsel for the moneylender's administrator] is quite right in saying the same observations apply here—and there remain to be collected sums owing for goods supplied during the existence of the business or for services rendered by the professional man during the course of his life or his business, there is no question of assessing those receipts to income tax; they are the receipts of the business while it lasted, they are arrears of that business, they represent money which was earned during the life of the business and are taken to be covered by the assessment made during the life of the business, whether that assessment was made on the basis of bookings or on the basis of receipts. But this is not that case; because here the interest in question is not the accrued earnings of the capital during the life of the deceased or the time the

business was carried on; it is the earnings of the capital, or so much as is left of it since the death, and this interest has been earned over the time which has elapsed since the death."

He went on to say (*ibid.*, 379):

"I think when you are dealing with what is interest and nothing but interest you cannot say it is in the nature of business, because it is payment by time for the use of money."

This passage was relied on by both sides in the present case. The Solicitor-General equated the sums received by Mr. Howard's executors in respect of the shares of receipts or profits to the interest element in the instalments received by the moneylender's administrator, and said, in effect, that they were income earned by the exploitation of the films after Mr. Howard's death just as the interest was income earned after the moneylender's death by the use of the money lent in his lifetime. Counsel for the taxpayers, on the other hand, relied on the principle stated in the earlier part of the passage just quoted as showing that if the receipts in question are to be regarded as remuneration earned by Mr. Howard while he carried on his profession:

"... there is no question of assessing those receipts to income tax; they are the receipts of the business while it lasted, they are arrears of that business, they represent money which was earned during the life of the business and are taken to be covered by the assessment made during the life of the business, whether that assessment was made on the basis of bookings or on the basis of receipts."

Counsel for the taxpayers contends that he is entitled to succeed on this principle, and that the shares of receipts or profits here in question cannot be regarded as the fruit or produce of some source of income separate and distinct from the mere carrying on of the profession in the course of which they were earned.

I think it is clear that if, in the course of a profession, an income-bearing asset is received as remuneration, the income produced by that asset after the discontinuance of the profession may be taxed as such, just as the interest accruing after the death of the moneylender was taxed in *Bennett v. Ogston* (2). But, accepting, as I do, the principles stated in that case, I think it is equally clear that the assessment to tax of the profits of a profession under Case II of sched. D down to the date of discontinuance is to be taken as covering all remuneration earned in the course of such profession, whether received prior to or after such discontinuance, and that, the liability to tax being thus exhausted so far as remuneration is concerned, nothing which is, in truth, remuneration so earned can afterwards be charged to tax merely because the mode of ascertaining and paying it is such that it might have been charged to tax under some other Case if it had not been remuneration so earned.

Applying these principles to the present case, I ask myself whether under each of the contracts "A," "B" and "C" Mr. Howard is to be regarded as having rendered his professional services for remuneration consisting of a lump sum, or lump sums, plus the notional capital equivalent of a new source of income in the shape of the right to receive the shares of receipts or profits, or simply as having rendered those services for remuneration consisting of a lump sum, or lump sums, plus a further sum consisting of the share of receipts or profits, whatever it might amount to. This seems to me to be the short question on the answer to which the result of the present appeal must depend, and for my part I think it should be answered in the latter sense. Each of the three contracts "A," "B" and "C" seems to me to have contemplated the remuneration of Mr. Howard in two ways, *i.e.*, (i) by means of a sum or sums of fixed amount to be paid within a specified time, and (ii) by means of a further sum ascertained by reference to the receipts or profits derived from the distribution of the film and from its nature uncertain in amount and time of payment. As regards this latter form of remuneration, contract "A" provided for the monthly payment to Mr. Howard of any amount due to him on account of his share of receipts (otherwise than in respect of Canada and the Americas), and contract "C" provided for the payment of Mr. Howard's share of the receipts within one year from their receipt by the company concerned, while contract "B" contained no provision for any periodical payment on account of his share in the ultimate net profits. I cannot, however, regard these differences with respect to mode and time of payment as having any material bearing on the character of the sums in question. I think that in all three cases (including contract "C" as varied by contract "E") they constituted remuneration, deferred in point of ascertainment and payment until (in the event which happened) periods subsequent to the death of Mr. Howard, but, nevertheless, professionally earned in his lifetime just as much as the lump sums were so earned. I appreciate that the point is one which may well appeal differently to different minds, but, for my part, I think it would be placing a strained and artificial construction on these contracts if, instead of being treated as giving Mr. Howard as part of his remuneration in each case a sum consisting of or representing a specified share or proportion of the receipts or profits derived from the distribution or exploitation of the particular film (which is what they purport to do), they were treated as giving him as part of such remuneration an income-bearing asset consisting of the

right to receive a specified share or proportion of such receipts or profits, the sums paid to his executors on account of such share or proportion being consequently considered for income tax purposes, not simply as remuneration professionally earned by him in his lifetime, but as income subsequently produced by remuneration so earned.

It follows that, in the view I take, the shares of receipts or profits paid to the executors after the death of Mr. Howard should be regarded simply as remuneration professionally earned by him in his lifetime, and as such, on the principles stated in *Bennett v. Ogston* (2), not liable to tax in their hands. This conclusion, of course, disposes of the alternative claim under Case VI as well as the primary claim under Case III of sched. D. If I am wrong as regards the shares of receipts or profits paid under contract "A" and contract "C" as varied by contract "E," I think it is, at all events, clear that sums paid to the executors on account of the share of profits under contract "B," which, be it remembered, is expressed [in cl. 7 (b)] as

"A sum equal to fourteen forty-ninths of the company's share in the ultimate net profits of the distribution of the said film"

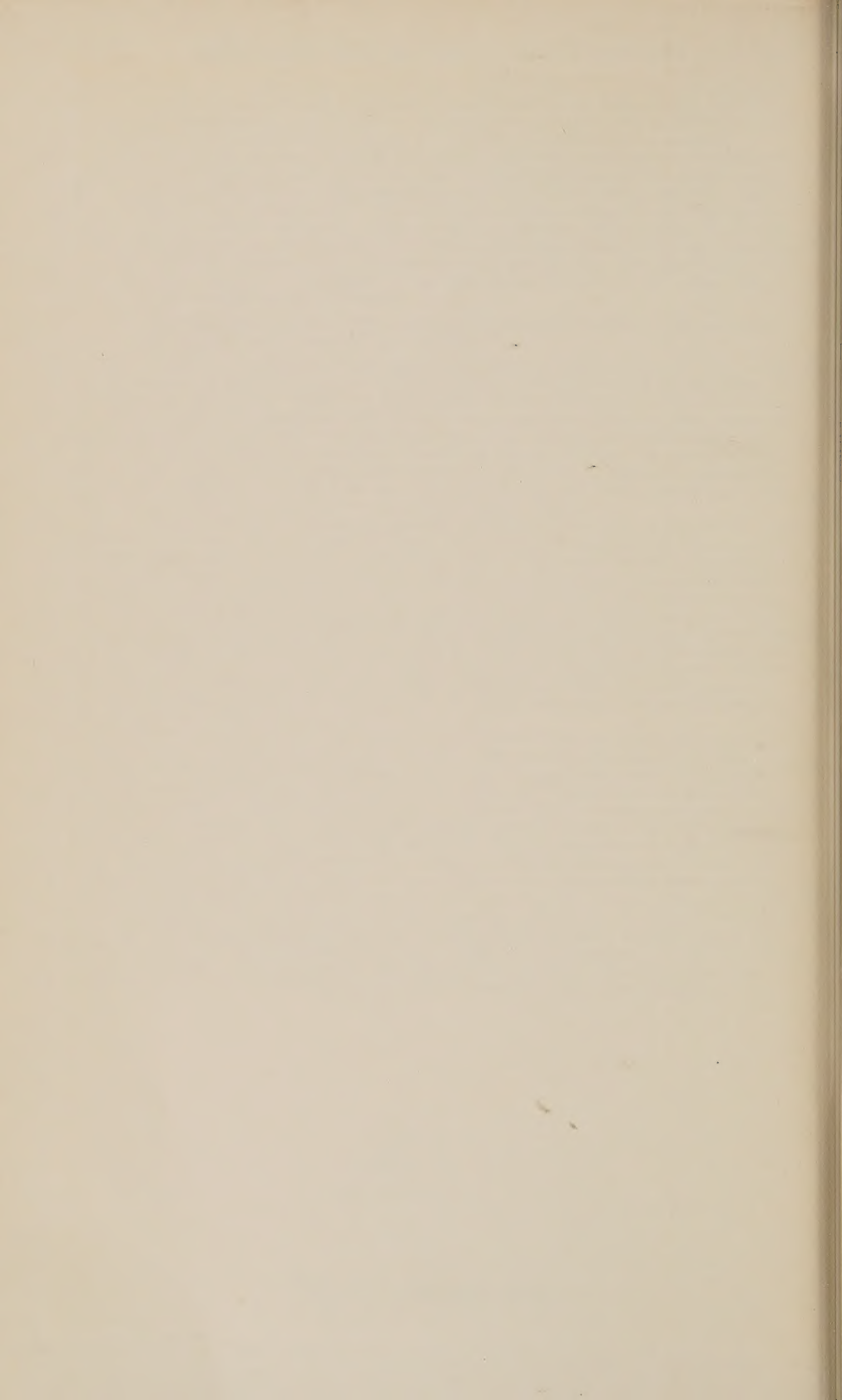
cannot be taxed in the hands of the executors under Case III or Case VI. The words used point to the ascertainment of an ultimate balance of profit and the payment in one sum of a share of the balance so ascertained. I see no justification for attributing to a single sum of this description the character of income in the hands of the executors, whatever may be said of the shares of receipts or profits payable periodically under the terms of the other two contracts. Periodical payments made on account of the share in the ultimate net profits under contract "B" must, I think, be regarded as of the same quality as the share on account of which they are paid, resembling in this respect instalments on account of a single lump sum payment.

There remains the sum of £11,000 payable by instalments under contract "C" as varied by contract "E." *A fortiori* I think the taxpayers are entitled to succeed in repelling the claim to tax under Case VI of sched. D in respect of these instalments whether the views I have expressed above with regard to the shares of receipts or profits under the several contracts are right or not. I should add that I do not think the fact that the method of remuneration prescribed by contract "C" was varied by contract "E" after the death of Mr. Howard has any material bearing on the result. It was merely a matter of substituting one mode of remuneration for another, and the substituted payments provided for by contract "E" were just as much remuneration professionally earned by Mr. Howard in his lifetime as those originally provided for by contract "C" as originally framed, the sole consideration for them being the professional services Mr. Howard had rendered.

I have not overlooked cl. 2 of contract "E" [which provided that the executors would give all such assistance as the company might reasonably require in regard to the exploitation of the film in question], but I cannot regard that clause, under which, admittedly, no services were, and none of any value could have been, rendered by the executors, neither of whom had anything to do with the film or cinema trade, as having the effect of converting the sums payable (so far as capable of being regarded as income for any purpose) from remuneration earned by Mr. Howard into a new source of income acquired by the executors by means of a fresh consideration moving from them. Nor have I overlooked the fact that there was something in the nature of an element of sale under contract "A" in the sense that Mr. Howard was the owner of the story and agreed to make over all rights in it to the company concerned. I do not, however, think this affects the result, as it is clear that the payments to be made under cl. 5 of contract "A" were to be made simply and solely as remuneration for his services. For these reasons, I am of opinion that the Special Commissioners and the learned judge came to a right conclusion, and would dismiss the appeal accordingly.







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